



**Moturi v Arasa (Environment and Land Appeal E010 of 2023)  
[2023] KEELC 22482 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22482 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

**JM KAMAU, J**

**DECEMBER 18, 2023**

**BETWEEN**

**MARY KEREBI MOTURI ..... APPELLANT**

**AND**

**GEORGE NYANUMBA ARASA ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon. W.K. Chepseba–  
CM Nyamira dated and signed on the 20th April, 20223)*

**JUDGMENT**

1. This is an Appeal from the Judgment of W.K. Chepseba Chief Magistrate, Nyamira Chief Magistrate's Court in ELC case No. 010 of 2021 delivered on 20/4/2023. In the said case, the Plaintiff George Nyanumba Arasa, the Respondent herein had sued his Step Mother Kerebi Moturi, the Appellant herein for: -
  - a. A Declaration that the Appellant holds LR No. North Mugirango/ BoisangaI/6564 measuring 1.36 acres in trust for the Respondent.
  - b. That the parcel of Land be registered in the name of the Respondent and in the name of Appellant appearing on the land parcel be cancelled forthwith and that the Appellant be allowed to retain her land parcel No. North Mugirango/ BoisangaI/3529 measuring 2.5 Hectares.
  - c. Costs and interest.
2. It is the Appellant's case that pursuant to succession cause No.31 of 2017 Nyamira, the Appellant being the wife of the Respondent's father, was given 1.36 acres out of the suit land which she holds in trust for the Respondent while the Appellant occupies North Mugirango/Boisanga I/3529 approximately 2.5 Hectares enough for her children. The Respondent was given by the family North



- Mugirango/ Boisanga I/6564 – 1.36 Acres but which was taken by and registered in the name of the Appellant in trust for the Respondent.
3. In her statement of Defence, the Appellant admitted that she is indeed the registered owner of North Mugirango/Boisanga I/3529 and North Mugirango /Boisanga I/6564 over which she is the absolute proprietor with all rights and privileges of the said land parcels under the land registration Act No. 3 of 2012.
  4. She denied that she held the land in trust. On 7/3/2023 the court ordered that it would rely on the parties' pleadings, lists of documents, Written Statements and Submissions the Respondent's witnesses being George Nyanumba, Arasa Bamwe Ongera, Aska Kerubo Onduko and Racheal Chieta. For the Appellants, Mary Kerebi, Eric Moturi, Jane Barongo and Rose Nyakundi were said to be witnesses. The parties were ordered "to put in further submissions if need within 14 days".
  5. No one testified. The parties said they were ready to rely on their pleadings, list of documents and statements. Judgment was given on 20/4/2023.
  6. Judgment was given as follows; -

“.....there is no doubt that the Defendant (Appellant) is the Registered owner of the said properties through transmission. It has not been denied that the accused is biological son of Innocent Makori and a step son of the Defendant (Appellant). The land belonged to his grandfather. I do find that the Plaintiff (Respondent) has proved his case against the Defendant (Appellant) on a balance of probability.....the Defendant is holding the land in trust and Judgment will be entered for the Plaintiff as against the Defendant as prayed.....Each party to bear his own costs”
  7. Being dissatisfied with this Judgment, the Appellant Appealed and prayed that the whole Judgment be reversed, varied and/ or set aside on the following grounds; -
    1. The Learned Magistrate erred in law by failing to consider the evidence and submissions given on behalf of the Appellant while considering his Judgment.
    2. The Learned Magistrate erred in law by failing to apply the applicable law on ownership of land which is the Land Registration Act of 2012.
    3. The Learned Magistrate erred in law and in fact by failing to appreciate and or misconstruing the Appellant's arguments, evidence and the law applicable.
    4. The Learned Magistrate erred in entering Judgment against the Appellant.
    5. The Learned Magistrate erred in law and in act by failing to appreciate the indefeasible rights of the Appellant as the registered owner.
    6. The Learned Magistrate erred in law and in fact by failing to consider all the case laws submitted by the Appellant.
  8. It is trite law that "whoever alleges must prove. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that 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.
  9. The Section reads as follows:
    - 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
10. The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes legal burden thus:
- “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.....”
11. The court of appeal in the case *Mbutbia Macharia v Annah Mutua & another* [2017] eKLR discussed the burden of proof and stated thus:
- (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.
12. In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi* (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of *Autar Singh Babra And another v Raju Govindji*, HCCC No.548 of 1998 appreciated that: -
- ‘Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.’”
13. This is made further clear in the case *CMC Aviation Ltd v Crusair Ltd* (no.1) (1987) KLR 103 as follows: -
- “The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”
14. In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi* (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of *Autar Singh Babra and another v Raju Govindji*, HCCC No.548 of 1998 appreciated that:-
- ‘Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.’
15. Order 3 Rule 2, Order 7 Rule 5 and Order 11 of the *Civil Procedure Rules*. Order 3 Rule 2 envisages a situation where the Plaintiff is required to file his list of documents and documents themselves together with the list of witnesses and their statements when filing the Plaintiff. For a Defendant the sister Rule comes into play.
16. Order 3 Rule 2 *Civil Procedure Rules* provides the documents to accompany the filing of a suit as follows:



- a. The affidavit referred to under Order 4 Rule 1 (2);
  - b. A list of witness to be called at the trial;
  - c. Written statements signed by the witnesses excluding expert witnesses; and
  - d. Copies of documents to be relied on at the trial including a demand letter before action.
17. Order 7 rule (5) of the *Civil Procedure Act* provides as follows:
- “The Defence and counterclaim filed under rule 1 and 2 shall be accompanied by -
- (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim
  - (b) a list of witnesses to be called at the trial;
  - (c) written statements signed by the witnesses except expert witnesses; and
- Statutory;
- (d) copies of documents to be relied on at the trial.”
18. The purpose of filing witness statements and documents simultaneously with the Plaint and Defence respectively is disclosure, in order not to ambush the opposite party. Some of the issues to be dealt with during a pre-trial conference include whether a party has given full disclosure of documents to the other party, whether inspection of documents has been done, whether a party has filed and exchanged all witness statements among other things. The purpose of filing documents and list of witnesses is to facilitate the quick disposal of the suit.
19. The sole purpose of witness statements is to avail each party sufficient time and facilities to enable him prepare his case and challenge the other’s evidence at the opportune time both in examination in chief and in cross-examination. This provision must then be read together with Article 25 of *the constitution* which provides that every person has a right to a fair trial which includes the right to have adequate time and facility to prepare.
20. Article 25 of *the constitution* reads as follows: -
- Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
- (c) the right to a fair trial.
- Article 50 of *the Constitution* (on Fair hearing) provides that: -
- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body
  - (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.



21. Judge G. K. Kimondo In *Surgipharm Ltd v Kenya Invalid & Pharmacy Supplies Ltd & 2 Others* [2013] eKLR High Court at Nairobi Civil Suit 105 of 2007 had the following to say:

“The purpose of a witness statement is to be found in Orders 3, 7 and 11 of the Civil Procedure Rules. ....A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally. ....The primary objective of witness statements is “to improve the efficiency of trials”. In an adversarial system there are elaborate rules for discovery to ensure that by the time of trial each party is fully prepared and no party is taken by surprise. ....There is an obligation upon each party to “come to trial with cards up on the table”. A witness statement should set out the facts to which the witness will testify orally at the trial. Clearly, a witness statement remains a guide for the oral testimony in court. As part of evidence in chief it is subject to cross-examination.....The witness statement is not a deposition or sworn statement. I can draw an analogy: In proceedings commenced by originating summons, parties often choose to rely entirely on their affidavits to determine the matter..... a witness statement is a synopsis of intended evidence at the trial.”

22. It should be the court’s last resort to deny a party a chance to be heard. The overriding objective of the civil procedure rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Judicial authority to do justice to all, vested on this court by Article 159 of *the Constitution* cannot be said and be seen to be exercised if the courts were to deny a party a chance to be heard on merit.
23. It is very important to note that witnesses must personally appear in court to testify. Written witness statements do not suffice as evidence at a court hearing or trial. Witness statements are not evidence. They are what they are referred to be, “Witness statements”. They are naked facts. They must be produced in Court by the witness who must be subjected to cross-examination unless the adverse party chooses not to.
24. Before the evidence is adduced in Court and the adverse party given an opportunity to shake that evidence through cross-examination, it is no better than averments in pleadings.
25. Documents must also be subjected to the same process.
26. It matters not that parties have consented to have both witness statements and bundle of documents be admitted to Court without being adduced.
27. Otherwise we may end up getting professional witness statement drafters.
28. The facts in the witness statements must be subjected to examination. oral evidence should be consistent with the circumstances, whether it stands true and does not deviate during times of cross-examination
29. Cross-examination gives the opposing party an opportunity to point out the weaknesses of a witness's testimony, like holes in their story or a lack of credibility.
30. Otherwise, how do you assess the credibility and demeanor of witnesses?
31. My main focus is to decide whether the Judgment of the lower court should stand or not and my response is in the negative. I therefore set aside and overturn the Judgment of the Honourable Chepseba and order for a re-trial of the case before another Court. And since the fault is not exclusively that of the Parties, I will not make any Order for costs.



**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 18TH DAY OF  
DECEMBER 2023.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

Court Assistant:

Appellant: Mr. Makhandia.

Respondents: Mr. Maswani.

