



**Kiome v Kihuga (Environment & Land Case 291 of 2015)
[2023] KEELC 17395 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 291 OF 2015
OA ANGOTE, J
MAY 11, 2023**

BETWEEN

JAMES NDIRANGU KIOME PLAINTIFF

AND

MOSES MWANGI KIHUGA DEFENDANT

JUDGMENT

Background

1. The Plaintiff instituted this suit against the Defendant *vide* a Plaint dated March 18, 2015 seeking the following reliefs:
 - i. An order directed at the Defendant to immediately stop the illegal construction on plot 2/9 Kayole-Soweto.
 - ii. An order directed at the Defendant to immediately demolish any structures constructed by the Defendant on Plot No 2/9 Kayole-Soweto.
 - iii. An order restraining the Defendant by himself, his agents, servants and/or any one claiming through him from constructing any structures on plot No 2/9.
 - iv. A permanent order restraining the Defendant by himself, his agents, servants and/or anyone claiming through him from entering on to/or remaining on the suit property known as Plot No 2/9 or encroaching onto the suit land.
 - v. Costs of the suit together with interest thereon at Court rates.
2. It is the Plaintiff's case that he is the bonafide owner of Plot No 2/9 at Kayole-Soweto Village(hereinafter suit property) having purchased the same from Ngugi Muigai of ID No xxxxxxx



- on the April 15, 1999 for a sum of Kshs 110,000 and that he received the allotment card immediately upon payment of the amount which was witnessed by three witnesses.
3. It was averred by the Plaintiff that sometime in 2014, the Defendant unlawfully encroached on the suit property and begun constructions thereon; that he reported the matter to the Assistant Chief, Savana Sub-location Umoja who summoned the Defendant in an attempt to arbitrate the dispute which failed and that before he begun construction, the Defendant demolished the perimeter wall-fence and toilet that were on the suit property.
 4. According to the Plaintiff, despite being asked to cease construction by the Assistant Chief, the Defendant has continued to do so; that the Defendant's illegal actions have subjected him to mental torture and stress as well as economic losses and that despite demand having been made and notice to sue given, the Defendant has neglected to vacate the suit property.
 5. The Defendant filed a Defence on May 13, 2015 where he denied the assertions set out in the Plaintiff stating that the Plaintiff is not the owner of the suit property; that when the parties were summoned by the area Chief, the Chief rightly found that he was the owner of the property and that the Plaintiff was asked to get a surveyor and point out his land which he never did.

Hearing & Evidence

6. The matter proceeded for hearing on the February 1, 2021. The Plaintiff, PW1, adopted his witness statement in which he stated that the plot was originally allocated to Ngugi Muigai who sold it to him; that when he purchased the plot, he fenced it and dug a pit latrine and that after 15 years, the Defendant came and destroyed the perimeter fence and started construction.
7. PW1 informed the court that the Chief asked the City Council to send him a surveyor to ascertain the plots on the ground and that upon the visit, the Surveyor confirmed that the property belonged to him. It was the evidence of PW1 that the Defendant proceeded to construct and the property now has tenants.
8. PW2 testified that Ngugi Muigai sold the suit property to the Plaintiff; that he was the Chief when the transaction took place and witnessed the same and that he accompanied the Plaintiff to the Chief's office where the Chief asked the Defendant to stop construction but he declined to.
9. PW3, a surveyor with the Nairobi County Government, prepared a ground report dated the August 24, 2017 in which he noted the existence of a development on the suit property which was allocated to Ngugi Muigai who later transferred the same to the Plaintiff and stated that the Plaintiff is the owner of the plot. The Defendant did not participate in the trial.

Submissions

10. The Plaintiff's advocate submitted that the Plaintiff's evidence is unchallenged and un-opposed; that the Plaintiff testified and provided evidence of his ownership of the suit property and that as expressed by the Court in *Miller vs Minister of Pensions* [1947]eKLR, the burden of proof in civil cases is on a balance of probabilities.
11. It was submitted that the Courts in *Linus Nganga Kiongo & 3 Others vs Town Council of Kikuyu* [2012]eKLR, *Edward Mariga Through Stanley Mobisa Mariga vs Nathaniel David Schuller & Anor* [1997]eKLR and *Kenya Power and Lighting Company Limited vs Pamela Awino Ogunyo* [2015]eKLR all take the position that where the Defendant does not participate in trial, the Plaintiff's evidence remains uncontroverted and therefore unchallenged.



Analysis and Determination

12. The Plaintiff instituted this suit against the Defendant seeking for, inter alia, a permanent injunction restraining the Defendant from interfering with the suit property and for the Defendant to cease any construction and demolish those already on the property.
13. Despite having duly entered Appearance and filed a Statement of Defence, the Defendant did not participate in the trial. As a result thereof, he failed to substantiate the allegations made in his Defence and produce any evidence to counter the Plaintiff's testimony and evidence which stand uncontroverted and unchallenged. The Defence on record remains mere allegations.
14. It is now settled that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove his case is in no way lessened because the Defendant did not adduce any evidence. This was succinctly expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N Kamau* [2016] eKLR where the Court stated as follows:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the Plaintiff to prove his claim on a balance of probabilities. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”
15. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. The same is set out under Section 107(1)(2) of the *Evidence Act*, Cap 80 which provides as follows:
 - (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.”
16. The Plaintiff testified that he is the lawful proprietor of the suit property having purchased it for value from one Ngugi Muigai. To prove his claim, he produced a transfer form dated April 15, 1999, a letter of temporary allocation dated September 20, 1990, a letter from village elders indicating that one Ngugi Maina sold the property to him, a survey report and ground status report all affirming his ownership of the suit property.
17. The Plaintiff's evidence aforesaid was not in any way controverted by the Defendant. In determining the question as to the proprietorship of untitled land, the Court is mandated to establish whether the evidence adduced establishes an unbroken chain leading to the root of the title. This was persuasively stated in the case of *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR as follows:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of



unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history...

It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ *in Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

18. Having regard to the entirety of the evidence, there can be no doubt that the Plaintiff has ably demonstrated the root of his title to the property and the Court finds that he has proven his ownership of the suit property on a balance of probabilities.
19. Having found that the Plaintiff is the rightful owner of the suit property, it follows that he is entitled to all the rights appertaining to his ownership thereof. The Defendant is a trespasser on the suit property and any construction on the suit property without the Plaintiff’s permission is illegal.
20. In the end, the Court finds that the Plaintiff has proven his case on a balance of probabilities and enters judgement for him in the following terms:
 - i. The Defendant is hereby ordered to cease any illegal construction on plot 2/9 Kayole-Soweto.
 - ii. The Defendant is hereby ordered to demolish any structures that he constructed on Plot No 2/9 Kayole-Soweto.
 - iii. A permanent injunction hereby issues restraining the Defendant by himself, his agents, servants and/or anyone claiming through him from entering on to/or remaining on the suit property known as Plot No 2/9 or encroaching onto the suit land.
 - iv. The Plaintiff shall have the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Jaoko for Plaintiff

No appearance for Defendant

Court Assistant – Tracy

