



**Muthemba v Gachara (Environment & Land Case 266 of 2016)
[2023] KEELC 18868 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 266 OF 2016
OA ANGOTE, J
JULY 19, 2023**

BETWEEN

LAWRENCE KIMANI MUTHEMBA PLAINTIFF

AND

LEE MAINA GACHARA DEFENDANT

JUDGMENT

1. Through the Amended Complaint dated March 11, 2017, the Plaintiff has sought for the following orders:
 - a. A permanent order against the defendant for demolition of all structures erected by him.
 - b. A permanent order against the defendant for eviction from the suit premises.
 - c. An order that the OCS Kayole police station to ensure peace prevails during the execution thereof
 - d. Costs of this suit.
2. The Plaintiff's case is that he bought the suit property, Plot No I 162 from Embakasi Ranching Company Limited in 1982; that he was consequently issued with a Share Certificate No 0080 and that he took quiet possession of the land but left it fallow for some time.
3. According to the Plaintiff, on or about October 30, 2014, himself, together with some officials from the Embakasi Ranching Company conducted a site visit; that at the site visit, they found that the Defendant had invaded the aforesaid plot and built a semi-permanent structure on it and that the Defendant claimed to be the registered owner of Plot No I 162. It was averred in the Complaint that all documents at the Embakasi Ranching Company shows the land belongs to the Plaintiff.



4. The Defendant opposed the suit vide a Defence dated May 12, 2016. The Defendant averred that Embakasi Ranching Company Limited could not purport to have sold the suit land which belongs to his father without information or reference to him and that the suit property was bequeathed to his father, Simon Peter Gachara, by his later father-in-law, Wallace Wainaina Wanyoike.
5. The Defendant averred that the said site visit is non-consequential as it did not prove that the land belonged to the Plaintiff; that the land which he occupies is clearly marked as Plot No N 162 in conformity to the original map and that the matter was reported to Kayole Police Station but the DCIO Kayole Police Station found no basis of handling the matter because the Plaintiff did not have evidence or proof of his complaint.
6. It was averred in the Defence by the Defendant that his father, Simon Peter Gachara has Certificate No 420 for Plot No N 162 and that he paid Kshs 3,500 and Kshs 1000 being survey fees vide receipts No 1947 and 4415 respectively.

Hearing and Evidence

7. The Plaintiff, PW1 relied on his statement in which he averred that he bought the suit property, Plot No 386/09, from Embakasi Ranching Company Ltd in 1982; that on October 30, 2014, him, together with the officials of Embakasi Ranching Officials conducted a site visit and found the Defendant had invaded the suit property and built a semi-permanent structure on it, and that despite demands from the area Chief, the Defendant has refused and/ or declined to move out of the suit property.
8. PW1 produced a bundle of documents as PEXB1, which included stamp duty payment dated April 8, 2009; beacon certificate payment dated January 20, 2016; transfer of share/security dated December 31, 1987; confirmation of names letter from the Chief Kabete Location; site visit fees receipt dated October 30, 2014 and the share certificate number 0080 from Embakasi Ranching Company Limited dated June 29, 2009.
9. The Plaintiff also produced in evidence the transfer document dated March 4, 1993; photographs of the suit property dated February 16, 2016 and a mutation map of the area where Plot I 162 is located.
10. The Defendant, DW1, stated that he has lived on the land since 2010, when his parents allowed him on the land. DW1 produced three documents as DEXB1, which were share certificate No 420 with respect to Plot No N161 and 162 dated November 28, 1982; receipt of payment of civil engineering fees dated November 17, 1988 and a receipt for payment of survey fees dated March 4, 1982.
11. It was the testimony of DW1 that the plot in issue is N162, which was allotted to them in 1988. DW1 produced the original allotment letter in evidence and the receipt. He averred that before he began living on the suit property, they used to cultivate the land; that he was given a lease by the Ministry of Lands and that the land initially belonged to his grandfather.
12. DW2, Simon Peter Gachagua Maina, is the Defendant's father. DW2 stated that he purchased the suit property from Embakasi Ranching Company in 1982 on behalf of his father-in-law; that the Plaintiff did not make any effort to call a witness from Embakasi Ranching; that he did not buy the shares but was allocated share certificate No 0080, which was one certificate for two plots and that the letter of allotment was issued to him by Embakasi Ranching Company Limited.
13. DW2 produced in court the original certificates numbers 0080 and N 420 dated May 3, 1993 and two allotment letters from Embakasi Ranching Company Limited.



Submissions

14. Counsel for the Plaintiff submitted that the suit property was allocated twice; that he obtained the title in 1982; that the second allotment was issued to the Defendant and that the Plaintiff was the first in time and his title should consequently prevail in accordance with the equitable maxim of 'when two equities are equal, the first in time prevails.'
15. Counsel relied on the case *M'Ikiara M' Rinkanya & Another vs Gilbert Kabeere M'Mbijiwe (1982-1988) 1KAR 196* as quoted in the case of *Kamau James Njendu v Serah Wanjiru & Another [2018] eKLR*. Counsel also relied on *Hubert L Martin & 2 Others v Margaret J Kamar & 5 others [2016] eKLR*.
16. It was Counsel's submission that after purchasing the suit property, which is Plot No I 162, the Plaintiff was not issued with any Certificate of Title or Certificate of Lease and that this however did not lessen the fact that the Plaintiff is the bona fide owner of the suit property. Counsel relied on the case of *Beatrice Wambui Maina vs Embakasi Ranching Company Ltd & Another [2022] eKLR*.
17. The Plaintiff's Counsel submitted that the suit property was transferred to the Defendant illegally by Embakasi Ranching Group, as it had no valid title to resale the suit property as Plot No N 162; that the Defendant can not be termed as a bona fide purchaser for value and that the transfer of Plot No N 162 was illegal, null and void and should be cancelled.
18. The Defendant's counsel submitted that the Plaintiff has not brought to this court any evidence or witness of whoever he says sold the plot to him; that the Plaintiff has not demonstrated that the plot he claims to have purchased from Embakasi Ranching Company Limited is the same one he occupies and that the Certificate number 0080 presented by the Plaintiff was fake as it was issued four months later than theirs.
19. According to the Defendant, the affidavits of Lee Maina Gachara and Simon Peter Gachara have not been contradicted or proved otherwise by the Plaintiff.

Analysis and Determination

20. Having considered the pleadings of the parties, testimonies, evidence and submissions filed herein, the following are the issues for determination by this court:
 - a. Whether Plot No I 162 and N 162 refer to the same property.
 - b. Whether the Plaintiff or the Defendant is the legal owner of the suit property.
21. The Plaintiff herein filed this suit seeking to assert his right to property over Plot No I 162, which he claims he was allocated by Embakasi Ranching Company Limited in 1982, through Share Certificate No 6762 (later changed to No 0080).
22. The Defendant, on the other hand, claims that his father, Simon Peter Gachara obtained title for the land from his late father, Wallace Wainaina Wanyoike. The Defendant produced in evidence Share Certificate No 420 with respect to Plot Nos N 161 and 162, issued to Wallace Wainaina Wanyoike dated November 28, 1982. Despite summons to witness being served upon the Chairman of Embakasi Ranching Company Ltd, he declined to appear before this court to adduce evidence.
23. Sections 107, 109 and 112 of the *Evidence Act* provide that:

' 107.



- 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.
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'
24. The Plaintiff bore the duty to persuade this court that its suit is merited by adducing evidence to meet the burden of proof, which is on a balance of probability. In ascertaining between the parties' claims as to who is the rightful owner of the suit land, this court must interrogate the root of title and the documentary evidence presented by the parties. In the Court of Appeal case of *Munyu Maina v Hiram Gatbiha Maina [2013] eKLR* the court stated that:
- ' When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal.'
25. With respect to unregistered property, tracing ownership is dependent on tracing the root of title through documentary evidence. This was held in *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.
- The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. 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 paramount 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.'

26. This court is guided by these decisions.
27. The first issue for determination is whether Plot No I 162 and N 162 refer to the same property. The Plaintiff has adduced a Share Certificate No 6762 (later changed to 0080) with respect to Plot No I 162, for one share. The Share Certificate does not appear to be signed by the Chairman of Embakasi Ranching Company Limited. Further the said Share Certificate was issued to one Mr George Mbogo with respect to Plot No I 162 and is dated November 28, 1982.
28. According to an Affidavit sworn by the Plaintiff dated 23rd February 1993, Lawrence Kimani Muthemba and Geoge Mbogo refer to one and the same person. The Plaintiff also adduced a mutation map in which he highlighted the position of Plot No I 162. According to the Plaintiff, on or about October 30, 2014, in the company of some officials from Embakasi Ranching Company, they conducted a site visit and found that the Defendant had invaded the aforesaid plot and built a semi-permanent structure on it. The Plaintiff adduced photographs of the structure.
29. On the other hand, the Defendant has adduced Share Certificate No 420 with respect to two plots, Plot No N 161 and 162, issued to Wallace Wainaina Wanyoike and dated November 28, 1982.
30. In matters like this, where ownership of property is based on holding shares in a land buying company such as Embakasi Ranching Company Limited, the testimony and evidence of the officials of the company is critical. That did not happen in this case.
31. In the absence of the officials of Embakasi Ranching Company, it was imperative for the respective parties to adduce ownership certificates, receipts of payment, ballots and a register of members with their name included. While each party adduced their respective Share Certificate as well as receipts of payment, they neglected to present their respective ballots and a register of members.
32. In the absence of the register of members and plot numbers, this court cannot ascertain that N 162 and I 162 are separate and distinct. Without such a register, this court can equally not ascertain whether the mutation map presented by the Plaintiff has included all the plots within LR No 10904/2 off Komarock Road.
33. It would equally have been essential for the Plaintiff, on whom the burden to prove his case fell, to adduce the testimony of a licensed surveyor as to whether Plot NO I 162 and N 162 refers to the same plot and whether the Defendant has indeed trespassed onto the plot. While the Plaintiff asserted that him and the officials of Embakasi Ranching Company Limited conducted a site visit on October 30, 2014 and found the Defendant on his property, he has not presented any report, statement or oral testimony of the officials.
34. Further, this court has noted that the share certificate adduced by the Plaintiff was not signed by the Chairman of Embakasi Ranching Company. It also appears that the Share Certificate issued to the Plaintiff changed numbers from the initial 6762 to 0080. The Plaintiff neglected to explain this changes and did not produce any other documents to support this transition.
35. On the basis of the foregoing, this court must find that the Plaintiff's suit falls far short of the required standard of proof. The Plaintiff failed to discharge his burden of proof, with respect to establishing that Plot No I 162 and N 162 refer to the same property, and that there was a double allocation of the same.



36. The Plaintiff did not also establish that the Defendant has indeed trespassed on his property. The photographs adduced by the Plaintiff are vague, with no markers to indicate that the property therein is Plot No I 162.
37. The Plaintiff having failed to establish whether Plot No. I 162 and N 162 refer to the same plot, this court's hands are tied. It cannot evaluate the validity of the share certificates adduced by the parties, and therefore is not in a position to determine whether the Plaintiff or the Defendant is the legal and beneficial owner of the suit property.
38. Having found that the Plaintiff has failed to discharge the burden of proof to establish his case, this Court dismisses the Plaintiff's suit with costs.

Dated, signed and delivered virtually in Nairobi this 19th day of July, 2023,

O. A. Angote

Judge

In the presence of

No appearance of Plaintiff

No appearance of Defendant

Court Assistant - Tracy

