



**Hungi v Otieno & 4 others (Environment & Land Case 603 of 2014)  
[2023] KEELC 20486 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20486 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 603 OF 2014**

**J OMANGE, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**JOSEPH MURITHI HUNGI ..... PLAINTIFF**

**AND**

**KENNETH OUMA OTIENO ..... 1<sup>ST</sup> DEFENDANT**

**ONGORO (CHAIRMAN HURLIGHUM SQUATTERS DEVELOPMENT) .... 2<sup>ND</sup>  
DEFENDANT**

**ALI MWANGI (VICE CHAIRMAN HURLIGHUM SQUATTERS  
DEVELOPMENT) ..... 3<sup>RD</sup> DEFENDANT**

**DANIEL OA POISI (SECRETARY HURLIGHUM SQUATTERS  
DEVELOPMENT) ..... 4<sup>TH</sup> DEFENDANT**

**ARTHUR OPIYO (TREASURER HURLIGHUM SQUATTERS  
DEVELOPMENT) ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This suit arises out of Hurlighum Squatters Development Plot no 149B located off Kangundo road hereinafter referred to as the suit property.
2. In a plaint filed in court on May 16, 2014 the Plaintiff deponed that at all material times he was the registered owner of the suit property having purchased it from Peter Muchina a member of Hurlighum Squatters Development at a consideration of ksh 240,000/= and as a result was issued with a share certificate and transfer on September 4, 2010. He depones that the Defendant illegally and wrongfully entered the suit premises and started depositing construction materials, fencing and putting up illegal structures on the properties. He states that by the time the Defendant was entering on the suit premises he had been in possession of the land since the year 2010.



3. He sought an order for permanent injunction restraining the Defendants whether by themselves, servants, agents or otherwise however from trespassing, developing, selling, transferring, disposing or in any manner alienating or interfering with the Plaintiff's quiet possession of suit property no Hurlingham Squatters Development Plot no 149B.
4. The firm of Jaleny & co Advocates initially appeared for the 1<sup>st</sup> Defendant but indicated that he wished to withdraw from acting for the 1<sup>st</sup> Defendant for want of instructions. Counsel averred that their efforts to contact the 1<sup>st</sup> Defendant were futile. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were served in person as attested to by the affidavit of service by James Kamundia Ndirangu dated November 16, 2022.
5. The Plaintiff testified in court on March 6, 2023 and produced a witness statement dated July 1, 2022 in which he told the court that he was involved in a road accident in December 2022 and was hospitalized for 8 months. After being discharged on or around September 2013 he visited the above suit property only to find that the 1<sup>st</sup> Defendant had demolished the semi-permanent structures he had built of iron sheets and had begun his own construction.
6. He reported the matter to Kayole police station where the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who are officials of Hurlingham squatters development recorded statements confirming that he was the holder of a genuine share certificate as opposed to the 1<sup>st</sup> Defendant who they alleged had a forged share certificate which did not originate from their organization. The Plaintiff claimed that the 1<sup>st</sup> Defendant recorded a statement that contradicted timelines given in his replying affidavit as to when he began developing the property. This prompted the filing of this suit.
7. The Plaintiff's evidence was uncontroverted as the Defendants did not testify. That notwithstanding the Plaintiff has a burden to discharge the burden of proof as envisaged by Section 107 and Section 108 of the *Evidence Act*, which provide;

107. Burden of proof

- (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.

108. Incidence of burden

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.”

8. The court in *Daniel Kenga Katana & 4 others v Dzitu Toto Bokole & 3 others* [2022] eKLR addressed the issue of uncontroverted evidence. The court stated;

“The issue that the court has to deal with is whether the Plaintiff discharged the burden of proof. The Plaintiff gave evidence to prove ownership of the suit land by adducing oral and documentary evidence which was uncontroverted. It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the Defendants fail to call a witness to adduce evidence and be cross-examined to test the evidence.” He further restated the quote by Justice Mwangi in *Peter Ngigi & Another (suing as legal representative of the Estate*



*of Joan Wambui Ngigi) v Thomas Ondiki Oduor & Another* 2019 eKLR wherein the learned Judge stated: -

“There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements”.

9. In this case the Plaintiff has sought for two prayers which are the basis of the issues I have identified for determination namely; Whether the Plaintiff is entitled to a permanent injunction restraining the Defendants or persons claiming under them from interfering with his occupation of the suit premises. Whether the court should issue a declaration that Hurlingham Squatters Development Plot no 149B belongs to the Plaintiff.
10. The Defendant in this case did not file a defence and did not counter the testimony by the Plaintiff. The evidence of the Plaintiff that he purchased the plot from Peter Mucina Gethu and was in occupation of the plot until the 1<sup>st</sup> Defendant demolished his semi -permanent structures is therefore unchallenged. I find that as the holder of a share certificate which was confirmed by the officials of the company he had an interest in plot 149B which is superior to that of the 1<sup>st</sup> Defendant who has interfered with his peaceful occupation of the same. Consequently, he has proved that he is entitled to an order for permanent injunction.
11. On whether the court should declare the Plaintiff the legal owner of the plot in question I note that the Plaintiff is the holder of a share certificate. As I have indicated above he clearly has an interest in the land. However, he has also produced a transfer certificate that indicates that the share certificate was transferred from Peter Mucina Gethu. The share certificate from the said Peter Mucina Gethu was not produced. A surveyors report was not produced. Neither was the mother title produced to confirm that the Hurlingham Squatters Development is the owner of the land in respect of which share certificates have been issued. In view of the foregoing I find that the Plaintiff still has some procedures to undertake before title can be vested upon him.
12. In the end, Judgement is entered for the Plaintiff against the Defendant in the following terms;
  - a. an order for permanent injunction restraining the Defendant whether by themselves, servants, agents, employees or otherwise however from trespassing, encroaching, constructing, erecting structures, entering, remaining, or otherwise interfering with the Plaintiff's quiet possession of suit property Hurlighum Squatters Development Plot no 149B.
  - b. Costs of the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**JUDY OMANGE**

**JUDGE**

In the presence of: -

Ms Wangare Ndirangu for Plaintiff

Steve - Court Assistant

