



**Githunguri v Muroki (Environment & Land Case 321 of 2013)
[2023] KEELC 17887 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17887 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 321 OF 2013
EK WABWOTO, J
MAY 25, 2023**

BETWEEN

KANYUA JOHN GITHUNGURI PLAINTIFF

AND

EUNICE WAIRIMU MUROKI DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit on 7th March 2013 seeking the following orders against the Defendant:
 1. A declaration that the Plaintiff is a *bonafide* purchaser for value of Nairobi/Block 106/441 formerly plot no. 095 Kibera Udongo Housing Co-operative Society Ltd.
 2. An order of permanent injunction do issue restraining the defendant, her servants and/or agents or anybody acting through or claiming from selling, alienating, transferring, charging, leasing or in any manner howsoever interfering with parcel no Nairobi/Block 106/441.
 3. An order of specific performance directed to the defendant to surrender title no Nairobi/Block 106/441 to the Chief Land Registrar and execute all necessary papers to facilitate transfer of the suit property to the Plaintiff.
 4. An or in the alternative an order be issued directed to the Chief Land Registrar to facilitate transfer of land reference no. Nairobi/Block 106/441 to the Plaintiff with or without the defendant's title and the deputy registrar of this court, do execute all necessary transfer papers to give effect to prayer no (3) herein above.
 5. Costs of this suit.



2. The Defendant despite being served with all the court process did not enter appearance neither did she file any defence. The case was set down for hearing as an undefended case on 1st March 2022.
3. The Plaintiff, John Kanyua Githunguri testified as the only witness in the suit. He adopted his witness statement that was filed on 7th March 2013 and produced the following documents as his evidence in chief. The documents were produced in the following order: -
 - i. Sale agreement dated 23rd March 1995 as PEX1.
 - ii. Copy of the share certificate PEXh2.
 - iii. Copies of receipts as PEXh 3.
 - iv. Copy of Certificate of title and lease transfer as PEXh 4.
 - v. Copy of list of membership as PEXh 5.
 - vi. Copies of correspondences as PEXh 6.
4. He stated that he is the beneficial owner/*bonafide* purchaser for value of the suit property formerly plot no 095 Kibera Udongo Housing Co-op Society from the defendant via a sale agreement dated 23rd March 1995. He obtained a share transfer document from the defendant and further undertook the share transfer with the co-operative society through requisite payment of their fees.
5. He also stated that he commenced construction of the foundation which however stalled when he proceed for further studies in Britain between 1997 and 2002. In 2004, he was called by the Land Survey who was allocating the parcel numbers and after due verification of his documents, it was confirmed that his plot being plot no. 095 had been amended to No. Nairobi Block 106/441. That since then the he has been in possession while engaged in the exportation business and still kept a watchful eye on his plot. However, in the year 2011, when the he formerly sought to register his share certificate at the land ministry for a title, he was informed that the plot had already been registered under the names of the defendant. He sought various enquiries from the Kibera Udongo Housing Co-op Society Ltd who confirmed that indeed despite him appearing in their records as the registered member and being in possession of their share certificate, they had proceeded to clear the defendant. He then proceeded to report the fraud with the CID Offices where enquires established that indeed the defendant had fraudulently obtained a title from the Land Ministry without the Plaintiff's knowledge dated 9th November 2009. That as the investigations continue, he discovered that the defendant has intention of disposing off the plot and thus the real likelihood of him losing out of his property and the reason for his urgency.
6. The Defendant/Respondent unless restrained by this Honourable court to dispose off, alienate, transfer, charge, lease or in any manner interfere with his quiet enjoyment, possession and occupation of parcel no. Nairobi/block 106/441 formerly plot no 095 Kibera Udongo Housing Co-operative Society Ltd to his detriment.
7. The Plaintiff seeks the court's intervention in granting him the necessary prayer as sought in the plaint.
8. After the close of the Plaintiff's case, the court granted the Plaintiff an opportunity to file his written submissions however after several mentions to confirm the filing of the same, none had been filed. This necessitated this court to proceed and prepare its judgment to avoid further delay.
9. Having considered the pleadings, oral and documentary evidence tendered, the main issue for determination is whether the Plaintiff has proved his case against the Defendant to the required standard to warrant the grant of the reliefs sought.



10. Although the suit was undefended, the Plaintiff had a duty to formally prove her case on a balance of probabilities as is required by law.
11. In the case of *Kirugi and another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
12. Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
13. The Plaintiff stated that he is the beneficial owner/purchaser for value of the suit property having purchased the same from defendant and made the requisite payment. He also stated that he has been in possession of the same and to date defendant is yet to surrender the title deed to finalize the transfer.
14. As already stated the Defendant never filed a defence, he did not adduce any evidence during trial. In the case of *Shaneebal Limited v County Government of Machakos* (2018)eKLR, the court cited the case of *Janet Kaphiphe Ouma & Anor v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007, and held that:

“In this matter apart from filing its statement of defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted”.
15. In the essence the evidence tendered by the Plaintiff remained unchallenged. The Defendant has no right whatsoever having received full payment to hold onto the original title. Her actions are totally uncalled for which should not be condoned in our society.
16. In the absence of any defence and or controverting evidence, this court is satisfied that the Plaintiff has proved his case to the required standard.
17. The court sits to administer justice. Equity always protects the rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. In the circumstances, I find that the Plaintiff is entitled to all the rights, interest and privilege that pertain to the suit property.
18. From the foregoing analysis, the court is satisfied that the Plaintiff has proved his case to the required standard and in this regard, this court makes the following orders: -
 - a. A declaration that the Plaintiff is a *bonafide* purchaser for value of Nairobi/Block 106/441 formerly plot No 095 Kibera Udongo Housing Co-operative Society Ltd.
 - b. An order of Permanent injunction restraining the defendant, her servants or agents and anybody acting through or claiming from selling, alienating, transferring, charging, leasing or in any manner however interfering with parcel No. Nairobi/Block 106/441.
 - c. An order of specific performance is hereby issued directing the Defendant to surrender title No. Nairobi/Block 106/441 to the Chief Land Registrar and execute all necessary papers to facilitate transfer of the suit property to the Plaintiff within 30 days from today.



- d. In the alternative to prayer (c) above after lapse of the 30 days, the Deputy Registrar of this court to execute all the necessary transfer documents and Chief Land Registrar to facilitate transfer of Land Reference No. Nairobi/Block 106/441 To The Plaintiff.
- e. Costs of the suit are awarded to the Plaintiff.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH MAY 2023.

E.K. WABWOTO

JUDGE

In the presence of

N/A for the Plaintiff.

N/A for Defendant.

Court Assistant: Caroline Nafuna.

E.K. WABWOTO

JUDGE

