



Kamau & another (Both Suing as the Legal Representatives of the Estate of Anthony Kamau Kinyanjui) v Kiri & 4 others; Gitonga (Interested Party) (Environment & Land Case 64 of 2020) [2024] KEELC 13708 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13708 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 64 OF 2020
JG KEMEL, J
DECEMBER 6, 2024**

BETWEEN

**MARTIN GATHECA KAMAU 1ST PLAINTIFF
MARGARET NJERI KAMAU 2ND PLAINTIFF
BOTH SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
ANTHONY KAMAU KINYANJUI**

AND

**ANDREW MURUNGA KIRI 1ST DEFENDANT
GITHUNGURI RANCING CONSTITUTENCY LIMITED 2ND DEFENDANT
RUIRU LAND REGISTRAR 3RD DEFENDANT
MARY NJAMBI MURUNGA 4TH DEFENDANT
LUCY WANJIKU MURUNGA 5TH DEFENDANT**

AND

GEORGE MWENDA GITONGA INTERESTED PARTY

JUDGMENT

The Pleadings

1. Vide an Amended Plaintiff dated the 9/10/2020 the Plaintiffs filed suit against the Defendants for the following orders;
 - a. An order declaring that Ruiru East Blk 1/1633 is the property of the deceased Anthony Kamau Kinyanjui.



- b. An order Revoking transfer of property number Ruiru East Blk 1/1633 to Andrew Murunga Kiri.
 - c. An order declaring the subdivision carried on 30/4/2019 or thereabout partitioning the deceased property into various twelve portions Ruiru East Block 1/6739 to 6750 null and void the same having been done fraudulently.
 - d. An order cancelling or revoking title deed LR No. Ruiru East Block 1/6742 in the hands of the 4th Defendant and L.R No. Ruiru East Block 1/6747 and LR No. Ruiru East Block 1/6748 in the hands of the 5th Defendant.
 - e. An order directed to the 3rd Defendant to register the Plaintiffs as owners of the suit property having obtained grant and confirmation of the grant having been issued.
 - f. An order directed to the 1st Defendant to remove from the suit land all graves thereon and inter the remains earlier buried on the suit land on his own land.
 - g. That cost of this suit be borne by the Defendants.
2. The Plaintiffs aver that Anthony Kamau Kinyanjui, their deceased father was the original allottee of the suit land. That upon his demise they buried him on parcel Block 2/1633 believing that the land belonged to him. That shortly thereafter they embarked on selling the land when they discovered to their disbelief that their deceased father did not own plot Block 2/1633 but Block 1/1633. Their case against the Defendants therefore is for the return of parcel Block 1/1633 which has been registered in the name of the Defendants fraudulently and subsequently subdivided into 12 plots. Particulars of fraud against the 1st and 2nd Defendants was pleaded under para 17 of the Plaint. That as a result of the fraudulent activities of the Defendants they have been deprived of the ownership and enjoyment of the suit land and in the alternative, they pray for an alternative land measuring 1.25 acres from the 2nd Defendant.
 3. The 1st, 2nd, 4th and 5th Defendants denied the claim of the Plaintiffs vide their statement of defense dated the 25/6/21. They contended that the deceased was allotted two plots that is to say, No Ruiru Kiu Block 2(Githunguri) 1633 and Block 1/1633 and sought to put the Plaintiffs to strictest of proof. The 1st Defendant was emphatic that he was initially allocated Block 2/1633 but on realizing the error, the same was rectified by the 2nd Defendant and allotted plot No 1/1633 which he has been in possession since 1985. That he has subsequently subdivided the suit land into 12 plots which are now registered in the names of the 4th, 5th Defendants inter alia. The Defendants in turn accuse the Plaintiffs of fraud in asserting that their deceased father was the original allottee of the suit land and that their claim is baseless in law and urged the Court to dismiss their suit with costs.
 4. The 3rd Defendant failed to enter appearance nor file a Defence.
 5. The Interested Party was enjoined into the suit on 6/6/2024 but failed to file any pleadings nor testify during the trial.

The evidence of the parties

6. The Plaintiff's case was led by 3 witnesses. PW1 – Martin Gatheca Kamau adopted the contents of his witness statement dated the 19/8/2020 in evidence in chief and produced the documents marked as PEX No 12-29.
7. PW1 stated that he is the son of the late Anthony Kamau Kinyanjui, deceased, who was the beneficial owner of the suit land pursuant to Ballot No 212A, Share Certificate No 688 serial No 423 from the



- 2nd Defendant. That his father was a shareholder in the 2nd Defendant's Company. That adjacent to the suit land was Block 1/1634 owned by the 1st Defendant. That they buried his father on parcel No Block 2/1633 believing that it belonged to the deceased however they later discovered that his father was allocated the suit land and not Block 2/1633. That they buried their father in the 1st Defendants land mistakenly. That they discovered that the land they buried their father belonged to the 1st Defendant when they wanted to dispose it. That the 1st Defendant however disowned Parcel Block 2/1633 and begun the clamour to claim the suit land on the pretense that he had been allotted parcel Block 2/1633 by error. That the 1st Defendant in collusion with the 2nd Defendant fraudulently processed title of the suit land in the name of the 1st Defendant in 2019 who later subdivided the suit land into 12 portions.
8. In cross he stated that his father died in 2002. That he exchanged Ballot No 992 with Ballot No 212A. That the deceased did not show them the land before he died and believing that Block 2/1633 was his they buried him thereon having been showed the plot by a surveyor namely Kimami. That he holds a title for Ruiru East Block 1/1633 and so does the 1st Defendant. That he processed the title in 2018 on the basis of his late father's clearance issued in 1992 for the suit land. That he did not obtain Land Control Board consent and neither have they occupied the suit land. That he was unaware that the 1st Defendant was cleared by the 2nd Defendant. He admitted that though he filed a case at the Land Dispute Tribunal, the verdict was overturned by the High Court. He added that he is not the registered proprietor of the Block 2/1633.
 9. In reexam he stated that his father's ballot was 992 which was exchanged with 212A as attested by the letter dated 25/2/91 on page 44 of the Plaintiffs bundle. That they buried their father in Block 2/1633. That the land was not occupied.
 10. PW2 - John Rimui Waweru testified and adopted his witness statement on page 79 of the Plaintiffs trial bundle. That he served as the Vice Chairman of the 2nd Defendant from 2003-2009. Without any evidence in support, he informed the Court that while in office the 1st Defendant approached him and informed him that there was a vacant land next to where he lived, whose owner had never taken up possession and asked him to convince the board of the 2nd Defendant to allocate him the land. He replied that all the land had been allocated. He shared the request with another Director namely Henry Wakihoro who also gave him the same response. The 1st Defendant proceeded to approach the Chairman a Mr. Kamau who was visually impaired and on the request of Mr. Kamau he checked the members register and noted that the land which the 1st Defendant was interested had been balloted under Ballot No. 112A by Anthony Kamau Kinyanjui, the land was Ruiru East Block 1/1633 (suit land). From the said members register he also found out that the 1st Defendant had balloted for 211 being Land Reference No. Ruiru East Block 1/1634. That by the time he left the board of the 2nd Defendant in 2009 the 1st Defendant did not hold a ballot for the suit land. He also informed the Court that the original register and other company documents and records were stolen around 2009 and the theft was reported to Ruiru Police Station under OB No. 19/15/09/2009. That although the original register was never found he was aware that copies are available at the Land Registrars and the District Officer's office at Ruiru. That another copy of the register was adduced in Case No. High Court No. 277 of 2016. Without giving any evidence in support, he informed the Court that the 1st Defendant must have obtained ballot No. 212A unprocedurally during the period when the register was missing. He also added that he knew the Plaintiff's father as a member of the 2nd Defendant and that his land Ruiru East Block 1/1633 bordered that of the 1st Defendant. In cross examination he added that during his Directorship the 2nd Defendant's Chairman was called James Kamau Njoroge while the Secretary was Francis Karianja Njoroge, while Henry Wainaina Kihoro was a co-Director. He admitted that title processing for the members was initiated by the 2nd Defendant through Certificate of



Clearances addressed to the Land Registrar directing the Land Registrar to issue titles to the member. That in 2006 he was aware that the 1st Defendant held a title for Ruiru Kiu Block 2/1633. He also confirmed that the 1st Defendant as well as Plaintiffs father Anthony Kamau Kinyanjui held ballot No. 212A at the same time.

11. PW3 – James Thendu relied on his witness statement on page 81 of the Plaintiffs trial bundle. He stated that in the year 2010 he served as a member of the Land Dispute Tribunal in Githurai Division in Ruiru and was one of the panel of elders who heard and determined the dispute with respect to Ruiru East Block 1/1633 filed by one Martin Kamau Gatheca against the 1st Defendant. That according to the evidence adduced at the Tribunal both the Plaintiffs father and the 1st Defendant held a similar ballot namely 212A. He also confirmed that they were supplied with a copy of the register by the 2nd Defendant. That as a Tribunal he made a finding that Ruiru East Block 1/1633 belonged to Anthony Kamau Kinyanjui.
12. DW1 – Andrew Murunga Kiri testified and relied on his witness statement dated 25/6/2021 and produced documents marked DEX 1 – 15. He informed the Court that he is a member of the 2nd Defendant having been issued with a members Certificate No. 5808 ballot No. 212A in 1995 for 1.25 acres. In 1996 he was shown 2 plots namely; Block 1/1633 & 1634 whereupon he took possession and has continued in occupation for a period in excess of 35 years. With respect to Block 1/1634 he informed the Court that he sold it to a third party. That titles for members were processed by the 2nd Defendant. That the 2nd Defendant erroneously issued him with two titles namely Ruiru Kiu Block 2/1633 and Ruiru Block 2/1634. That it was not until the year 2010 that he was called to the 2nd Defendant's offices and later at Ruiru Police Station where the error was discovered. He was asked to surrender the titles for rectification and to be issued with the correct titles being Ruiru East Block 1/1633 and 1634. That the error emanated from the 2nd Defendant's offices had nothing to do with the members. He confirmed that the Plaintiff's father was a shareholder of the 2nd Defendant who balloted, and was shown land namely Ruiru Kiu Block 2/1633. When he died in 2002 his family buried him on the said land and denied the Plaintiff's averments that the burial was on a wrong parcel of land. He added that he buried his kinsmen on parcel No. Ruiru East Block 1/1633 in 2008 and 2009. That the 2nd Defendant has written several letters to the Land Registrar confirming that he is the owner of Block 1/1633 and for that reason he obtained a clearance dated 11/4/2014 and subsequently a title for the said land. That he has subdivided the land into 12 portions and engaged a developer to commence a multi-million development on the property. He added that the Plaintiffs have never occupied Block 1/1633 and that their property is Block 2/1633 where they interred the remains of their father. In cross examination the witness stated that he got title for Block 1/1633 in 2016 after he surrendered Block 2/1633 which was issued to him in 1992. That he challenged the decision of the Land Dispute Tribunal through Judicial Review proceedings in High Court in 2010. The High Court determined the review in his favour in 2011 and quashed the decision of the Land Dispute Tribunal on the basis that the said Tribunal had no jurisdiction to determine title to land. He confirmed that James Thendu was one of the members of the Land Dispute Tribunal. He also confirmed that he sold a portion of the land to George Mwendwa, the Interested Party in this case. He added that Anthony Kamau Kinyanjui balloted for Block 2/1633 and it is the land that he was buried in 2002. Before his demise, he stated that he had taken possession and was cultivating the land.
13. DW2 – John Maina Mburu relied on his witness statement dated 8/7/2022 and produced documents marked DEX No. 16-18. He informed the Court that he is the current Director and Chairman of the 2nd Defendant having been so elected on 12/9/2009. He informed the Court that a fully paid member of the 2nd Defendant is entitled to 3 parcels of land being 1.25 acre shamba, ¼ acre and 1/8 of an acre. He added that the 1st Defendant is the bonafide owner of Ruiru East Block 1/1633 and Ruiru East Block



1/1634 which parcels are adjacent to one another. The 1st Defendant fully paid the requisite fees to the 2nd Defendant and was issued with receipts, Share Certificate No. 5808 and ballot No. 212A in 1985. That the 2nd Defendant identified plots to its members in 1986 which they had balloted for. Anthony Kamau Kinyanjui and the 1st Defendant were such members. The 1st Defendant had two parcels Ruiru East Block 1/1633 and 1634. That it was the 2nd Defendant who processed titles for its members. He informed the Court that some errors occurred with respect to plots in Block 1 and Block 2 where some members erroneously occupied the plots in the two Blocks interchangeably. To rectify the matter the 2nd Defendant requested members to surrender the erroneously issued titles for rectification and reissuance of the correct title deeds. That such errors and rectifications of titles were common across the board and not peculiar to this case. That it was in 2009 when the 2nd Defendant discovered that the 1st Defendant held title for Block 2/1633 and Block 2/1634 while occupying Block 1/1633 and Block 1/1634. That by then the suit land was yet to be registered. That according to the records maintained by the 2nd Defendant Anthony Kamau Kinyanjui, deceased, was the owner of Ruiru Kiu Block 2/1633. That vide Clearance Certificate dated 11/4/2014 the 1st Defendant was cleared for titling and issuance of title with respect to Ruiru East Block 1/1633.

14. In cross examination the witness informed the Court that Ruiru East Block 1 and Ruiru Kiu Block 2 are on different blocks and that those plots in Block 1 are more prime than those in Block 2. He added that he learned about the mix-up of the titles in 2006 after which the contesting parties submitted themselves before the Land Dispute Tribunal for determination of ownership of the suit land. That the error with respect to the 1st Defendant's title was rectified and was issued with the correct title namely Ruiru East Block 1/1633.

The written submissions

15. The Plaintiffs' submissions were filed by Matiri Mburu and Chepkemboi Advocates on 4/11/2024. M/s Kanyi Kiruchi & Co. Advocates filed submissions on behalf of 1st, 2nd, 4th and 5th Defendants. The Interested Party was enjoined on 6/6/2024 and crossed his on 17/10/2024 without adducing evidence. He however filed submissions through the law firm of Plouw & Co. Advocates.
16. Counsel for the Plaintiff submitted that according to the proceedings at the Land Dispute Tribunal Anthony Kamau Kinyanjui balloted for 212A being parcel No. Ruiru East Block 1/1633 while the 1st Defendant balloted for 211 being Ruiru East Block 1/1634 which was later sold. That the 2nd Defendant's register produced during the Tribunal's hearings shows that Kinyanjui held ballot No. 212A and the 1st Defendant held 211A. Counsel submitted that both parties concede that there were errors in title issuing. Counsel for the Plaintiff argued that the 1st Defendant having been issued with a title for Ruiru Kiu Block 2/1633 in 1992 cannot disclaim the title and seek title for Block 1/1633. That he should take ownership of Block 2/1633 even if he was a resident in a different property which he alleges to have been shown. Counsel for the Plaintiff challenged the procedure allegedly used for rectification of the 1st Defendant's initial title. That under Section 79(1)(b) he argued that the Land Registrar may rectify the register with consent of all affected parties. He challenged the 1st Defendant to show the instrument used to rectify his initial title to pave way for issuance of title in Block 1/1633. Counsel for the Plaintiff submitted that the Plaintiffs were not involved in the rectification of title and yet they stood to be affected by the said rectification. That the said rectification was not carried out pursuant to a Court Order contrary to Section 80 of the Land Registration Act. To buttress that proposition counsel pointed the Court to the case of *Mary Ruguru Njoroge Vs. Gachuma Mbugua (2014)eKLR*. Further Counsel added that the rectification of title had no basis in law since it is trite that Registrars have no power to rectify title. See the case of *Republic Vs. Registrar of Titles (2013)eKLR*.



17. Counsel for 1st, 2nd, 4th and 5th Defendants submitted that according to the records of the 2nd Defendant Anthony Kamau Kinyanjui was the original owner of Ruiru East Block 1/1633 and that the 2nd Defendant issued a Clearance Certificate to the 1st Defendant in 2014 for titling and subsequent issuance of title. Therefore, the Plaintiffs are bonafide of Ruiru Kiu Block 2/1633 and the 1st Defendant owns Ruiru Kiu Block 1/1633.
18. As to who between the Plaintiff and the 1st Defendant was allocated Ruiru East Block 1/1633 Counsel submitted that the Plaintiffs father balloted and was shown parcel No. Block 2/1633 took possession and upon his death was buried on the said land a fact that has not been denied by the Plaintiffs. That it was only in 2010 when the Plaintiffs wanted to dispose the land Ruiru East Block 1/1633 that they discovered that the Defendant held their title which the 2nd Defendant owned up to the mistake and proceeded to rectify it causing the 1st Defendant to surrender the title for Block 2/1633 in return of issuance of title for Block 1/1633 which land he had taken possession since allocation in 1986 to date. Counsel submitted that the 1st Plaintiff holds title for Ruiru Kiu Block 2/1633 and his claim for Block 1/1633 is without any basis. In any event, his deceased father had occupied the land namely Block 2/1633 since allocation in 1985. That despite the confusion of titling the critical issue is the ground positioning of the claimants on the land. Counsel concluded that it is the 1st Defendant who is entitled to Block 1/1633 and not the Plaintiffs.
19. Counsel for the Interested Party submitted that he purchased a portion of the land being Ruiru East Block 1(Githunguri)/ 6747 being a portion of the suit land from the 1st Defendant and followed the due process in acquisition having conducted proper due diligence and urged the Court to find that he is a bona fide purchaser for value without any notice of a defect. The Court was urged to place the Interested Party on the pedestal of a bona fide purchaser as held on the case of Dina Management Limited Vs. County Government of Mombasa & 5 Others (Pet. No. 8 (E0)2021 and the case of Samuel Kamere Vs. Land Registrar Kajiado Civil Case No. 28 of 2005 (2015)eKLR. In addition, the Interested Party submitted that he was not made aware of any competing interest on the land at the time of transaction, neither did he hold any reason to suspect any fraudulent activity or any prior conflicting claims. That he acted in good faith devoid of any fraud in the transaction and that when the existence of the current suit was brought to his attention he quickly and successfully petitioned the Court to be enjoined so as to defend his title.

Analysis and determination

20. Having considered the pleadings of the parties, the evidence adduced during trial, the rival written submissions the issues for determination are as follows:-
 - a. Whether the Plaintiffs have proven their case;
 - b. Who between the Plaintiffs and the 1st Defendant was allocated Ruiru East Block 1/1633; and
 - c. The cost of the suit.
21. It is not in dispute that the Plaintiffs father one Anthony Kamau Kinyanjui was a member of the 2nd Defendant. That the Plaintiffs father was the beneficial owner of Ruiru East Block 1/1633 measuring 0.50Ha. which was balloted under ballot No. 212A. That he held Share Certificate No. 666 and serial No. 423 represented by parcel No. Ruiru East Block 1/1633 (suit land). That when their father died in 2002 the Plaintiffs erroneously buried him on Ruiru Kiu Block 2/1633 believing that that was his land. That in 2010 in the process of disposing Block 2/1633 they discovered that the 1st Defendant held title to the land. It is not in dispute that by the time their father died in 2002 the suit land had



not been titled. It is the Plaintiffs' case therefore that their father is entitled to Block 1/1633 and not Block 2/1633.

22. It is also not contested that the 1st Defendant was a member of the 2nd Defendant and just like the Plaintiffs father also balloted and was allocated land by the 2nd Defendant. According to the 1st Defendant he was allocated Block 1/1633 way back in 1985, took possession cultivated the same, buried his grandchildren and still he is in occupation today. That he however obtained title for Block 2/1633 in 1992. That the said title was issued erroneously and the error was only discovered between 2006-2010. That the 2nd Defendant rectified the error, called for the title for Block 2/1633, issued him with a Clearance Certificate in 2014 and issued with a title in 2016 for Block East 1/1633, land that he balloted and was allotted by the 2nd Defendant paid and occupied since 1985.
23. The 1st Defendant therefore denied the Plaintiffs claim.
24. The 2nd, 4th and the 5th Defendants led evidence in support of the 1st Defendant's case
25. The 3rd Defendant did not enter appearance nor filed a Statement of Defence although it was represented by its Legal Counsel during the trial.
26. With the leave of the Court the Interested Party was enjoined into the case but did not file any pleadings nor called witnesses during trial.

Whether the Plaintiffs have proven their case;

27. It is trite that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
28. The Plaintiffs case is anchored on a claim of ownership of the suit land. So critical is the question of proof that under Section 116 of the Evidence Act, the burden to prove that the suit land belongs to the Plaintiffs has been placed on the shoulders of the claimants. The adage that he who avers must prove. Section 116 states as follows;

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”
29. The Burden therefore rests with the Plaintiffs to show that the suit land does not belong to the 1st Defendant.
30. Where two parties are claiming the same parcel of land just like in this case the Court must look at the root of title to see who among the two contestants have accounted for the validity of title without any broken chain. In this case the Plaintiffs have led evidence that when their father died in 2002 they believed he owned parcel No. Block 2/1633 and having been shown the said land proceeded and interred his remains therein. That in 2010, they desired to sell the land and begun showing prospective buyers only to be summoned at the Police Station and accused of selling land belonging to the 1st Defendant who held title. A quick search at the 2nd Defendants office led the Plaintiff's to believe that their father land was Block 1/1633 and not Block 2/1633. This led to the filing of a complaint with the Land Dispute Tribunal in Githurai where the Panel of Elders ruled in their favour. Their success was short-lived as the 1st Defendant initiated Judicial Review proceedings in the High Court which



ruled in his favour in 2011 quashing the decision of the Land Dispute Tribunal on grounds inter alia of lack of jurisdiction.

31. I shall now examine the basis of the Plaintiffs claim to see if the Plaintiffs have proven fraud against the Defendants and whether they are entitled to the prayers sought in their Plaint

32. Fraud is defined in Black's Law Dictionary, 9th Edition defines fraud as;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

33. In the case of Ndolo Vs. Ndolo (2008) 1 KLR (G & F) 742 the Court stated that:

“..... it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”.....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

34. In the case of Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others [2015] eKLR, the Court held that;-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”

35. It was the Plaintiffs case that their father was a shareholder in the 2nd Defendant's company having held Share Certificate No 688 issued on 19/10/1972. A Share Certificate adduced on page 17 of the



- trial bundle bears evidence. That upon balloting he was issued with a ballot No 212A. I have seen the ballot with the 2nd Defendants stamp superimposed with a date of 25/2/1991. Against it is a black paper written 1633. What follows are various receipts in the name of Anthony Kamau Kinyanjui for payments of various items ranging from water project of 5/10/1984, completion of shares of 7/3/1983, share of 5/5/1983 shares and entry fee of 18/8/86 Title deed of 18/9/91, entry fees and shares of 14/7/68, title deed for 1.25 acres of 3/9/94 survey fees of 1/8/1973, survey fees of 7/3/1991, survey of 7/3/83, share of 6/6/83.
36. It was the evidence of PW1 that Kinyanjui balloted for the land in 1985. It was not explained why the ballot claimed being 212A is dated the 25/2/1991. The Court notes that all the receipts issued to Kinyanjui had reference to the Share Certificate No 688 which corresponds with the Share Certificate issued on 19/10/92. Except for the receipt dated the 18/9/91 which denoted for ballot No 1038, none of the receipts bore the ballot No 212A. There was no explanation for this scenario.
37. Fastforward is the Clearance Certificate for 1.25 acres addressed to the Land Registrar by the 2nd Defendant certifying that Kinyanjui is the beneficial owner of ballot No 212A. The land reference number bears No 2650 which has been crossed and No 1633 substituted. The Block is however blank and the Court is unable to tell whether it was in block 1 or Block 2. This evidence is critical as this case will stand or fall on this fact. That said the said Kinyanjui was cleared for title issuance. As explained by PW1, it would appear that Kinyanjui died before a title was issued in his name. Given that the plots were comprised in two blocks, and in the absence of identity of the block it is doubtful if the Land Registrar would issue a title based on the incomplete information on the Clearance Certificate. There is no explanation given for the erasure of the Plot Number. In the absence of an area map coupled with the area list of the members/owners of the plots or for that matter the members register, the erasure creates doubt as to the identity of the Plot allotted to Kinyanjui.
38. That said, the Courts attention has been drawn to the letter dated the 25/2/91 adduced in evidence by PW1 addressed to the Chairman of the 1st Defendant in which Kinyanjui agreed to exchange ballot No 992 with 212A. According to the letter balloting of the land took place on 22/10/1984. The letter further stated that the land under ballot 992 was given to Kinyanjui but the land was found inadequate for cultivation having fallen under the power lines and that Kinyanjui willingly agreed to transfer ballot No 992 to another ballot No 212A as directed by the surveyor in consultation with the board of the 2nd Defendant. That he therefore surrendered plot under ballot No 992 to the 2nd Defendant. This letter offers an explanation why ballot No 212 earlier alluded to was date stamped 25/2/91, similar date with the said letter.
39. PW1 led evidence and produced a members' register in support of his evidence that his father was a holder of ballot No 212A and plot No Block 1/1633. I have perused the said register and find that the 1st Defendant held Ballot No 211A for 1634 while Kinaynajui held ballot No 212A for 1633. What is of interest is that the column indicating location of the plots is blank. Unlike other plots in the said register, it does not state whether it is block 1 or 2. It is therefore difficult for the Court to confirm that indeed Kinyanjui's land was in block 1 as alleged by the Plaintiffs.
40. PW2 led evidence that the 1st Defendant unsuccessfully approached him and his co-directors with a view to being allotted a plot that was next to his land. There was no evidence however in support of this allegations that the 1st Defendant obtained title for Block 1/1633 through fraud. In my view nothing turns on this one.
41. According to the evidence led by the 1st Defendant he balloted for 2 plots under 211A and 212A being parcels Block 1/1633 and Block 2/1634 in 1985, took possession, cultivated it and buried his grandsons in 2003 and 2008 or thereabouts. The Court has seen the Share Certificate No 5808 in the



name of the 1st Defendant issued on 29/4/1986 for 1.25 acre plot. Next to it is a ballot No 212A. I have perused this ballot and note that it is the same ballot produced by PW1 on page 45 of the trial bundle. The Share Certificate of the 1st Defendant contains the ballot No disclosed as 212A. Having found that Kinyanjui exchanged ballot No 992 for 212A in 1991, the question is whether this ballot having been balloted by the 1st Defendant in 1986 was available for Kinyanjui in 1991. In the absence of any plausible explanation, I think not.

42. It is not in dispute that the 1st Defendant was issued with titles for Block2/1633 and 1634 on 30/9/1992 respectively.
43. That later he sold Block 1/1634 and remained with Block 1/1633. That the plots are adjacent to each other. According to the LDT proceedings plot Block 2/1633 is 15 kilometers from the Thika – Nairobi Highway while parcel Block1/1633 is ½ kilometer away from the highway. This evidence lends credence to the fact that the 1st Defendants two plots were adjacent to each other.
44. It was the evidence of the 1st Defendant that in 2006, when in the process of disposing parcel 1634 he noticed in the Land Board that there was an error on the title he held which was issued to him in 1992. The error was that he held title for Block 2/1633 instead of Block1/1633 which he had been allotted and taken occupation since 1985. That he then reported the matter to the 2nd Defendant who wrote to the Land Register on 5/12/2006 informing him that the 1st Defendant was issued with a title erroneously for Block2/1633, RIM No 3 instead of Block1/1633 in RIM No 1 where he resides and that the same be rectified to conform to the 2nd Defendants register. It can be presumed that this letter prompted the Land Register to write to the Commissioner for Lands on 7/3/2007 forwarding transfers for execution. Evidence on record shows that the 1st Defendant was issued with a Clearance Certificate on 11/4/2014 for Block1/1633 for titling under ballot No 212A Share Certificate No 5808 in Registry Index Map (RIM) No 1 leading to the issuance of title in his name on 13/9/2016.
45. DW2, the Chairman of the 2nd Defendant led evidence that both Kinyanjui and the 1st Defendant are members of the 2nd Defendant. That land was balloted in 1985. That the 1st Defendant balloted for two parcels namely Block1/1634 and Block1/1634 while Kinyanjui balloted for Block2/1633. That due to an error committed in the 2nd Defendants office, the 2nd Defendant was issued with a title for Block2/1633 instead. That upon the discovery several letters were written to the Land Registrar to rectify the title upon surrender by the 1st Defendant of the titles for Block2/1633 and 1634. That the two blocks are different though the plots bear the same numbers and that the problem of confusion in numbers was not unique to the parties before Court. He stated that title processing was the role of the 2nd Defendant and in cases of errors it intervened and caused the corrections and rectifications to be carried out. The Court has perused a number of correspondences between the 2nd Defendant and the Land Registrar raising the issue of the error and seeking rectification of the titles. In the absence of evidence to support fraud, the Court is unable to make a finding on fraud.
46. I concur with the decision of the Court in the case of James Njoroge Gitau Vs. Lucy Chepkurui Kimutai [2018]eKLR where the Court held as follows:-

“This evidence is coming from the company itself, and cannot be taken lightly. It is the Company which knows its members and which knows what land it has assigned to the members. If the Company refutes that one is a member, then that person needs to rebut this, through cogent evidence. I am afraid that the Defendant had not deliver any evidence to me that Kimutai held any shares at Kalenjji Enterprises. She has not delivered any Share Certificate, nor any receipt for payment for survey so as to be assigned the suit land. All



that the Plaintiff had was a document, titled “Rift Valley Enterprises (Koelel Farm) List of Allottees” as proof that the suit land was assigned to the deceased.”

47. Similarly in this case the Plaintiff has not led cogent evidence to dislodge the evidence of the 2nd Defendant that Kinyanjui indeed held any interest in parcel Block1/1633.
48. In answer to issue No 1 the Court finds that the Plaintiffs failed to adduce evidence in support of any fraud on the part of the Defendants.
49. Arising from the above analysis the Court finds that on a balance of probabilities the Plaintiffs have failed to prove their case. Luckily not all is lost for the Plaintiffs as evidence was led that the 1st Plaintiff holds title for Block2/1633 issued on the 20/8/18 as per the copy of the green card certified by the Land Registrar on 27/10/2020.
50. In the upshot the Plaintiffs case fails and it is dismissed with costs in favour of the 1st and 2nd Defendants only.
51. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Njonjo for 1st and 2nd Plaintiffs

Wachira HB Kanyi for 1st and 2nd Defendants

3rd Defendant - Absent

Wachira HB Kanyi for 4th and 5th Defendants

Court Assistant – Ann

