



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chome v Baya & another (Environment & Land Case 55 of 2015)  
[2023] KEELC 16945 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16945 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 55 OF 2015**

**MAO ODENY, J**

**APRIL 24, 2023**

**BETWEEN**

**SHADRACK CHARO CHOME ..... PLAINTIFF**

**AND**

**DAMA CHARO BAYA ..... 1<sup>ST</sup> DEFENDANT**

**MARIAM SHEKUE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated April 10, 2015, the plaintiff herein sued the defendants seeking for the following orders; -
  - a) A declaration for orders in accordance with the claim in paragraph 14.
  - b) General damages as claimed in paragraph 15 of the plaint.
  - c) Costs of this suit.
2. The plaintiff's case is that on August 2, 2011, he entered into an agreement with the 1<sup>st</sup> defendant for the purchase land portion No 411R Malindi measuring approximately 50 by at a consideration of Kshs 140,000/- which he paid in full. That sale agreement was witnessed by the officials of Kilio cha Maskini welfare group in charge of maintaining the register of the area properties.
3. Sometime around April 4, 2015, the plaintiff learnt that the 2<sup>nd</sup> defendant had invaded the suit property and started construction thereon. Thereafter, the plaintiff reported the matter to the said officials and the district officer who unsuccessfully summoned the 2<sup>nd</sup> defendant.
4. The 2<sup>nd</sup> defendant filed a statement of defence dated September 25, 2019 but did not give evidence during the hearing of this case.



## Plaintiff's Case

5. PW1 adopted his witness statement dated December 3, 2019 as evidence in chief and produced a copy of the sale agreement dated August 4, 2011, letter by Kilio Cha Maskini Welfare Association dated April 6, 2015, letter by the Deputy County Commissioner dated April 7, 2015 and photographs of house under construction as exhibits.
6. PW1 testified that the 1<sup>st</sup> defendant's name was cancelled in the register maintained by the officials of the welfare group, and his name indicated as the owner of the suit property.
7. On cross examination by Mr Ole Kina, counsel for the 2<sup>nd</sup> defendant, the plaintiff told the court that there was an agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant prior to his and that when he bought the suit property he did not take possession. The plaintiff confirmed that he had not asked for a refund from the 1<sup>st</sup> defendant since the 1<sup>st</sup> defendant had refused to attend meetings scheduled by the officials.
8. The plaintiff told the court on re-examination that every transaction had to be done before the welfare officials, which he did. According to him, the 2<sup>nd</sup> defendant's transaction was not proper as she did not follow the procedure.
9. The plaintiff's testimony marked the close of the case and the defence case was similarly closed upon various adjournments with no witness testifying on their behalf.
10. Counsel for the plaintiff reiterated the evidence on record and submitted that the plaintiff has proved his case on a balance of probabilities and further stated that the defendant did not rebut the plaintiff's evidence as she did not give evidence.
11. Counsel added that the plaintiff having proved his claim as required under section 107 of the Evidence Act, he is entitled to the suit property and protection guaranteed under article 40 of the Constitution.

## Analysis And Determination

12. The issues for determination is who is the owner of the suit plot and whether the plaintiff is entitled to the orders sought.
13. From the evidence it is not disputed that the suit plot originally belonged to the 1<sup>st</sup> defendant and it seems that the 1<sup>st</sup> defendant then sold the suit property to both the plaintiff and the 2<sup>nd</sup> defendant on different dates.
14. It was the plaintiff's case that the transaction between the 2<sup>nd</sup> defendant was faulty for failure to comply with the welfare group's procedure for disposing property.
15. Section 107 and 108 of the Evidence Act, cap 80 provide that: -

“ 107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden



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.”

16. The plaintiff gave uncontroverted evidence to prove ownership of the suit property by adducing oral and documentary evidence. It is trite that allegations stated in a statement of defence cannot be said to controvert the plaintiff’s evidence if the defence fails to call witnesses to adduce evidence and be cross-examined to test the veracity of its evidence.
17. In the case of *Peter Ngigi & another (suing as legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondiki Oduor & another* [2019] eKLR the court stated as follows:-

“There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.”
18. It should be noted that even when evidence is uncontroverted the burden is still on the plaintiff to prove his or her case as was held in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR “I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”
19. The plaintiff produced a copy of sale agreement and copies of documents from the welfare association indicating that he indeed purchased the suit property from the 1<sup>st</sup> defendant. The logical conclusion in the absence of any other evidence to controvert the plaintiff’s evidence, therefore is that the plaintiff discharged the burden of proof, which in such cases is on a balance of probabilities.
20. The plaintiff claimed general damages for trespass and it is trite that trespass is actionable per se as was held in the case of *Duncan Nderitu Ndegwa v Kenya Power and Lighting Co Ltd & Anor* [2013] eKLR that:

“once trespass to land is established, it is actionable per se and indeed no proof of damage is necessary”.
21. Similarly, in the case of *Vincent Koskei v Benard Koskei* p2018] eKLR Onyango J. held that: -

“In the instant case I consider an award of Kshs 100,000/=(Kenya shillings one hundred thousand) to be adequate compensation for the defendants infringement of the plaintiff’s right to use and enjoy his land”
22. Consequently, I find that the plaintiff has proved his case against the defendants and grant the following specific orders:
  - a) A declaration is hereby issued that the plaintiff is the lawful owner of the suit property No 411R Malindi.
  - b) A permanent order of injunction is hereby issued restraining the defendants their agents, servant, employees, and/or assigns from constructing, selling, trespassing, encroaching, or whatsoever dealing with all that suit property.



- c) The 2<sup>nd</sup> defendant to give vacant possession of the suit property and demolish her structures at her own costs within 45 days failure to which eviction to issue.
- d) General damages of Kshs 150,000/.
- e) Costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY OF APRIL, 2023.**

**M.A. ODENY**

**JUDGE**

