



**Orwenyo v Ngovu & 2 others (Environment & Land Case
677 of 2012) [2025] KEELC 2884 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2884 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 677 OF 2012**

**AA OMOLLO, J
MARCH 20, 2025**

BETWEEN

KEFA NYAKUNDI ORWENYO PLAINTIFF

AND

DAVID GACHERU NGOVU 1ST DEFENDANT

URUTAGWO MWIRUTI WOMEN GROUP 2ND DEFENDANT

ANN WAIRIMU NDUNGU 3RD DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the Defendants vide Plaintiff dated 8th October 2012 and amended severally with the final amended plaintiff now dated 5th December 2024. The Plaintiff is asking the court to grant him the following orders;
 - a. An order directing the 2nd and 3rd Defendant to refund the purchase price of the property adjusted to reflect the current market rate, considering the increase in land value from time of purchase.
 - b. General Damages
 - c. Costs of the suit and interest at court rates
 - d. Any other and/or further reliefs the Honourable court deems fit to grant.
2. The Plaintiff pleaded that he is the lawful owner of Plot No.40 within L.R No.6845/67/40 located at Utawala area within the City of Nairobi having purchased it from the 2nd Defendant (Urutagwo Mwiruti Women Group). That he purchased the suit land from the 2nd Defendant in the year 2005 with the land sale agreement dated 3rd June 2005 signed between him and the 2nd Defendant.



3. He stated that he commenced development on the suit land by erecting a wall and laying the foundation as well as placing on site materials for construction of a permanent building. However, in the month of May 2012, Philip Osiemo Orwenyo (deceased) acting on his instructions visited the suit land and he found the Defendant in the process of developing a temporary structure on the land.
4. That the deceased (Mr Osiemo) visited the offices of the 2nd Defendant to follow up on the matter and the group who were the initial sellers assured mr Osiemo that the Plaintiff is the rightful owner of Plot No. 6845/67/40, the suit land. The Plaintiff stated that besides owning the parcel of land, he is also a member of the Emmaus Welfare Society which is registered under the department of gender and social development.
5. The Plaintiff contended that he asked the Defendant to stop the unlawful intrusion on the suit land but continued the acts of trespass. He impleads that actions of the Defendants have caused irreparable damage to him having invested Kshs. 360,000/- in the purchase of the property but has been denied the fruits on his investment.
6. That unless the court intervenes and directs the 2nd Defendant to refund the purchase price at the plot's current value, the Plaintiff will suffer irreparable damage. That he seeks to be refunded by the 2nd Defendant the purchase price at the current market price considering that the property was purchased in 2005 and that there has been a significant hike in the value of the property.

Defence and Counter claim

7. The 1st Defendant filed a statement of defence and counter claim dated 6th November 2012 and which has never been amended seeking for the following orders;
 - a. Kshs.10,285/= as pleaded in the counter-claim
 - b. General damages
 - c. Interest at such rate as this court may determine to be appropriate in the circumstances of the claim
 - d. Costs of the counter-claim
 - e. Such further or other orders, relief as this Honourable Court may deem just and fair to grant.
8. He stated that since 1998 he has been the lawful owner of the suit plot and contends that it is indeed the 1st Defendant who has commenced development on this plot, erected a wall and laid the foundation and gathered construction materials on his land. He denied the Plaintiffs' averments and stated that at no point did the Plaintiffs go to the initial owners of the suit land but resorted to unlawful means, modes and methods of harassing the Defendant.
9. That immediately the issue as to the double allocation came up, the matter was referred to the area Assistant Chief who invited/summoned both parties to attend to a meeting but the Plaintiffs failed to attend. That the Plaintiffs went to City Council of Nairobi and opened a purported account in May 2012 where they paid rates for the said suit land. That by a stratagem between the Plaintiffs and police officers, the 1st Defendant has been subjected to harassment with the suit land being tampered with.
10. The 1st Defendant stated that he holds lawful and genuine Plot Ownership Certificate and that the person who can clear the air in these circumstances is the Urutagwo Mwiruti Women Group which issued the certificate. The 1st Defendant claims for the sum of Kshs.10,285/= being damage suffered as a result of damage done to the suit land.



11. The Plaintiff filed a reply to defence and counter-claim dated 23rd January 2013 stating that the Defence does not raise any reasonable defence, consisting only of mere denials. He also denied every averment in the 1st Defendants' counter claim.
12. The 2nd and 3rd Defendants filed statement of defence dated 19th January 2025. They contended that the amended plaint is irregularly amended and is fatally before the court as it offends the mandatory provisions of order 8 rule 7(1) of the Civil Procedure Rules 2010. Further, they deny the Plaintiff's averments specifically that they entered into a land sale agreement with him and or they sold the suit land to him.
13. They denied ever receiving any money and or sum of Ksh.360,000 as alleged. It is their defence that the Plaintiff cannot be refunded the alleged purchase price commensurate with the current value of suit land having never purchased the same from the 2nd and 3rd Defendants. They plead the maxim res inter alios acta.

Evidence

14. Kefa Nyakundi Orwenyo testified in support of the Plaintiff's case and adopted his witness statement dated 19th July 2022 as his evidence in chief. He also produced documents contained in the list dated 8th September 2012 as PEx2-4 and the document in further list dated 2/7/2024 as PExh 1 (which is the sale agreement dated 3.06.2005). The witness stated that he purchased the suit land after a friend told him that there were some plots for sale in Utawala. Upon being shown the plots he liked 3 of them with each valued at Ksh.360,000.
15. That he issued a banker's cheque of Kshs.200,000 for deposit, signed the sale agreement and was issued with receipt and the certificate of ownership by the 2nd Defendant. He stated that since he sold the two other plots from what he purchased, he remained with one, which is the suit land and which he wanted to develop but he thereafter relocated to the USA.
16. He testified that he sent his brother money to buy building materials and which were bought and delivered on site but his brother was chased away. After they complained, the 2nd Defendant issued him with a letter confirming that he is the one entitled to the suit plot.
17. In cross examination, the Plaintiff stated that he relocated to the USA in 2010 and that the case was filed when there thus he did not swear the affidavit on 8/10/2012. He also confirmed that he had not filed receipts issued to him by the 2nd Defendant and there is no name of Anne Wairimu Ndungu in sale agreement produced or the name of the person with whom he spoke to around July 2014 and who assured him that the suit land was his.
18. That he did not conduct a search to know the officials of the 2nd Defendant neither does he have a letter from the 2nd Defendant showing that they gave Mr. Stanley Ndung'u authority to act on their behalf in as much as it is his evidence that he met the said Stanley and Angelica in the 2nd Defendant's offices. He insisted that he had a receipt to show that he paid the balance of Kshs.160,000 since paragraph (iii) of the agreement confirms that he paid the balance.
19. Anne Wairimu Ndungu testified as DW1 in support of the Defendants' case. She adopted her witness statement dated 19/1/2025 as evidence in chief and produced the bundle of documents in the list dated 19/1/2025 as DExh 1 and 2. She stated that she has never received any money from the Plaintiff for the sale of the suit land. With regard to the letter dated 27th September 2012, DW1 admitted she knows Ndungu Murigi but asserted that he is not an official of the 2nd Defendant. That she does not know who signed the letter.



20. On cross examination, DW1 stated that she was a chairlady of the 2nd Defendant but has ceased to be. That the signatures on the share certificate are not hers although she did not produce any expert evidence to confirm that the signature is not hers. She insisted that she did not sell the land to the Plaintiff and has never employed anyone to work in the two offices she operated.

Analysis and determination;

21. The Plaintiff claim against the Defendants is on the basis that he entered into a sale agreement with the 2nd Defendant for purchase of the suit land, paid the purchase price but the ownership of the same was given to the 1st Defendant. In defence, the 1st Defendant stated that he is the legal owner of the suit land and in counter claim sought for the sum of Kshs.10,285/= being damages suffered as a result of actions done to the suit land by the Plaintiff. The main issue for determination is whether or not the Plaintiff is entitled to an order for refund and for general damages.
22. The Plaintiff has pleaded that he purchased the suit land from the 2nd Defendant in the year 2005 and executed the land sale agreement dated 3rd June 2005 with the 2nd Defendant. Ann Wairimu Ndungu in her testimony said that she was the chairlady of the 2nd Defendant and that she operated the 2nd Defendant's two offices thus she would be the signatory in the sale agreements between purchasers and the 2nd Defendant. During cross examination, the Plaintiff confirmed that Anne Wairimu Ndungu was not a name in the alleged sale agreement.
23. It is trite law under section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya that he who alleges must prove. In the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-
- “As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
24. I have considered the documents presented by each of the parties. The Plaintiff relies on the sale agreement dated 3rd June 2005; the plot ownership certificate and a letter dated 27. 9.2012 issued by the 2nd Defendant. The sale agreement was signed by Stanley Ndung'u Murigi and witnessed by Angelica Wangui Njuguna who the 3rd Defendant admits as working for the 2nd Defendant. The 2nd Defendant is described as the seller.
25. The letter dated 27th September, 2012 confirming that the Plaintiff is the owner of the suit plot is on the letter head of the 2nd Defendant and signed by Ndungu Murigi. with regard to the suit land. DW1 said that the 2nd Defendant is a registered self-help group under which the 3rd Defendant is the Chairlady, Margaret Wanjiku as the secretary, and Grace Koech as the Treasurer. The fact of the 3rd Defendant being the chairlady at the material time is confirmed by the plot ownership certificate dated 28th July 2005 issued to the Plaintiff.
26. The Plaintiff was put on notice through the statement of defence filed that the 2nd and 3rd Defendants were denying selling to him the suited plot. Since the 2nd Defendant can only act or sue and be sued through its officials, the rule of evidence required of the Plaintiff to present material that would link Mr Stanley Ndungu Murigi as having authority to transact on behalf of the 2nd Defendant by signing the sale agreement on its behalf. The burden of proof did not shift on the 2nd and 3rd Defendants to prove that the said Ndung'u Murigi was not their authorised agent.



27. Further, the Plaintiff asserted that he paid the full purchase price for the suit land. In his written statement, he did not give details on the mode of payment but in his oral testimony before the court, he said that the first payment of Kshs 200000 was by banker's cheque. However, he did not specify in whose favour the bankers cheque had been drawn neither did he produce a copy of the said cheque or his bank's statement to corroborate that the payment was made in favour of the 2nd Defendant. His testimony does also not disclose who received the balance of Ksh.160,000 on behalf of the 2nd Defendant.
28. In the case of Agriculture Finance Corporation vs. Lengetia Ltd, (1985) KLR at 770, the Court of Appeal held that:
- “As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. There existed no direct contract between the first respondent and the appellant, and so the first respondent had no cause of action against the appellant”.
29. Since the Plaintiff is seeking refund of the monies he paid out towards the purchase price adjusted at current market rates of the suit plot, he is under obligation in law to specifically prove that he indeed paid the sum of Kshs 360000 and specifically plead and prove what is the current market price of the suit plot by way of evidence of a valuation report. Premised on the evidence tendered to court, the Plaintiff failed to discharge the burden of proof for want of documents to prove payments made to the 2nd Defendant or a valuation report.
30. In the case of David Bagine V Martin Bundi CA No. (Nrb) 283/1996, the Court of Appeal referring to Lord Goddard CJ in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177) held that-
- “It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and so to speak, throw them at the head of the Court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”
31. The prayer for general damages would only succeed if the Plaintiff's claim against the Defendants was proved. The plaintiff having amended his claim seeking refund means that his claim against the 1st Defendant was deemed as withdrawn since he did not pay to him any monies. In this case, the Plaintiff failed to prove that Stanley Ndungu Murigi was one of the officials of the 2nd Defendant, failed to demonstrate that the monies he expended were received by the 2nd and 3rd Defendants and failed to show that indeed it is the officials of the 2nd Defendant who pointed out to him the sold plot. Lastly, he failed to prove that he is the one who fenced the suit plot.
32. In light of the foregoing, I hold that the Plaintiff has failed to prove on a balance of probabilities that he paid any money to the 2nd and 3rd Defendants as the evidence led was towards payment made to Stanley Ndung'u Murigi who he did not join in these proceedings. Hence this court cannot make any adverse orders against the said Ndung'u Murigi without affording him a hearing as that would go against the rules of natural justice. The claim for general damages also fails for want of proof of claim against the three defendants sued. The sum total is my finding that the Plaintiff's case is without merit.
33. It is noteworthy that the 1st Defendant filed a counter-claim but did not call any evidence to prove his claim inter alia for loss of damages that was pleaded as Kshs 10285/= The claim by the 1st Defendant



is therefore dismissed for lack of evidence. The 2nd and 3rd Defendants also filed a statement of defence and counter-claim but there were no specific orders sought. None is granted.

34. In conclusion, the Plaintiff's claim as well as the claims brought by the Defendants in the counter-claim are all dismissed for lack of merit. Each party to meet their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2025

A. OMOLLO

JUDGE

