



REPUBLIC OF KENYA



KENYA LAW
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**Gunga v Baya (Land Case 106 of 2018)
[2023] KEELC 20825 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 106 OF 2018
MAO ODENY, J
OCTOBER 16, 2023**

BETWEEN

NZINGO KAZUNGU GUNGA PLAINTIFF

AND

ERICK KAZUNGU BAYA DEFENDANT

JUDGMENT

1. By a Plaint dated 11th May 2018, the Plaintiff sued the Defendant seeking the following orders:-
 - a. A declaration that the Plaintiff is the legal and/or beneficial owner of all that parcel of land on title no. Chembe/Kibabamshe/86.
 - b. A permanent injunction restraining the Defendant herein, his agents, servants and/or any other person acting under him from trespassing, cultivating, building, selling or otherwise dealing with the suit property in any manner whatsoever.
 - c. Costs of this suit.
 - d. Any other relief this Honorable Court deems fit to grant.
2. The Plaintiff averred that she is the legal, beneficial and registered owner of all that parcel of land identified as Title No. Chembe/Kibabamshe/86 measuring approximately 6.0 Ha. having obtained the same pursuant to an order of the court confirming her as the administrator of the estate of her late husband Kazungu Gunga (the deceased).
3. That since her husband's demise, the Defendant unlawfully entered the suit property without the consent of the deceased's family members and has since erected structures thereon in an attempt to legitimize a non-existent claim.



4. The Defendant entered appearance on 5th July 2018 and filed a statement of defence dated 17th July 2018 and averred that he is the rightful owner of the suit property having acquired the same from the deceased through an agreement for sale dated 3rd March 1986. Further that the National Land Commission vide Gazette Notice Vol. CXIX-No. 97 dated 17th July 2017 confirmed this position.

Plaintiff's Case

5. PW1 adopted her written statement filed on 11th May 2018 as her evidence and produced as PEXH 1-2 the documents in the list of documents dated 11th May 2018. The documents include a copy of a demand letter and certificate of title in her name respectively.
6. It was PW1's testimony that the deceased could not have sold the suit property to the Defendant since he was dead, as at the time the agreement was allegedly signed, however she could not remember when her husband died.
7. On cross-examination PW1 stated that at some point, prior to his death, the deceased asked her to check whether the title had been changed. She further confirmed that the Defendant has lived on the suit property and developed the same over the years. PW1 conceded that she only tried to evict the Defendant after the demise of her late husband and that she tried to have the Defendant carve out a portion of the suit property for her to live in.
8. PW2, Jesca Kadzo Kombe Mrandi the Plaintiff's daughter, equally adopted her written statement filed on 12th August 2020 and told the court that the suit property was registered in the Plaintiff's name after her father's death and succession thereon. Like PW1, PW2 was not aware when the Defendant bought the suit property.
9. On cross-examination by Mr. Fondo, counsel for the Defendant, the witness was shown her statement and stated that she was not aware of what she had stated therein. She has stated that the Defendant bought the suit property from the deceased and that the deceased died around 1995-1996. PW2 testified that the National Land Commission advised the parties to negotiate.

Defendant's Case

10. DW1 adopted his written statement dated 1st November 2018 as his evidence in chief and produced as DEXH 1-7, the documents in the list of documents dated 1st November 2018. T DW1 told the court that he entered into an agreement dated 3rd March 1986 with the deceased to purchase the suit property, paid the agreed purchase price and took possession but failed to pursue the transfer. He added that the deceased's son, one Charo Kazungu, was present during the transaction.
11. It was DW1's testimony that the matter was referred to the National Land Commission and a decision was made in his favour.
12. DW2 Johnson Mutama Kalama similarly adopted his written statement dated 1st November 2018 as his evidence in chief and stated that the Defendant purchased the suit property from the deceased in 1986. That the area chief and the National Land Commission resolved that the suit property belongs to the Defendant.
13. DW2 further told the court on cross-examination that he witnessed the Sale Agreement at the advocates' office in the year 1986. He added that the consideration was Kshs. 73, 300/- paid in instalments and that the second agreement was for payment of the balance of the purchase price.



Plaintiff's Submissions

14. Counsel for the Plaintiff largely reiterated the contents of the pleadings and evidence on record. Counsel proceeded to point out the inconsistencies in the two sale agreements particularly the contradiction in the purchase price.
15. Counsel also raised issue that the deceased did not sign the handwritten sale agreement and submitted that there was no reasonable explanation by the Defendant why the certificate of title was not handed over to him upon completion of the purchase price.

Defendant's Submissions

16. Counsel for the Defendant identified four issues for determination namely;
 - a. Whether or not the Defendant is in rightful possession of the suit property.
 - b. Whether or not the land Control Board consent is a pre requisite in land transactions.
 - c. Whether or not spousal consent is necessary in land sale transactions.
 - d. Whether or not the title document for Title No. Chembe/ Kibambamshe /86 was lawfully transmitted to the Plaintiff.
17. Counsel submitted that the Sale Agreement dated 3rd March 1986 was a valid one and in line with Section 38 of the Land Act, 2012. That in the absence of an appeal against the decisions of the NLC (DEXH-1) this court has no jurisdiction to entertain the present suit to dispossess the Defendant in this case.
18. Counsel relied on the case of Republic v National Land Commission; Katana Karisa Saro and another (Interested Parties) Ex-parte; John Kamande Mwaniki [2022] eKLR and Rule 29 of the National Land Commission (Historical Land Injustices) Rules, 2016.
19. Secondly, whether Land Control Board Consent is a prerequisite for a land sale transaction, counsel relied on the Court of Appeal's decision in Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR to argue that the LCB consent was not necessary in the circumstances herein as the Defendant had created a constructive trust and that he was already in exclusive use and possession of the suit property.
20. Thirdly, whether spousal consent was necessary in the circumstances, counsel submitted that since the agreement between the deceased and the Defendant was executed in 1986 long before the land laws reforms in 2012, it was not necessary that spousal consent be obtained. Counsel relied on the case of JM v JMA & 4 others [2017] eKLR where the court cited with approval the case of Elizabeth Nthenya Wambua v Philip Wambua Masila & 3 others [2013] eKLR.
21. Lastly, on whether the title document for the suit property was lawfully transmitted to the Plaintiff, counsel submitted that there was no proof provided by the Plaintiff that proprietary rights were lawfully transmitted to her as per Section 61 and 62 of the Land Registration Act No. 3 of 2012 and as was held in The Estate of Musilu Khatela Shanguya (deceased) [2021] eKLR.

Analysis And Determination

22. The issues for determination are whether the Defendant bought the suit property from the deceased husband of the Plaintiff and whether the Plaintiff is entitled to the orders sought for a declaration that she is the legal owner of the suit land and an injunction against the Defendant.



23. There is no doubt that the Defendant is in actual possession of the suit property and that the same is registered in the name of the Plaintiff. Section 24(a) of the [Land Registration Act](#) provides as follows: -

Subject to this Act, 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.

24. Section 26 (1) of the [Land Registration Act](#) states as follows: -

a. The Certificate of Title issued by the Registrar upon registration ... 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.

25. The Plaintiff's case was that the title to the suit property herein was transmitted to her by virtue of a grant issued in a succession cause of the deceased's estate. I however note that there was no proof for such proceedings presented before this court. That notwithstanding, a copy of the gazette notice presented by the Defendant, which was the basis of the Defendant's case, reveals that the National Land Commission found that the Deceased only sold 10 acres to the Defendant out of the suit property. The Plaintiff herself testified that the Defendant lived on the suit property even before the deceased's death and that he developed the same over the years.

26. What came out clearly from the Plaintiff's testimony is that the Defendant peacefully occupied the suit property even before the deceased's demise and that the dispute only arose after the deceased's death. The Plaintiff explained that the reason for the dispute before the Area Chief was that she wanted the Defendant to carve out a portion of the suit property for her to live since she was at that time living with her parents.

27. It follows therefore that a close reading of the Plaintiff's testimony and the Defendant's evidence on the gazette notice, leads to one probable conclusion. That the Defendant indeed purchased a portion of the suit property from the deceased but the certificate of title was registered in the Plaintiff's name but there was no proof of a certificate of confirmation of grant in favor of the Plaintiff that was presented before this court.

28. Further this matter was referred to the National Land Commission for dispute resolution and the same was heard and a verdict given in favour of the Defendant. There is no evidence that the Plaintiff appealed against such decision.

29. In the case of *Almer Farm Limited v National Land Commission & 2 others* [2021] eKLR the Court of Appeal held thus:

“We have at the beginning of this ruling summarized the facts that were before the ELC at Kitale. The Judge found, rightly, we think, that the applicant had submitted to the jurisdiction of the 1st respondent. Proceedings were conducted and a decision reached which was duly gazette pursuant to the laws creating the 1st respondent. The applicant, if dissatisfied with the said decision was required to follow the procedure laid out in the said law if it desired to file an appeal. There is considerable authority for the statement that where



there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed – Speaker of the National Assembly v James Njenga Karume [1992] eKLR.

The applicant who was aggrieved was required to file an appeal within the timeline prescribed in law. It did not do so but instead, contrary to procedure, it applied for judicial review. That was not the procedure prescribed by the National Land Commission (Investigation of Historical Injustices) Regulations.”

30. The Defendant neither sued the Land Registrar nor filed a counterclaim for orders of cancellation of the Plaintiff’s title on grounds of fraud or pleaded particulars of fraud. The Defendant only urged the court to dismiss the Plaintiff’s case. The court cannot grant orders that have not been pleaded.
31. I have considered the pleadings, the evidence by the parties together with submissions and the relevant authorities and find that the Plaintiff has not proved her case and therefore is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF OCTOBER 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.

