



Chege & another v Mwangi & another (Environment & Land Case E014 of 2022) [2023] KEELC 18660 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18660 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E014 OF 2022
LN GACHERU, J
JULY 13, 2023**

BETWEEN

VIRGINIAH NJERI CHEGE 1ST PLAINTIFF

SAMUEL IRUNGU CHEGE 2ND PLAINTIFF

AND

MILLICENT RUGURU MWANGI 1ST DEFENDANT

SAMSON IRUNGU MWANGI 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs herein brought this suit against the Defendants and sought for Judgement against them Jointly and Severally for the following orders;
 - a. That Mwangi Samson Alias Samson Kamara Mwangi is the registered owner of Land Parcel Number Loc 8/kagaa/336.
 - b. Costs of the suit.
 - c. Interest of (a) and (b) at Court's rates.
 - d. Any other or better relief the Honourable Court may deem just to grant.
2. The Plaintiffs claim against the Defendants is that the suit land was at all material times registered in the name of Mwangi Samson Alias Samson Kamara Mwangi, who died on August 23, 1977. That the said Mwangi Samson Alias Samson Kamara Mwangi had two sons Stephen Mwangi Kamara ,and Nahashon Chege Kamara, who are deceased. They averred that after the death of Stephen Mwangi Kamara, his wife, the 1st Defendant, and the son, the 2nd Defendant, took out letters of administration against his Estate and included the suit property as forming part of his estate whereas it did not belong to the deceased.



3. The Defendants filed a joint Defence opposing the Plaintiffs' case. It was their defence that the suit property is registered in the name of Mwangi Samson alias Stephen Mwangi, who held the land exclusively and has buried all his deceased family on the suit land. They averred that the Plaintiffs are wife and son of Nahashon Chege, deceased, and that the Plaintiffs have their land which was owned by their grandfather. They added that Stephen Mwangi Kamara was prior to his baptism known as Mwangi Samson, as he was using his father's name. They opposed the contents of the Plaint.

Plaintiff's Case

4. The matter was set down for hearing.
5. PW1 Samuel Irungu Chege, the 2nd Plaintiff adopted his witness statements dated June 21, 2022, and November 22, 2022, as his evidence and relied on the documents contained in the Bundle of Documents dated May 27, 2022. He added in his testimony that he is related to the Defendants and that they live on distinct parcels of land.
6. On cross-examination, he testified that he is the son Nahashon Chege, who died in 1975. He confirmed that as per the green card, the land was first registered in 1960, in the name of Mwangi Samson. He testified that his grandfather was called Samson Kamara Mwangi alias Mwangi Samson, who died in 1977. When put to task on the death certificate, he testified that it indicated his grandfather was Samson Kamara Mwangi, and his uncle was Stephen Mwangi Kamara. It was his testimony that they have been to several offices to resolve the matter and added that he had nothing to show that Samson Kamara Mwangi was also Mwangi Samson. On re-exam, it was his testimony that they have lived on the suit property since he was born
7. PW 2, Virginia Njeri Chege, 1st Plaintiff adopted her witness statement dated June 21, 2022, as evidence in chief. On cross-examination, she testified that she was married to Nahashon Chege who was the son of Samson Kamara alias Samson Kamara Mwangi. She added that Kamara had a son called Mwangi who was called Mwangi Samson. She testified of not being aware of the history of the land and told the Court that she had filed no succession case.
8. PW3 Mwangi Chomo, adopted his witness statement dated June 21, 2022, as his evidence. It was his testimony on cross-examination that he heard about the history of the land from his father, but he comes from the same clan with the parties to the suit. He testified that Stephen Mwangi was never called Mwangi Samson.
9. PW4 Jamleck Irungu Kimuhu, adopted his witness statement. He testified on cross-examination that Mwangi was the first born of Samson Kamara Mwangi and that the suit property belonged to Samson Mwangi Kamara. The Plaintiffs thereafter closed their case.

Defence Case

10. DW1, Millicent Ruguru Mwangi, 1st Defendant, adopted her witness statement dated July 25, 2022, and produced the documents contained in their List of Documents dated March 9, 2022. It was her testimony that the suit land belonged to her husband, Mwangi Samson, who bought it from Kanyi Gitu, and which land is occupied by her daughter. She testified that the 2nd Plaintiff is cultivating a portion of the land which portion she had given to her mother-in-law.
11. DW2, Samson Irungu Mwangi, the 2nd Defendant equally adopted his witness statement and told this Court on cross-examination that his sister is occupying the suit land and the 2nd Plaintiff is cultivating some portion which he begun to cultivate in the year 2022. He reiterated that his father was called Samson Mwangi.



12. DW3 Alice Wambui Mwangi, adopted her witness statement and testified on cross-examination that she lives on the suit property which her father bought. She also stated that she shared the land with her grandmother.
13. The parties thereafter filed their submissions.
14. The Plaintiffs filed their submissions through the Law Firm of C W Macharia & Associates Advocates, and submitted on two issues. It was their submissions that they had adduced enough evidence to prove that the suit land is registered in the name of Mwangi Samson. It was their further submissions that they were able to lead evidence that the name Samson belonged to their grandfather and not the 1st Defendant's husband.
15. The Plaintiffs further submitted that they are all in occupation of the suit land with clear demarcations for over 30 years, having been placed there by Samson Kamara Mwangi. That the Plaintiffs have put up permanent structures on the suit land a clear demonstration that the land belonged to Samson.
16. The Defendants filed their submissions through the Law Firm of Kirubi Mwangi Ben & Co Advocates wherein they raised three issues for determination by this Court. They interrogated the testimonies of all the Plaintiffs witnesses in their submissions and pointed out that there was admission on the witnesses that the 1st Defendant's husband was also called Mwangi Samson. It was their submissions that they were able to demonstrate that the land was previously owned by Kanyi Gitu as per the documents produced. They submitted that the parcel of land in which both families had settled on was Loc. 8/ Ngerere/ Thombotho/ 271.
17. They further submitted that the 1st Plaintiff had commenced succession proceedings over the estate of their grandfather and had included Loc 8/ Ngerere/ Thombotho/ 271, as the property at the exclusion of the suit property. Submitting on the County Commissioner's Letter, the Defendants maintained that they had proven that Mwangi Samson and Samson Kamara Mwangi were two different persons.
18. This is a dispute between family members over the true owner of Loc 8/ Kagaa/ 336, which is registered in the name of Mwangi Samson. While the Plaintiffs maintain the said Mwangi Samson is their grandfather and father-in-law, the Defendants maintain that that is their father and husband respectively. This is an interesting matter since it stems from similarity and/ or confusions in names.
19. Having gone through the pleadings and all the documents attached thereto, analyzed the testimonies and having gone through the rival submissions by parties, the issues for determination by this Court are
 - i. Who is the registered and/ bona fide owner of the suit property?
 - ii. Whether the Plaintiffs' are entitled to the prayers sought
 - iii. Who should pay the costs for the suit

I. Who is the registered and/ bona fide owner of the suit property?

20. It is trite law that registration of property in the name of a proprietor confers upon that person absolute and indefeasible rights over the land. The right to own property is not only a Constitutionally guaranteed right under Article 40(1), but it also enjoys statutory protection under Sections 24-26 of the *Land Registration Act*. Section 24 of the Act confers proprietary rights on a registered proprietor while Section 25 highlights the rights of the registered proprietor. Section 26 and the most important



on the other hand confers indefeasible rights to a registered proprietor, but it makes provisions on the circumstances that the right may be lost. Section 26 (1) of the [Land Registration Act](#) which provides:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

21. None of the parties to this suit produced a copy of the title deed and what this Court has perused are copies of Green Card, as well certificate of Official Search. The foregoing indicate that the suit land is registered in the name of Samson Mwangi, who became the registered owner on March 4, 1960. The registration of Samson Mwangi as the proprietor of land vested on him the rights thereon within the meaning of Section 27 of the Registered Land Act Cap 300(repealed) which is similar to Section 24 of the [Land Registration Act](#) which states;

“24. Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b.

22. The Plaintiffs are alleging that this Mwangi Samson is also Samson Kamara Mwangi and the Defendants on the other hand maintain that Mwangi Samson is also Stephen Mwangi Kamara. It should be remembered that this is the Plaintiffs’ case and they have a duty under the [Evidence Act](#) to lead evidence as to their allegations of facts, reason the law provides for the legal burden. This burden of proof may shift, but what shifts as per law is the evidentiary burden. Section 107 of the [Evidence Act](#) makes provision for the legal burden of proof, it provides:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

23. The evidential burden on the other hand is provide for under Sections 109 and 112 of the [Evidence Act](#) which provides:

- 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 the 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 the fact is upon him.

24. The Plaintiffs have a burden of leading evidence to the satisfaction of this Court that the registered proprietor, Mwangi Samson is indeed Samson Kamara Mwangi and as such discredit the Defendants testimony. It is important to point out that none of the Plaintiffs’ witnesses was present during the registration of the suit land. As per the record from ACK Emmanuel Church, the Plaintiffs referenced it as a document showing the said Samson Kamara Mwangi was baptized. Unfortunately for this



- Court and the Plaintiffs' case, the said document is not clear and this Court cannot tell whether the said Samson Kamara had a change of names or not. Perhaps a representative from the Church would have aided this Court, but this Court has no control on the witnesses, a party can call to Court especially where the production of a document was not objected to.
25. From the Plaintiffs' bundles of documents, this Court has perused a copy of a document from ACK Muthira Parish which indicates in entry 21 that one Samson Kamara died on August 23, 1977. This corroborates with the Death Certificate which shows the deceased was called Samson Kamara Mwangi. There is also another document from ACK Emmanuel, Weithaga Parish, which this Court notes there is one person referenced as Mwangi Samson. The Plaintiffs did not try and establish the relevance of this name to proving that Mwangi Samson is indeed Samson Kamara Mwangi in light of the case before this Court.
 26. In their statements adopted as evidence before this Court by the Plaintiffs, what remained constant is that the suit land belonged to their grandfather and father-in-law and not the Defendants father and husband who was known as Stephen Mwangi Kamara and not Mwangi Samson. PW2 the 1st Plaintiff, told this Court on cross-examination that when she got married, she found that Kamara had a son called Mwangi who was called Mwangi Samson. Additionally, PW4 testified on cross-examination that Samson Kamara's son was Mwangi Samson.
 27. What this Court could deduce from the testimonies of the Plaintiffs' and their witnesses is that none of the parties was present during the demarcation and registration of the land in the name of Mwangi Samson. What is interesting is that Stephen Mwangi Kamara who was a husband and father of the Defendants is also being referred to as Mwangi Samson. But taking cue from the Plaintiff's testimony, Stephen Mwangi Kamara, was a first born child of Samson Kamara Mwangi and who by operation of customs, was to be called after the father of Samson Kamara Mwangi. Yet again, this Court was not told the name of the said grandfather.
 28. The Defendants on the other hand allege that their husband and father was called Mwangi Samson before being baptised as Stephen Mwangi Kamara. There was no evidence of baptism availed before this Court to ascertain this. What this Court has perused is death certificate which shows that Stephen Mwangi Kamara died on July 14, 1996, at the age of 66 years old, which implies at the time the land was demarcated, he was 30 years old. He was eligible to acquire land. The Defendants testified that the deceased bought land from Kanyi Gitu and to demonstrate this, they availed what they have referred to as a "Land Demarcation Fee Certificate" number 160065. The Certificate being referenced to therein is the suit property and it shows the name of Kanyi Gitu was cancelled and the name of Mwangi Samson was input there.
 29. To further demonstrate that their husband and father was also called Mwangi Samson, the Defendants produced a copy of a letter from Premier College which shows Mwangi Samson was a student there. Whether the document and contents thereof referred to Stephen Mwangi Kamara or not was not objected to by the Plaintiffs. Better still, this seems to corroborate the testimonies of PW2 & PW4 that Stephen Mwangi Kamara was also called Mwangi Samson. The Plaintiffs did not challenge the production of the said documents or produce any evidence to rebut this.
 30. The Plaintiffs attached a copy of a Green Card for Loc 8/ Ngerere/ Thombotho/ 271, registered in the name of Kamara Mwangi who this Court learns was a father and grandfather of the parties to the suit herein. It is curious to note that he was referred to as Kamara Mwangi and not Mwangi Samson in this registration. This Court has a letter from the County Commissioner which informs it that there was a dispute between parties.



31. The Plaintiffs had duty to lead evidence to ascertain whom the suit land belongs to. It is also trite law that the legal burden of proof in civil cases rests with the Plaintiff. This Court is persuaded by the definition of burden of proof laid out in the case of *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR), where the Court held:

Burden of Proof¹⁴ is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff’s claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant’s action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact.”

32. The Court has perused the documents that were adduced by the Plaintiffs in an attempt to demonstrate that Mwangi Samson is also Samson Mwangi Kamara, and who is the registered owner of the suit land. This Court is alive to the commonness in the name Mwangi Samson and Samson Mwangi Kamara but it is also alive to the fact that this could be different people. As a matter of fact, there is a claim of such and which the Defendants have attempted to demonstrate.
33. The Court in the case of *Mbutia Macharia v Annab Mutua Ndwiga & another* [2017] eKLR when discussing issues of Burden of Proof, considered the Text Book meaning of it laid out in Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
34. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

35. The Court held:

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”



36. Undoubtedly, the Plaintiffs did not discharge this burden to the satisfaction of this Court. If at any point the evidentiary burden shifted, which this Court finds it never did, the Defendants did to the satisfaction of this Court adduce evidence that Mwangi Samson was also Stephen Mwangi Kamara.
37. The Land Demarcation Fee Certificate corroborates the Defendants claim that the land was first given to a Kanyi Gitu and even though the certificate was issued in 1962, yet the land was registered in 1960, those were not issues to be interrogated by this Court. This is for the reason that the Court noted from the Green Card for Loc 8/ Ngerere/ Thombotho/271 that Kamara Mwangi was registered the owner on May 1, 1958, and yet the Land Demarcation Fee Certificate was issued two months after registration. This Court cannot purport to interrogate this.
38. As already established hereinabove, PW2 and PW4 testified that Mwangi was also called Mwangi Samson and it would not be difficult for this Court to conclude that the suit property belongs to Stephen Mwangi Kamara alias Mwangi Samson.

Whether the Plaintiffs' are entitled to the prayers sought?

39. The Plaintiffs prayer was inter alia a declaration that Mwangi Samson alias Samson Kamara Mwangi is the registered proprietor. What the Plaintiffs wanted of this Court is to find that the registered proprietor is also called Samson Kamara Mwangi.
40. The Court has already established herein above that the burden rested on the Plaintiffs and which burden they failed to discharge on a balance of probability. The fate of the Plaintiffs suit was well settled in Mbuthia Macharia v Annah Mutua Ndwiga, supra where the Court observed that if a party fails to discharge the burden of proof then his/her claim must fail. It follows therefore that the Plaintiffs are not entitled to the prayers sought.

Who should pay the costs for the suit?

41. Matters of costs is a discretion of this Court. This Court is alive to the fact that costs shall follow the events and a successful party is entitled to costs. However, this Court appreciates that this are members of the same family and shall direct that each party to bear their own costs.
42. Having carefully considered the available evidence and having analysed it as above, the Court finds that the Plaintiffs have failed to prove their case on the required standard of balance of probabilities.
43. Consequently, the Plaintiffs suit against the Defendant as contained in the Plaint dated May 24, 2022, is hereby dismissed entirely with an order that each party should bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 13TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Plaintiff – Absent

Defendant – Absent

Joel Njonjo – Court Assistant

L. GACHERU



JUDGE

13/7/2023

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