



**Gathirwa v Nyangau & another (Environment & Land Case
168 of 2015) [2023] KEELC 17433 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 168 OF 2015**

**MAO ODENY, J
MAY 17, 2023**

BETWEEN

PETER MAINA GATHIRWA PLAINTIFF

AND

PENGO NYANGAU 1ST DEFENDANT

MOHAMED BARUTI 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated September 14, 2015, the Plaintiff herein sued the Defendants seeking the following orders; -
 - a. A declaratory order that the two plots in dispute, namely plot 118 also known as plot 248 and plot 119 also known as 247 as registered on the register of the Coast Development Company Limited are solely owned by the Plaintiff, in exclusion of the defendants.
 - b. An eviction order requiring the defendants to vacate the plaintiff's plots within 45 days and hand-over vacant possession to him.
 - c. An order compelling the defendants jointly and severally to pay the plaintiff 100,000/- as damages.
 - d. Costs and interests at the rate of 14 per cent.
 - e. Further or any other relief that the Honourable Court may deem appropriate.



Plaintiff's Case

2. PW1 Peter Maina Gathirwa adopted his Witness Statement and testified that he bought the suit property from Amina Mohamed in 1991 as per the Sale Agreement which he produced as exhibit 1 and further stated that he made payments through the DC.
3. According to PW1 on June 5, 1991, he entered into a sale agreement with one Amina Mohamed through her proxy Ngewa Mwinyi Fak to purchase a building erected on one John Keen's Plot No. 118 alias plot 248 (the first suit property). That Amina was a licensed occupant on the suit plot and PW1 paid a total of Kshs. 21,000/- as consideration, and the vendor vacated the premises. Thereafter, the 1st Defendant unlawfully demolished the Plaintiff's buildings, took possession and erected his own buildings.
4. Similarly, regarding Plot No. 119 alias plot 247, (the second suit property), PW1 stated that he purchased the buildings erected thereon from one George Okeyo, a licensed occupant on the suit land belonging to John Keen. It was PW1's evidence that he entered into an agreement dated October 14, 1993 at a consideration of Kshs. 20,000/- which he paid in full.
5. PW1 stated that he had paid survey fees for the 2 plots and that the 2nd Defendant entered the suit property in the year 2015. It was his evidence that they reported the matter to the Chief who told the Defendants that the land belonged to PW1.
6. On cross-examination, PW1 was shown exhibit 1 and confirmed that the agreement was between one Simon Siele Ole Sonel and himself, and that the said Simon paid Kshs. 6,000/- to Nzewa Mwinyi Faki. PW1 further stated that although he was a witness in the said agreement, he was the buyer and had paid Kshs. 14,000/-.
7. PW1 also stated that he was a squatter on the first suit property and that Amina Mohamed got him into the squatter scheme and added that the survey was done in 1993 after he had purchased the suit property. According to him, one had to buy a house before being identified as a squatter. He admitted that the Defendant is the one in occupation of the suit land.
8. On 16th February 2021, Mr. Nyambuye, counsel for the Plaintiff told the court that the suit against the 1st Defendant had abated.

2nd Defendant's Case

9. DW1 Mohammed Baruti adopted his Witness Statement and stated he bought plot No. 119(247) and paid the purchase price to one Njoroge who was a Manager of Coast Development Company associated with John Keen. He also stated that he neither knew the Plaintiff nor George Okeyo, and that his neighbors were Pengo Nyangau and Charo Katana. It was DW1's testimony that there was no house when he took possession of the suit property plot is No 119 (247) whereby he has built a 2 roomed permanent house.
10. On cross examination, DW1 testified that he made payments to one Njoroge who then showed him the boundaries. He also stated that the plots had been surveyed prior to 1997 when they bought the plots.
11. DW1 told the court that the entire land was given to squatters and it was the said Njoroge receiving monies on behalf of John Keen. It was DW1's testimony that they were dealing with Njoroge and not the elders or Assistant Chiefs.



Plaintiff's Submissions

12. Counsel for the Plaintiff identified two issues for determination namely who is the rightful owner of plot No. 119(247), who between the Plaintiff and 2nd Defendant has a better title to the suit property, what are the appropriate reliefs.
13. Counsel relied on section 107 of the *Evidence Act* and the cases of *Muringi Kanoru Jeremiah v Stephen Ungu Mwaabua* [2015] eKLR; and *Alice Wanjiru Rubiu v Messiac Assembly of Yahweh* [2021] eKLR, and submitted that having produced the Sale Agreements and payment receipts, the Plaintiff had successfully proved ownership and was therefore entitled to the prayers sought.

Analysis and Determination

14. The issue for determination is whether the Plaintiff has proved ownership of the suit land namely plot No 119(247). It is not disputed that the suit properties were part of a larger parcel of land owned by one John Keen, a director at Coast Development Company Limited which land was given to squatters for distribution.
15. The rule of evidence is that whoever alleges must prove which burden is placed on the Plaintiff to prove his or her case on a balance of probabilities. This position is anchored in the *Evidence Act*, under sections 107, 108 and 109 which provide as follows;-

Section 107: Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove 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.

Section 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.

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.

16. The Plaintiff is therefore duty bound to prove his case against the Defendants that he owns the suit parcels of land. The case against the 1st Defendant abated therefore the remaining case is against the 2nd Defendant in respect of plot No 119(247) Upon the demise of the 1st Defendant the Plaintiff could have filed a citation or substitution proceedings if he so wished but he left the suit to abate. That is a choice which the Plaintiff made.
17. In respect of the case against the 2nd Defendant regarding Plot No 119(247), the Plaintiff produced a copy of a handwritten agreement dated 14th October 1993 between himself and one George Okeyo. The agreement is written in Swahili language and as per the agreement it is also evident that the property being sold was a house at a consideration of Kshs. 5,000/-. It is not clear whether the said house was on the plot no. 119 alias 247. No evidence was adduced to show the connection between the house and the suit property.



18. The Plaintiff testified that he paid Kshs. 5,000/- to George; Kshs. 1,000/- as down payment to John Keen on October 8, 1994 and the balance of Kshs. 14,000/- to Coast Development Limited on September 19, 2009. What does not add up however and was not explained by the Plaintiff is the fact that the receipt from Coast Development clearly indicates that the payment was for a share. Whether it was a share of the company or otherwise was not clarified.
19. The Plaintiff also contradicted himself whereby he stated in his testimony, that upon survey, the alleged plot where George's house was built, was given the number 118, yet he had averred in his Plaint that George's house was on Plot 119.
20. Similarly, in the Sale Agreement dated April 7, 1993 between the Plaintiff and Kahindi Karisa Kadenge, the same was for purchase of a house for Kshs. 4000/- and we are not told which plot this house was located.
21. The agreement dated June 5, 1991, Simon Ole Senu paid Kshs. 6000/ to Nzewa Mwinyi Fak who received the same on behalf of Amina Mohammed the amount being the balance out of Kshs 15,000/- payable to the properties of John Keen Farm Kilifi.
22. The Plaintiff signed this agreement as a witness and not a person buying the suit land which was not indicated. The "properties of John Keen farm in Kilifi" is not descriptive enough to identify the suit land. Why did the Plaintiff sign this agreement as a witness and not as a purchaser? What is the relationship between Simon ole Senu and the Plaintiff and whose behalf was he paying this money if the Plaintiff was a witness to the agreement?
23. In the circumstances, I find that the Plaintiff has not proved on a balance of probabilities that he is the owner of suit property. Indeed, he confirmed that the 2nd Defendant occupies the suit property and that he has never been in occupation. The Plaintiff's suit is therefore dismissed with costs to the 2nd Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF MAY, 2023.

M.A. ODENY

__JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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