



REPUBLIC OF KENYA



Mwaura v Hiribae (As an Administrator of the Estate of Patrick Chome Ngala - Deceased) & 9 others (Land Case 227 of 2014) [2023] KEELC 17989 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 227 OF 2014
MAO ODENY, J
JUNE 14, 2023**

BETWEEN

JOHN GATERU MWAURA PLAINTIFF

AND

BETTY NAMAHANDO HIRIBAE (AS AN ADMINISTRATOR OF THE ESTATE OF PATRICK CHOME NGALA - DECEASED) 1ST DEFENDANT
KILIO CHA MASKINI WELFARE SOCIETY 2ND DEFENDANT
GILBERT K. SHUTU 3RD DEFENDANT
SIMON MALUA 4TH DEFENDANT
ELIZABETH MACHARIA 5TH DEFENDANT
SARAH KONDE 6TH DEFENDANT
GRACE KAZUNGU 7TH DEFENDANT
EDDIE NYIRO 8TH DEFENDANT
PETER KAINGU 9TH DEFENDANT
SUNIL MEDIRATTA 10TH DEFENDANT

JUDGMENT

1. By a Plaint dated 2nd December 2014 and amended on 6th March 2015, the Plaintiff herein sued the defendants seeking the following orders:
 - a. A permanent injunction restraining the 1st Defendant by himself, his servant, agents, Representatives and/or assigns from further trespassing, encroaching, dealing with and



interfering in any way with the plaintiff's quiet possession and enjoyment of his portion of all that parcel of land referenced Portion No. 411/R Maweni Malindi, measuring 35x100 meters.

- b. A declaration that the Plaintiff is the rightful, legal, beneficial and bona fide owner of his share of a portion of all that parcel of land referenced Portion No. 411/R Maweni, Malindi measuring 35x100 meters having paid for the purchase fee towards acquisition of the same through the 2nd Defendant as agents of the registered owner of the land thereof and that the Defendants' actions are unlawful.
- c. Costs and interest of this suit.

Plaintiff's Case

2. PW1 John Gatheru Mwaura adopted his Witness Statement and relied on the list of documents as his evidence in chief and stated that he is the rightful owner of a plot within the large Plot No. 411/R in Maweni area having purchased the same from his brother one Elijah Njoroge of which he produced a sale agreement.
3. PW1 further stated that the suit the property was owned by one Sunil Medirata and that the 2nd Defendant was constituted and a committee elected to oversee collection of money from the original squatters, who purchased the portions they had occupied from the said owner.
4. It was PW1's testimony that his brother and the 2nd Defendant entered into an in 1993 for the purchase of a plot within the larger 411/R in Maweni whereby he paid the purchase price by instalments as indicated in the payment receipts from the 2nd Defendant.
5. PW1 stated that the 1st Defendant never raised any issues/complaints in respect to him buying the said Plot and house from his brother, but reported the same to the Chief where a verdict was entered in his favor as per the proceedings produced by the Plaintiff.
6. It was further PW1's evidence that the committee led by the 1st Defendant collected money from squatters for remittance to the registered owners which was never done and criminal proceedings were commenced against the 1st Defendant and some members of his committee which committee was eventually removed and a new one elected.
7. PW1 stated that they entered into a new agreement between the committee and the registered owner where the purchase price was agreed at Kshs. 20,000,000/=, and each plot owner was to pay Kshs. 100,000/= towards purchase of their plots as per the letters produced by PW1 and that the Chairman of the new committee endorsed the Plaintiff as the owner of the plot he was occupying and made payments towards the Purchase of the said plot.
8. PW1 produced a house owner's form which indicates the Plaintiff's name and a bundle of receipts collectively showing that he had already paid a total of Kshs. 95,000/= towards the Purchase price.
9. On cross examination, PW1 confirmed that he bought the land from his brother.
10. PW2- Esther Waithegeni Gikonyo also relied on her Witness Statement as her evidence in chief and stated that he is the Plaintiff's wife and when she got married to him in 1998 she found him living on the said Plot. She further stated that the Plaintiff informed her that he had bought the land from his brother and showed her a Sale Agreement.
11. PW2 further stated that the Plaintiff was a member of Kilio Cha Maskini welfare and had been paying to the committee all the required fees for the purchase of land.



12. It was PW2's testimony that the 1st Defendant sometime in 2002 started putting up a structure which was demolished by the Municipal Council of Malindi and in 2012; he went to their plot with a group of armed people threatening to demolish their house and further in 2014, the 1st Defendant started putting up a foundation on the suit land still trying to sell the same to other people.
13. During cross examination, PW2 confirmed that the 1st Defendant had intruded on their plot and had started building a foundation which was later demolished.

Defendant's Case

14. DW1-Betty Namahando Hiribae adopted her Witness Statement and stated that she is the wife of the 1st Defendant who is now deceased and who she substituted in this suit. She stated that her late husband never sold the suit land to the Plaintiff's brother, as the Plaintiff's brother only sought permission to set up a video café on the said land.
15. DW1 stated that her husband fenced the plot and that Kilio cha Maskini tried to resolve the ownership dispute but the committee recorded that the 1st Defendant was the owner of the property.
16. DW1 further stated that the documents of proof of payment that had been provided by the Plaintiff were forged as they were similar to documents produced by another person and have been eaten by rats. DW1 also confirmed that the 1st Defendant was one of the founders of Kilio Cha Maskini Welfare and a chairman at some point.
17. On cross examination DW1 stated that her husband was the Chairman of Kilio Cha Maskini and that similarity of the documents was not conclusive evidence that they were forged or not and the alleged forgery had never been reported anywhere for any steps to be taken.
18. DW2- Albert Kambi Mwalune adopted his statement and on cross-examination, he stated that Sunil gave them authority to sell the land to the squatters and that he was no longer a member of Kilio Cha Maskini. He further stated that he did not have any evidence that the 1st Defendant was the owner of the suit land and that he had not seen any documents that the Plaintiff bought the suit land.
19. DW2 further stated that he did not report the alleged forgery to the Police and neither did he know whether the 1st Defendant sold the land to the 1st Plaintiff.

Plaintiff's Submissions

20. Counsel submitted that the issue for determination was whether the Plaintiff has provided proof that he is the rightful owner of the suit land.
21. Counsel relied on the documents produced and the evidence by the parties and submitted that from the chronology of events it was clear that the Plaintiff acquired the suit property lawfully.
22. Further that it was not disputed by any of the Defendant's witnesses that there was an agreement between the registered owner of the land one Sunil Medirata whereby an account was provided for the squatters to pay the purchase price for their portion as advised by the officials of the 2nd Defendant.
23. Ms Tonia submitted that there were allegations of forgery of documents that have been made against the Plaintiff, but the same was never reported to the police. Further that the 1st Defendant's witnesses admitted that the 1st Defendant was a founder and chairman of the 2nd Defendant which proves that he was in a position of influence in respect of all decisions that were made with regard to the activities of the 2nd Defendant in the suit property.



24. Counsel therefore urged the court to allow the claim as prayed.

Defendant's Submissions

25. Counsel submitted that the Defendant has been in undisrupted possession, occupation and utilization of the suit land and that the Plaintiff's brother one Elijah Njoroge had leased the said parcel from the 1st Defendant and when a dispute arose it was handled by the chief and the same resolved in favour of the 1st Defendant.
26. Counsel relied on the case of *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR, where the Court relied on the decision of *Karugi & Another v. Kabiya & 3 Others* [1987] KLR 347, and held that the burden on a Plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.
27. Counsel therefore urged the court to find that the Plaintiff has not proved his case against the Defendants hence the same should be dismissed with costs.

Analysis and Determination

28. This is a case where the Plaintiff and the Defendants claim ownership of the suit land reference Portion No. 411/R Maweni Malindi, measuring 35x100 meters.
29. The issues therefore are who is the rightful owner of the suit land and whether the Plaintiff is entitled to the orders sought.
30. The Plaintiff gave evidence together with his witness who gave a chronology of how he purchased the suit land from the brother Elijah Njoroge who was recognized by Kilio Cha Maskini Welfare Society having paid his dues as a member,
31. A look at the minutes dated 11th September 2012 which was a case between the Plaintiff and Patrick Chome Ngala shows that the same was heard by the chief Malindi location in favor of the Plaintiff. At the second last paragraph it stated thus:
- “It is also clear that as per the current records of Kilio Cha Maskini Welfare Society/ Association they recognize John Mwaura as the bonafide owner of the house and plot whom the list as member No. 66, In conclusion therefore, until such a time Patrick will produce records that will prove he is recognized by the committee of Kilio Cha Maskini Welfare Association, I am convinced that the owner of the plot in dispute is John Gateri Mwaura”
32. Vide a meeting dated 2nd December 2012 the District Officer Malindi adopted the findings of the Chief Malindi location that John Mwaura is the bona fide owner of the suit plot.
33. Further a notice dated 6th December 2004 to the Plaintiff indicated that pursuant to a meeting on 28th August 2004 all plot owners on plot No 411/R were to pay Kshs. 1500/ and that they should complete payment of Kshs 20,000/ by 31st December 2004. This Notice would not have been addressed to the Plaintiff by the Secretary of the Welfare if he was not a member.
34. The Plaintiff also produced payment receipts to Kilio Cha Maskini as part payment of plot no 411/R, the society would not have issued receipts for plot No 411/R if the Plaintiff was not buying the suit land. The Plaintiff was further issued with a House Owner's Form which was filled and signed by the Officials of Kilio Cha Maskini Welfare.



35. The Defendant alleged fraud which was not pleaded or specifically proved. Some of the members alluded to fraud but in their conclusion they resolved that each of the parties stay where they have been occupying, the members did not have the eye or the authority to state that certain documents were forged and others authentic as they were neither investigative agencies nor expert document examiner.
36. It is trite law in evidence that he who alleges must prove. Section 107(i) of the Evidence Act provides that:
- “However desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
37. Similarly, Section 108 of Evidence Act, further states that:
- “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.”
38. The Defendant alleged fraud, therefore it was incumbent upon him to prove such fraud which he failed to do.
39. In the case Miller v. Minister of Pension (1947) All ER 373 on the standard of proof in civil matters-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
40. I have considered the pleadings, the evidence and the documents produced by both parties and find that the Plaintiff has proved his case on a probability of success.
41. The Plaintiff is therefore entitled to the orders plus costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF JUNE 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.

