



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 885 OF 2014

MARTIN MUHINDI.....PLAINTIFF

(Suing as the personal representative of the Estate of Grace

Muhindi-Deceased)

VERSUS

PETER MBUTI.....1st DEFENDANT

EMBAKASI RANCHING

COMPANY LIMITED..... 2nd DEFENDANT

JUDGMENT

1. Vide a Plaint dated 3rd July, 2014, the Plaintiff instituted this suit against the Defendants seeking for the following reliefs;

i. A permanent injunction restraining the 1st Defendant from further developing the Plaintiffs Plot Nos. V805 & V804 situated in Ruai, Nairobi.

ii. A declaration that the Estate of Grace Muhindi(deceased) is the registered owner of Plots No V804 and V805.

iii. An order that the 1st Defendant exhumes the body of his late wife, Miriam Wambui Mbuti from Plot V805.

iv. An order of eviction against the 1st Defendant from the Plots No V805 and V806 situated in Ruai.

v. Costs of the suit.

vi. Any other costs that the court deems fit to grant.

2. The Plaintiff averred in the Plaint that he is the son and administrator of the Estate of Grace Muhindi(deceased); that the deceased is the lawful owner of Plots No. V804 and V805 (*hereinafter the suit plots*) situated in Ruai having purchased them from the 2nd Defendant herein in 1999 and that sometime in March, 2014, the 1st Defendant trespassed on the suit plots and erected a fence thereon.

3. The Plaintiff averred in the Plaint that on 19th April, 2014, the 1st Defendant further illegally buried his wife Miriam Wambui Mbuti on Plot number V805 and that the 1st Defendant is in continuous trespass on the suit plots and unless restrained by this court, the estate of the late Grace Muhindi will suffer loss and damage. None of the Defendants entered appearance nor filed Defences.

Plaintiff's Case

4. The matter proceeded for formal proof hearing on 6th October, 2021. The Plaintiff, PW1, adopted his witness statement dated 3rd July, 2014 as his evidence in chief. The Plaintiff informed the court that he is the son and administrator of the Estate of the Late Grace Muhindi and that the late Grace is the legal owner of Plots number V804 and V805 (the suit properties) having purchased them from the 2nd Defendant.

5. PW1 informed the court that sometime in March, 2014, upon visiting the suit properties, he discovered that they had been fenced off; that

he carried out investigations which revealed that on 19th of April, 2014, one Miriam Wambui Mbuti had been buried on the suit plots by the 1st Defendant and that he visited the 2nd Defendant's offices to inquire into the ownership of the plots and was issued with a letter confirming that they belonged to his late mother.

6. According to the Plaintiff, the 1st Defendant's actions of fencing off the property and burying his late wife on the suit plots are illegal and have subjected the Estate of the Late Grace Muhindi to huge losses and should be restrained.

Submissions

7. The Plaintiff counsel submitted that Article 40 of the Constitution guarantees the property rights of every person; that the suit plots belong to the deceased who purchased them from the 2nd Defendant and that the Plaintiff has produced into evidence share certificates and receipts, a map and letters ascertaining the purchase of the property.

8. Counsel cited the cases of *Danson Kimani Gacina & Another vs Embakasi Ranching Company Ltd [2015]eKLR* and *Caroline Awinja Ochieng & Another vs Jane Anne Mbithe Gitau & 2 others [2014] eKLR* where the courts held that proof of ownership of unregistered land is found in documentary evidence which establishes an unbroken chain leading to the root of the title.

9. According to counsel, the 1st Defendant's actions in fencing off the property and burying his wife thereon without the consent of the owner of the property, being the deceased, is tantamount to trespass. Reliance was placed on the case of *Nyangeri Obiye Thomas vs Yunuke Sakagwa & another [2014] eKLR* where the court observed that trespass is an unjustifiable intrusion by one person upon land in possession of another. It was submitted that the Plaintiff proved his case on a balance of probabilities and is entitled to the orders sought.

Analysis & Determination

10. Having carefully considered the pleadings, the Plaintiff's testimony and submissions herein, the sole issue that arises for determination is whether the Plaintiff is entitled to the orders sought in the Plaintiff.

11. The Defendants herein neither entered appearance nor filed Defences. the suit therefore proceeded as an undefended suit. The Plaintiff's allegations 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.”

12. 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.”

13. 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.”

14. 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.”

15. The Plaintiff instituted this suit seeking for a declaration that his deceased mother is the legitimate owner of the suit plots. It is the Plaintiff's case that his late mother purchased the suit property from the 2nd Defendant who is yet to issue titles in respect of the two plots and that the 1st Defendant is trespassing on the suit properties, has fenced off the said plots and buried his deceased wife on one of the plots.

16. In support of his case, the Plaintiff produced in evidence the limited Letters of Administration *Ad litem*, Share Certificate/Non-member Certificate of Plot Ownership Numbers 003477 and 003475 in the names of Grace Wairimu Muhindi, receipts evidencing payments for the suit plots, a sketch map showing the location of the plots and two letters from the 2nd Defendant dated 25th April, 2014 and 11th May, 2021 confirming the deceased Grace Muhindi as the owner of the suit plots.

17. 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. That is the position that was persuasively stated by Onguto, J in the case of *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others [2015] eKLR* as follows:

“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.”

18. From the materials presented to the court, there is uncontroverted evidence that the deceased bought the suit properties from the 2nd Defendant and was issued with Non-member Certificates of Plot ownership for the suit plots dated 31st January, 2000. The Plaintiff also adduced receipts issued by the 2nd Defendant with respect to the suit plots and letters from the 2nd Defendant affirming ownership of the plots in the name of Grace Muhindi. That being the case, it is the finding of this court that the Plaintiff has proved on a balance of probabilities that the suit plots belong to the late Grace Muhindi.

19. The Plaintiff has sought for the eviction of the 1st Defendant from the suit properties and for the exhumation of the body of the 1st Defendant's wife from plot number number V. 805. According to the Plaintiff, the 1st Defendant's actions of fencing off the plots and burying his wife thereon without his consent are tantamount to trespass.

20. Halsbury's law of England 3rd Edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

“A person trespasses upon land if he wrongfully sets foot on, Or rides or drives over, it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land.”

21. The Plaintiff having testified that he visited the suit properties and found that they had been fenced off by the 1st Defendant and the evidence in this regard being uncontroverted, the court finds that the 1st Defendant has trespassed onto the suit properties and should be evicted

22. On whether or not exhumation should be done, the beginning point is to establish whether the body of the 1st Defendant's wife was indeed buried and/or interred on the suit plots as alleged. The Plaintiff avers that he carried out investigations which revealed that the 1st Defendant's wife is buried on the suit property and has in this regard produced the funeral program for the late Miriam Wambui Mbitu.

23. The funeral program of the late Miriam Wambui Mbitu does not indicate the location of her interment. Considering that the order of exhumation has serious and far reaching consequences and there being no sufficient evidence of the exact location of the burial of the late Miriam Wambui, the court declines to grant the order.

24. Consequently, the court finds that the Plaintiff has proved his case on a balance of probabilities save for the question of exhumation of the late Miriam Wambui. For those reasons, the court enters Judgment in the Plaintiff's favour as follows:

a) A declaration be and is hereby issued, that the Estate of the late Grace Muhindi (deceased) is the absolute proprietor of Plots Nos. V804 and V805 situate in Ruai, Nairobi.

b) A permanent injunction be and is hereby issued restraining the 1st Defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon, demolishing and or in any manner whatsoever interfering with the Plaintiff's Plots Nos. V804 and V805.

c) The 1st Defendant is hereby ordered to vacate and deliver vacant possession of Plots Nos. V804 and V805 to the Plaintiff within 60 days failing which an order of eviction be and is hereby issued.

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

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

O. A. ANGOTE

JUDGE

In the presence of:

Ms. Thungu for the Plaintiff

Mr. Ajulu for Mr. Kuria for the Defendants

Court Assistant - Okumu