



Maungu v Rop & another (Sued as legal representative of the Late representative of the Late of Wilbourne Kiplimo Rotich) (Environmental and Land Originating Summons E004 of 2022) [2023] KEELC 21727 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2022
JA MOGENI, J
NOVEMBER 23, 2023**

BETWEEN

NEWTON DISHON MAUNGU PLAINTIFF

AND

LENAH CHERUTO ROP 1ST DEFENDANT

COLYNE KIPTOO 2ND DEFENDANT

**SUED AS LEGAL REPRESENTATIVE OF THE LATE REPRESENTATIVE OF
THE LATE OF WILBOURNE KIPLIMO ROTICH**

JUDGMENT

1. This is an originating summons dated 26/01/2022 brought under Order 37 Rule 1 (a) (b) 9 (f), 3, 11 and 14 of the Civil Procedure Rules 2010, Section 1, 1 A, 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Article 40, 159 and 92 of *the Constitution* of Kenya 2010 and all other enabling provision of the Law.
2. Let Lenah Cheruto Rop and Colyne Kiptoo (Legal) Representative of the Estate of Wilbourne Kiplimo Rotich of Post Office Box Number 30257 -00100 Nairobi, within the next fifteen (15) days after service of this Summons on them enter an appearance to this Summon which issue on the Application of the Plaintiff/Applicant, care of Asinuli & Associates Advocates who claim to be the Creditors of Post Office Box 30729-00100 Nairobi for the following orders:
 1. A declaration that the subject house being number C988 Madaraka Estate, National Housing Corporation – Nairobi belongs and or is the property of Newton Dishon Maungu, the Plaintiff/Applicant herein.



2. That Lenah Cheruto Rop and Colyne Kiptoo (being the administrators of the Estate of Wilbourne Kiplimo Rotich (deceased) be and are hereby ordered to invest the property and or house number C988 Madaraka Estate in favour of the purchaser Newton Dishon Maungu the Plaintiff/Applicant herein.

Alternatively

a. That this Honorable Court do issue an Order Vesting the property and or House Number C988 Madaraka from National Housing Corporation to the Applicant Newton Dishon Maungu.

b. The Deputy Registrar of the High Court of Kenya at Nairobi be allowed to sign or execute the transfer of the title in favour of Newton Dishon Maungu.

3. That the Defendant/Respondent herein be ordered to pay the cost of this application.

3. The application is supported by the affidavit of Newton Dishon Maungu the applicant sworn on 26/01/2022.

4. Through an ex parte oral application on 8/12/2022, the plaintiff sought and was granted leave to serve the defendant/respondent by way of substituted service through an advertisement in the newspaper either in the Daily Nation or Standard Newspaper. The same was done through the Standard Newspaper dated 20/12/2022.

5. On the 18/01/2023 the plaintiff requested for a date for formal proof which was scheduled for 21/03/2023. On this date the formal proof hearing could not proceed since the plaintiff was indisposed and therefore the matter was adjourned to 18/07/2023. The formal proof proceeds on 18/07/2023 at 11:20 a.m.

6. The plaintiff never filed a witness statement and his list of documents contained the originating summons, the supporting affidavit and the annexures. During the formal proof hearing he stated that he had filed a witness statement but I have searched on the CTS and through the court file and noted that there is no witness statement that was filed.

7. The plaintiff's testimony is therefore based upon his pleadings as his testimony. It was the plaintiff's testimony that he purchased the suit property Madaraka Infill "B-E" flat number C-988 from Wilbourne Kiplimo Rotich (deceased), vide a sale agreement dated 19/12/2011 which he averred vide the supporting affidavit that he had as a "NDM1".

8. He further averred in his affidavit that vide a letter dated 2/09/2013, the defendant had confirmed having received full payment of the agreed purchase price of his interest in the property and allowed the plaintiff/ applicant to take possession of the property. My perusal of the affidavit and the court documents did not trace the letter dated 2/09/2013 from the defendant (deceased) allegedly turning over the suit property to the plaintiff.

9. The plaintiff averred through the supporting affidavit that assumed the role of the landlord of the suit property and he received rent from the tenants without any interruptions and paid all dues to National Housing Corporations in respect to the vendor's interest to the suit property. He attached to his supporting affidavit statements of accounts allegedly from the National Housing Corporation and marked them as "NDM3" which are in the name of the deceased defendant which show that all transactions took place in 2014.

10. As already stated, the defendant did not enter appearance and neither did they file a defence. This means that the plaintiff's Originating summons is undefended.



11. Even with the above, the Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as an exparte evidence is not automatic proof since the Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

12. Further in the case of Gichinga Kibutha...Vs... Carooline Nduku (2018)eKLR, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

13. The plaintiff has alleged that he purchased the suit property after entering into a sale agreement dated 19/12/2011 with the deceased who died after executing the Agreement for sale 26/12/2013. The family of the deceased took out Letters of Administration but failed and or ignored to declare the plaintiff as a liability to enable them transfer the suit property to him leading to filing of this Originating Summons.

14. Order 37 Rule 1 provides as follows:

“ 1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions

- a. any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
- b. the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- c. the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- d. the payment into court of any money in the hands of the executors, administrators or trustees;
- e. directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;



- f. the approval of a sale, purchase, compromise or other transaction;
- g. the determination of any question arising directly out of the administration of the estate or trust.”

15. From my reading of Order 37 rule 1 it is clear on the categories of litigants who can take out an originating summons and seek a determination on that platform. In the present application the Applicant allegedly entered into an agreement for sale of the suit property with Wilbourne Kiplimo Rotich deceased. He therefore has a claim arising out of determination arising directly out the administration of the estate of the deceased defendant one Wilbourne Kiplimo Rotich.

On the other hand, Order 37 rule 3 of the Civil Procedure Rules provides:

“A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”

16. I do therefore find that this originating summons is properly before the court. I also find that despite having been served with summons to enter appearance, the defendant did not file a statement of defence within the time stipulated in law and at all. As a result, the originating summons is undefended and the evidence adduced by the plaintiff is uncontroverted. As stated herein that does not mean that the court application by the plaintiffs, interlocutory judgment was entered against them on 17th July, 2015 and the matter set down for formal proof.

Analysis And Determination

17. This Court has now carefully considered the pleadings in general, the available evidence, the plaintiff’s written submissions and relevant provisions of law. What this Court needs to determine is whether the Plaintiff has made out a case for the grant of the orders he seeks in the Originating Summons.

18. As already stated hereinabove, the Defendant herein did not file her Defence. The suit therefore proceeded as an undefended suit. Though the Defendant did not attend Court, the onus of proof is still on the Plaintiff. It is trite that he who asserts or alleges must prove. The said proof is on the balance of probability. See the *Evidence Act* Section 107 which states;-

- 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.

19. The matter proceeded for hearing through formal proof. What is formal proof? In the case of Samson S. Maitai & Ano....Vs...African Safari Club Ltd & Ano. (2010) eKLR, the Court held that:-

“.....I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsburys Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry.



Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.

20. It is therefore evident from the above observation of the Court that in a formal proof hearing, all rules of evidence and procedures are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. Further, it is also evident that in adducing such evidence, the party has to raise a presumption that whatever is claimed is true and this is what goes to the merit of the case.
21. Taking into account the above principles on what entails a formal proof, the Court will juxtapose the same with the available evidence and facts to establish whether the Plaintiff herein has raised a presumption that whatever is claimed by him is true.
22. The plaintiff averred and submitted that he paid for the suit property and the same was handed over to him. That he took possession of the suit property since September 2013. He has produced a copy of lease agreement marked as “NDM7” and averred that he has been collecting rent from the suit property since he took over as the owner and that he has not encountered any form of interruptions.
23. The plaintiff has averred that he is unable to finalize the transaction with NHC since the defendants took out letters of administration and a Grant was confirmed without his knowledge and the suit property was included in the list of properties to be shared among the defendants.
24. Despite the evidence preferred by the plaintiff, I have noted glaring inconsistencies. The plaintiff alleged that he entered into an agreement for sale with the husband of the defendant and produced a sale agreement dated 19/12/2011. One of the conditions of sale was that the vendor had to be paid Ksh. 900,000 within 90 days of signing of the agreement, and that the purchaser will pay the balance of the deposit owed to National Housing Corporation Ksh. 390,000 through a banker’s cheque on or before 19th December 2011.
25. There is no proof placed before this court to lend credence before the court that the above conditions contained in the Agreement for Sale were fulfilled to warrant the property being transferred to the plaintiff. At the same time the plaintiff has not presented before the court proof of payment of the balances to National Housing Corporation (hereinafter NHC) as the Agreement for sale had stated.
26. The plaintiff stated at paragraph 3 that the vendor confirmed through a letter that he had received full payment of the agreed purchase price and therefore allowed the purchaser to take vacant possession of the suit property. The document attached to the affidavit and marked as “NDM2” is not a letter and there is no proof of this alleged information stated here. I note that there is in fact no transfer document that was signed by the deceased vendor to transfer the suit property to the plaintiff.
27. Where there is an agreement for sale of land and there is a consideration paid, which in the case at hand does not seem to be the case, then there has to be a valid transfer signed and registered.
28. Further, the statements allegedly showing that the Plaintiff paid NHC the outstanding balances, do not in any way indicate that these were deposits to clear the loan balance by the plaintiff. The name of the plaintiff is not mentioned anywhere in these statements to show that the money paid was from the plaintiff. The entries only mention cash receipts and all statements speak to one transaction made on 10/12/2021 at 14:37 payments refer to cash receipts with corresponding numbers which were not produced as proof of payment by the plaintiff.



29. I have searched for facts to show all these things, but none have been found, except the admitted mere possession of the suit property by the plaintiff which is uncontroverted since the defendant did not file a statement of defence. Still there is no evidence cogent evidence that would have made me categorically state that indeed the plaintiff is the owner of the suit property. There is no evidence on colour of right. What I have found in this case is a possessor without proved ownership. In the circumstances and given my limitation I cannot manufacture evidence or assume legal consequences in favour of the plaintiff when I have no factual data supportive thereof.
30. I also note that there is no evidence that M/s Eboso & Company Advocates were agents of the plaintiff. There is no evidence that the firm was involved in drawing the sale agreement and facilitating any payments either to the defendant (deceased) nor to the NHC.
31. Therefore, on a balance of probabilities I find the evidence of the plaintiff is wanting and falls short of the required standards to convince me that the scale would tilt in his favour, the probability is unlikely. It is note worth this was a case where the court was faced with choosing either to believe the evidence of the plaintiff or not to believe, the contest was the plaintiff is alone since the suit is undefended.
32. Unfortunately, there were glaring gaps in the plaintiff's evidence which militated against the same being believable. Why for instance were the alleged statements from NHC not certified as true copies of the original statements? Why would the plaintiff be the one holding the statements of the vendor? If he the purchaser was allowed to take over possession, why was a transfer not executed by the vendor? This and many questions abide. It the lawyer executed the sale agreement why wasn't such lawyer called as witness? And why wasn't the executed instrument of transfer to the purchaser (since he was given possession) available and/or any payment receipts for the registration of the transfer at the Lands office?
33. The net result is that I have come to the conclusion that the plaintiff's originating summons has not been proven on a balance of probabilities and in the circumstances it fails. Since it has failed I will therefore dismiss it promptly.
34. On the question of costs, I have taken account of the attendant circumstances in this matter. The defendant did not defend the suit and therefore in the premises and in the exercise of my discretion order that the plaintiff will bear their own costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 23RD DAY OF NOVEMBER 2023.

MOGENI J

JUDGE

In the virtual Presence of:

Mr Simiyu for the Plaintiff

No appearance for the Defendants

