



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 567 OF 2016

BEATRICE WAMBUI MAINA.....PLAINTIFF

VERSUS

EMBAKASI RANCHING COMPANY LTD.....1st DEFENDANT

SAMUEL MUCHOKI MWANGI..... 2nd DEFENDANT

JUDGMENT

Background

1. In the Complaint dated 27th May, 2016, the Plaintiff has sought for the following reliefs;

i. That there be a declaration that the deceased Mr Mwangi Munyiri is the lawful exclusive owner of Plots Number A105, A105B, A106 and A106B situated at Ruai within Embakasi Ranching Company Limited Settlement Scheme and that the 1st Defendant does facilitate the issuance and processing of the Title Deeds/Leases thereof as had been envisaged at the time of allocation.

ii. That a permanent injunction does issue against the Defendants-their agents from trespassing, alienating, damaging, evicting the Plaintiff from the Plots number A105, A105B, A106 and A106B situated at Ruai within Embakasi Ranching Company Limited Settlement Scheme and/or otherwise howsoever from interfering with the said Plots or in the alternative the Defendants do compensate me with the actual market value of the Plots at the time of hearing of this suit.

iii. Costs and interests.

2. It is the Plaintiff's case that her deceased father is the lawful exclusive owner/allottee of Plots Nos. A105, A105B, A106 and A106B situated at Ruai within Embakasi Ranching Company Limited Settlement Scheme (the suit properties) and that the 1st Defendant is yet to issue Title Deeds for the said plots.

3. The Plaintiff averred that the deceased secured the allocation of the plots by virtue of his Share Certificate No. 667 for Plots A105 and A106 and receipt dated 30th July 1993 for Kshs 12,000 for Plots Nos. A105B and A106B; that the deceased took possession of the suit properties before his demise and that he continues to be in possession of the suit properties to date.

4. According to the Plaintiff, sometime in April 2016, she discovered that the 1st Defendant had trespassed onto the aforesaid plots; that on 5th February, 2014, the Defendants colluded and purported to take over ownership of the aforesaid plots and that they were in the process of selling the same to third parties. It was averred in the Complaint that the aforesaid actions were carried out with the intent to force the Plaintiff to cede the plots to the 1st Defendant to enable it dispose the same to third parties, a practice the 1st Defendant is notorious for.

5. The Plaintiff finally averred that the 1st Defendant as the allocating party has a duty to protect the plots that it allocates to its shareholders since the issuance of the Title Deeds has not commenced and that the Defendants' actions are unlawful and are depriving her peaceful occupation of the suit properties. The Defendants neither entered appearance nor filed Defences.

Plaintiff's case

6. The matter proceeded for formal proof hearing on 20th September, 2021. The Plaintiff's counsel applied for the withdrawal of the suit as against the 2nd Defendant, which application was allowed by the court. The suit therefore proceeded as against the 1st Defendant alone.

7. The Plaintiff, PW1, adopted her witness statement filed on 27th May, 2016 as her evidence in chief. The Plaintiff also produced the bundle

of documents filed on 26th July, 2018 as [PEXHB1]. PW1 informed the court that she is the administrator of the Estate of the late Mwangi Munyiri, her deceased father; that the deceased is the lawful owner of Plots A105, A106, A105B and A106B (the suit properties) situate in Ruai having purchased the same from the 1st Defendant and that she does not live on the plots. According to the Plaintiff, the 1st Defendant has been interfering with the suit properties.

8. The Plaintiff, through his counsel, filed submissions on 7th December, 2021. The submissions were essentially a recap of the Plaintiffs' case which I have considered.

Analysis & Determination

9. The Defendants herein neither entered appearance nor filed Defences. The suit therefore proceeded as an undefended suit. The Plaintiff's allegations therefore remain uncontroverted. However, this does not lessen the burden of proof placed on the Plaintiff. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. This principle is set out in **Section 107 (1) (2)** of the **Evidence Act** which provides 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 evidential burden of proof placed on the Plaintiff is captured in **sections 109** and **112** of the **Evidence Act** and states as follows:

“109. 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 that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

11. The Court of Appeal in *Mumbi M'Nabea vs David M. Wachira [2016] eKLR* while discussing the standard of proof in civil liability claims in this jurisdiction stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

*.....The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:*

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

12. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] eKLR*, posited thus:

*“Denning J, in *Miller –vs- Minister of Pensions [1947] 2 All ER 372* discussing the burden of proof had this to say;-*

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

13. The Plaintiff instituted this suit seeking for a declaration that her deceased father is the legitimate owner of the suit plots. It is her case that the deceased purchased the suit properties from the 1st Defendant who is yet to issue her with the title deeds; that the 1st Defendant has purported to take over ownership of the suit properties and that the 1st Defendant intends to dispose the suit properties to a third party.

14. In support of her case, the Plaintiff produced in evidence the certificate of confirmation of grant issued to her in respect of her father's Estate, the share certificate No 667 in the names of Mwangi Munyiri and a receipt from the 1st Defendant for the sum of Kshs 12,000 indicated to be for payment of Registration, Survey Fees and Bonus plots.

15. The court is alive to the fact that there are circumstances where a property in dispute has no title. This does not however mean that no

rights can accrue therefrom. In such circumstances the court will set out to establish whether the documentary evidence establishes an unbroken chain leading to the root of the title as persuasively stated by Onguto J in the case of Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others [2015] eKLR;

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....

It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in Sen v Headley [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

16. From the materials presented to the court, there is uncontroverted evidence that the deceased was a share-holder of the 1st Defendant Company having been issued with Share Certificate Number 667, comprising of two ordinary shares. The Plaintiff also adduced in evidence a receipt issued by the 1st Defendant to her late father, Mwangi Munyiri, for the sum of Kshs 12,000 for payment of member’s registration, survey fees and bonus plots. The receipt also indicates the original plot allocated as plots A104 and A106 and the bonus plots as A105B and A106B.

17. From the foregoing, the court finds that the deceased, Martin Munyiri, is the rightful owner of the suit properties. In conclusion, this court finds that the Plaintiff has proved on a balance of probabilities that her claim is valid. Consequently, the Plaintiff’s Plaint is allowed as follows:

a) A declaration be and is hereby issued that the deceased, Mwangi Munyiri, is the lawful exclusive owner of Plots Numbers A105, A105B, A106 and A106B situated at Ruai within Embakasi Ranching Company Limited Settlement Scheme.

b) An order be and is hereby issued directing the 1st Defendant to facilitate the issuance and processing of the title deeds in respect of Plots Number A105, A105B, A106 & A106B in favour of Mwangi Munyiri (deceased) within 90 days of this Judgment.

c) A permanent injunction be and is hereby issued against the 1st Defendants’ agents from trespassing, alienating, damaging, evicting the Plaintiff from the Plots number A105, A105B, A106 and A106B situated at Ruai within Embakasi Ranching Company Limited Settlement Scheme and/or otherwise howsoever from interfering with said plots.

d) The 1st Defendant shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF MARCH, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Onyango for the Plaintiff

No appearance for the Defendants

Court Assistant - Okumu