



Kathuni & another v Wang'ondu & 2 others (Environment & Land Case 99 of 2020) [2023] KEELC 20155 (KLR) (25 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20155 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 99 OF 2020
JG KEMEI, J
SEPTEMBER 25, 2023**

BETWEEN

JOHNSON MUNENE KATHUNI 1ST PLAINTIFF

MARY MUGURE KIARIE 2ND PLAINTIFF

AND

STEPHEN KANINI WANG'ONDU 1ST DEFENDANT

SCHOLASTICA WACHUKA WANG'ONDU 2ND DEFENDANT

ZHENG ENERGY LIMITED 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs filed suit against the Defendants on the 29/10/2020. With leave of the Court the Plaintiff was amended on the 27/10/2021 and sought the orders as follows;
 - a. A permanent injunction be issued against the Defendants by themselves or agents orders of eviction and demolition do issue against the Defendants whether by themselves servants agents employees family or claiming through them interfering in any manner whatsoever with land parcel Thika/Mun/Block8/186 & 187(suit lands).
 - b. That the Honourable Court be pleased to order the cancellation of the 3rd Defendants titles to the lands and the same be transferred in the names of the Plaintiffs.
 - c. That the OCS Thika Police Station do supervise the orders and do ensure peace prevails.
 - d. Costs of the suit.
2. It is the Plaintiffs' case that they are the absolute allottees of parcel Numbers Uns. Commercial Plot C and D at Thika which properties after survey converted to Thika/Mun/Block8/186 and 187 (suit lands).



3. They aver that the Defendants have encroached on the suit lands and commenced permanent construction without their consent and authority. Further that the Defendants caused themselves to be registered as the owners of the lands despite the Plaintiffs being bonafide allottees of the said lands from the Commissioner of Lands. That the 3rd Defendant has proceeded to charge the properties and in the event of default, the properties might be sold in exercise of statutory power of sale.
4. Particulars of fraudulent dealings on the part of the Defendants were pleaded under para 7 of the Plaint.
5. On the 4/8/21 the Plaintiffs successfully obtained orders to enjoin the 3rd Defendant on the grounds that at that material time it was the registered owner of the suit lands.
6. Vide an application dated the 27/10/2021 the Plaintiffs successfully moved the Court for orders to serve the Defendants by way of substituted service through the Standard Newspaper of the 14/2/2022 as evidenced by the affidavit of service sworn on the 14/2/2022 by the Plaintiffs' Counsel on record.
7. Despite service the Defendants failed to enter appearance nor file defence(s).
8. On the 12/4/2023 the hearing of the Plaintiffs case kicked off. Johnson Munene Kathuni testified on his behalf and on behalf of the 2nd Plaintiff. He relied entirely on his written statement on record dated the 27/10/2020 and produced documents in support of the case and marked PEX No. 1-10.
9. The witness stated that he is a bonafide allottee of the uns. Commercial plot No C (parcel 186) while the 2nd Plaintiff was allotted uns. Commercial plot No D (parcel 187) on the 11/1/2001. That subsequently made a payment in the sum of Kshs 105,500/- in the month of August 2013 in compliance with the terms of the allotment letters aforesaid.
10. That in 2017 his attempts to develop the property were interrupted by goons sent at the behest of the Defendants and despite reporting the matter to Thika Police Station no action was taken. That on the 5/5/2020 Police officers from Thika Police station chased away his workers on the suit land and confiscated working tools on site prompting him to lodge a complaint at the Director of Criminal Investigations headquarters which office directed the County Criminal Investigation Officer to investigate the matter. That in October 2020 he visited the land and to his shock found a permanent structure being erected on the suit lands and upon investigation, it emerged that the Defendants were the alleged owners of the illegal structures. That the actions of the Defendants are illegal and fraudulent and are designed to deny them the right to own and enjoy peaceful occupation of their respective suit lands despite being bonafide allottees therein. In addition, that they have not sold or transferred the suit land to any third parties least of all the Defendants. Therefore, that the Defendants have no legitimate claim on the suit lands. That the Defendants have prevented them from accessing their lands through violence and aggression.
11. The Plaintiffs filed written submissions on the 22/5/2023 through the law firm of Messrs Kanyi Kiruchi & Co Advocates.
12. On the issue whether the Plaintiffs were bonafide owners of the land, Counsel submitted that the Plaintiffs are the registered owners of the lands being in possession of allotment letters issued in 2001. Relying on Section 24 of the [Land Registration Act](#), Counsel submitted that being the registered owners of the suit lands they enjoy ownership rights arising from the effect of the said registration. That the Defendants have not led evidence to show that the title of the Plaintiffs was acquired in a tainted manner.
13. On whether the Plaintiffs titles were fraudulent Counsel relied on the case of *Munyua Maina Vs. Hiram Gathitha Miana* (2013)eKLR that emphasises the demonstration of a clean root of title free from any



illegality fraud and irregularities as proof of ownership. That the 1st Defendant cannot tangle a title without showing proof of the process of acquisition. That unlike the Defendants, the Plaintiffs held an indefeasible title. Reliance was placed on the decision of the Court in the case of Hubert L Martin & 2 others Vs Margaret J Kamar & 5 Others (2016)eKLR.

Analysis and determination

14. Having considered the Pleadings, the evidence adduced at the hearing, the written submissions and all the material placed before me in the suit the issues that are key in determining the dispute are; whether the Plaintiffs are bonafide owners of the suit land; who meets the cost of the suit.

The legal and evidential burden of proof

15. In answering the pestering question in this dispute, it is apt to put into perspective the legal and evidential burden of proof and who bears the burden of proof at what stage of the case. I shall make reference to the relevant legal framework for emphasis.

16. Section 107 of the *Evidence Act* states:-

“(a) 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.

(b) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

17. Section 109 of the *Evidence Act* states as follows:-

“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.”

18. Section 110 of the *Evidence Act*:-

“The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

19. Black’s Law Dictionary, (9th Edition, 2009) at page 1535 defines ‘the standard of proof’ as;

“the degree or level of proof demanded in a specific case in order for a party to succeed.”

20. In the case of Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017)eKLR the Supreme Court had the following to say on the evidential burden of proof:-

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the Plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not



controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law....”

21. Undoubtedly the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant. The standard of proof in civil cases is proof on the balance of probability.
22. Having set out to explain the legal and evidential burden of proof, I shall now address the issues in the suit.
23. It is not in dispute that despite service of summons by substituted service the Defendants failed to enter appearance nor file a defence. The case of the Plaintiffs therefore was undefended and was heard through a formal proof. This suit is undefended and therefore the Court only has the Plaintiffs’ evidence to make a determination.
24. That said it is trite that the person who bears the burden of proof is the Plaintiff and the burden diminishes not nor dissipates on account of the suit being undefended as is the case here.
25. The Plaintiff’s case is that they are the registered owners of the suit lands and therefore enjoy the rights and privileges continued in Section 24 and 25 of the [Land Registration Act](#). The Sections are set out as follows;

“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) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
26. They have placed reliance on allotment letters issued to them in 2001 for unsurveyed plots C and D which in their own words were later surveyed and registered as parcel 186 and 187. Alongside the allotment letters they have adduced evidence in form of receipts issued to them in 2013 being the sum demanded in the letters of allotment.
27. Section 3 of Government Lands Act vested the power to the President, subject to written law to make grants or dispositions of any estates, interests or rights in or over unalienated Government land. The powers of the President were delegated to the Commissioner of Lands and limited to alienation of unalienated Government land.
28. In this case it is not disputed that the Plaintiffs hold allotment letters dated the 11/1/2001 for plots C and D, each measuring 0.25 ha from the 1/1/2001 for a period of 99 years. One of the conditions comprised of the letter of allotment states as follows;
- “If acceptance and payment respectively are not received within the said thirty (30) days from the date hereof the offer herein contained will be considered to have lapsed.”
29. It is trite that a letter of offer is an offer to treat. It does not constitute a contract between the offeror and the offeree and does not confer an interest in land at all. The letter of offer is incapable of conferring an interest in land being nothing more than an offer awaiting the fulfilment of the conditions stipulated therein. This court shall be guided by the decision of the Supreme Court in *Torino Enterprises Limited* Hon Attorney General SC Petition No. 5 (E006) of 2022 where the court stated as follows;
- “... We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an Allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.
30. In addition, the Learned Judges of the Apex Court went further and stated as follows;
- “Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a Stand Premium and Ground Rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an Allotment Letter.
31. In this case the Plaintiffs have not adduced evidence of the perfection of the letter of offer let alone the fulfilment of the terms and conditions of allotment. Though a receipt of payment was produced in



evidence to show that the Plaintiffs paid for the land, the same was made on the 29/8/2013, a period in excess of 12 years post the allotment letter. Taken the time of payment read with the condition in the letter of offer aforesaid, it is not in doubt that the payment was made contrary to the terms of the letter of allotment. This alone puts into question whether or not the land was still available for alienation at the time the Plaintiffs made the payment in 2013. I say so because the titles held by the 1st and 2nd Defendants were issued on the 15/3/1999 way before the Plaintiffs were allocated the lands. The lease for the said plots was registered on the 20/3/1999 in the names of the 1st and 2nd Defendants for a lease of 99 years from the 1/12/1994. It has not been explained whether the land was available for alienation in 2013 so much so that the Plaintiffs would legitimately make the payment to the allotting authority.

32. It is the Plaintiffs case that plots C and D were converted to parcels 186 and 187. In the absence of any evidence in form of a part development plan, survey plan and the Registry Index map, the averment is unsupported and the Court is unable to form an opinion on this evidence.
33. Equally the photographs produced by the Plaintiff in evidence do not show that the alleged Construction are situate in the plots aforesaid. The Plaintiffs failed to lead evidence on the encroachment of the suit lands.
34. A more fundamental ground why this suit should fail can be deduced from the green cards adduced by the Plaintiffs which shows that the lands are charged to a lender with rights created therein and is likely to be affected by the decision of this Court. It has not been explained why the Plaintiffs failed to enjoin this party and yet they produced the green cards which clearly showed that the lands are encumbered in their favour.
35. In the end it is clear that the Plaintiffs have failed to proof their case. They failed to discharge the burden of proof. For the above reasons the court is of the view that they have not demonstrated that they have acquired a valid interest in the land.
36. Final orders for disposal:-
 - a. The Plaintiffs suit be and is hereby dismissed.
 - b. I make no orders for costs.
37. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Waithira HB Kanyi for 1st and 2nd Plaintiff

1st, 2nd and 3rd Defendants - Absent

