



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIRBI**  
**ENVIRONMENTAL & LAND DIVISION**  
**CIVIL CASE ELC NO. 820 OF 2013**

DANSON KIMANI GACINA.....1<sup>ST</sup> PLAINTIFF

DANIEL MBUGUA GACINA.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

EMBAKASI RANCHING COMPANY LTD.....DEFENDANT

**JUDGMENT**

**Introduction**

Danson Kimani Gachuna and Daniel Mbugua Gacina (“the Plaintiffs”) are brothers. They claim to have purchased some property from the Defendant in 1976. The property purchased was not registered. They were consequently only issued with certificates in 1990 as evidence of ownership. They have waited for their title documents to be processed by the Defendant since 1990. The Defendant holds the title paramount and had subdivided the paramount parcel of land into various subplots for resale.

In 2008, after over 32 years since the purchase of the property the Plaintiffs decided to develop their properties. They were surprised. A semi-permanent structure had been erected on their property. The new occupant was unknown to them. They call the new occupant a trespasser. The trespasser as well had documentation from the Defendant’s offices showing that the trespasser had been allocated the suit premises. The Plaintiffs followed up with the defendant but got no answers. That is the Plaintiffs story as captured in the pleadings filed herein.

**Litigation**

On 8<sup>th</sup> July, 2013, the Plaintiffs commenced action. They filed a plaint. They also filed verifying affidavits, list of documents, list of witnesses and witnessess statement alongside a bundle of documents. They say they served the Defendant. When the Defendant did not enter appearance, the Plaintiff sought a date for formal proof. A date of 5<sup>th</sup> November, 2014 was fixed. Again the plaintiffs notified the Defendant of this date. The Defendant did not send a representative to attend court on the material date. The Plaintiffs did. They sought to formally prove their claim. All along the Plaintiffs acted in person.

**The claim**

The Plaintiffs claim is straight-jacketed. The Plaintiffs seek a declaration that the land belongs to them. They also seek to injunct the occupant from constructing on the land. They also want the Defendant

restrained from allocating the land to any other person. They finally want the Defendant to issue title deeds to them and that if the occupant has any title deeds the same be revoked. Finally they also seek costs of the suit.

### **The trial and evidence**

Both Plaintiffs testified ex parte on 5<sup>th</sup> November, 2014. They repeated basically what was in the plaint. PW1, the 1<sup>st</sup> Plaintiff, testified that he paid Kshs. 7,000/= in 1976 and was given two plots. In 1998 he paid another 12,000/= and was given bonus shares in form of plots. He was shown the beacons. He had been shown the beacons in 1982. In 2008 he went to inspect his beacons and found a trespasser had settled on the plot. He provided to the court a shareholder's certificate (PEXh.1), payment receipts (PEXh-2), and beacons certificate (PEXh-3). He asked the court to evict the trespasser. He also testified that the trespasser had fake documents claiming ownership of the plots.

PW2, the 2<sup>nd</sup> Plaintiff, testified that his story was the same as the one of PW1. He paid the Defendant for plots in 1976. He was allocated plots. He was shown beacons. He went to his plot in 2008 and found a stranger had built thereon. When he contacted the Defendant, he received no help.

### **Analysis and Determination**

The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.

The Plaintiffs claim ownership of plots known as D355, D356, D355B, D356B, E12, E13, E12B and E13B on LR No. 10904/2. A total of eight plots. The plots were allocated to them for a consideration paid to the Defendant. PW1, like PW2, in an endeavor to prove ownership to the plots produced receipts, share certificates and beacon certificates.

Even though PW1 had testified that he purchased and paid for two plots in 1976, he did not produce any evidence to show such payment in 1976. The only receipt availed for payment in 1976 was for the amount of Kshs. 2,200/=. It was not for 7,000/= and there was no other receipt. That receipt which was marked as PEX-2 was dated 13<sup>th</sup> November, 1976. It was receipt No. 10292 issued by M/s Gatuguta & Manek. It was not issued by the Defendant. That receipt also had the glaring inscription on its face horizontally reading "CANCELLED". In my view, this remark took away the probative value of the receipt. Even then it was not proof that the 1<sup>st</sup> Plaintiff had paid the Defendant any money in 1976.

The 1<sup>st</sup> Plaintiff also had three other receipts. The three receipts were issued by the Defendant on 3<sup>rd</sup> October, 1990, 16<sup>th</sup> December, 1998 and 18<sup>th</sup> November, 2008. The receipts were for the amounts of Kshs. 7,000/=: 2,000/= and 12,000/= respectively. The first of these three receipts was for the civil engineering works. It made reference to the plots E12B and E13B. The second of the receipts being the receipt issued on 16<sup>th</sup> December, 1998 was for the bonus shares. It is the receipt that led to the issuance of and allotment of plot No. E12B and E13B as the bonus plots. The two receipts certainly clash. It is not possible, nay practical, that the 1<sup>st</sup> Plaintiff already owned plot No. E12B and E13B in the year 1990 to have been paying for the civil engineering works over the same. The two receipts issued on 3<sup>rd</sup> October, 1990 and 16<sup>th</sup> December, 1998 certainly clash and contradict the 1<sup>st</sup> Plaintiff's own testimony that he originally owned plots #E13 and E12 in 1976 and thereafter acquired plots E12B and E13B in 1998 through bonus shares.

Then there is the receipt issued on 18<sup>th</sup> November, 2008. This receipt related to the beacon certificate. The 1<sup>st</sup> Plaintiff testified that he was shown the plots in 1982. In 2008 he was shown the beacons. It is

apparent that this could have been so as the Beacons Certificate was only paid for in November, 2008. This was after the 1<sup>st</sup> Plaintiff discovered an intruder on his parcel of land. Interestingly, though both receipts as well as the Beacon Certificate made no mention of plot No. E12B and E13B. The plots now referred to in 2008 were E12B and E13B.

I come to the conclusion that there are one too many weak links in the documentary claim of the 1<sup>st</sup> Plaintiffs evidence to satisfy me on a balance of probabilities as to which unregistered plot or property was owned by the 1<sup>st</sup> Plaintiff.

### *The 2<sup>nd</sup> Plaintiff's case*

What of the 2<sup>nd</sup> Plaintiff? The 2<sup>nd</sup> Plaintiff's testimony as observed already took the same road as the 1<sup>st</sup> Plaintiff's. The documentary evidence availed by the 2<sup>nd</sup> Plaintiff was the same as the 1<sup>st</sup> Plaintiffs documentary evidence, except the 2<sup>nd</sup> Plaintiff did not have a receipt of 1976. He had a share certificate issued on 1<sup>st</sup> August, 1978. He also had a receipt issued on 18<sup>th</sup> November, 2008 for Kshs. 2,000. He also had a Beacon certificate issued on 18<sup>th</sup> November, 2008. All these documents were issued by the Defendant.

All these documents related to plot Nos. D355B and D 356B. None related to the 2<sup>nd</sup> Plaintiff's plot No. 1301C, 1302C, D355 and D356 except for the receipt for payment of the Beacon certificate. Once again the chain was broken. The root of the title was not clearly traced and established by the 2<sup>nd</sup> Plaintiff to the satisfactory standard. Even more curiously the Defendant on 27<sup>th</sup> March, 2012 endorsed the 2<sup>nd</sup> Plaintiff's share certificate with the following remarks.

*“One plot with somebody's house and graveyard agreed to be compensated with all alternative plot as discussed and directed by the Board”.*

It is apparent that the 2<sup>nd</sup> Plaintiff was aware the plot was no longer available for the 2<sup>nd</sup> Plaintiff.

### **Conclusion**

I would hold by reason of the foregoing that the Plaintiffs have not on a balance of probabilities shown the exact plots which they owned. The Plaintiffs have also failed to avail an unbroken chain of ownership which traces back the property to the root itself, being LR No. 10904/2. Their claims fail.

I would not only dismiss the Plaintiff's case for want of evidence but also for the reason that the Plaintiffs claim is time barred. The Plaintiffs purchased the land in 1976. They never attempted to take possession until 2008. They do not disclose the current occupants of the suit property. The possibility that the current occupants could have been on the premises for more than twelve (12) years is certainly there. There is certainly no reason why the said occupants were not joined to these proceedings. Even though the non-joinder should not defeat the suit, the court is certainly entitled to make an adverse inference that the suit is barred against any party now in possession and not joined to the proceedings.

I would consequently dismiss the plaintiff's suit and it is dismissed. There will be no orders as to costs.

**Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of December, 2014.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

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for the Plaintiff

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for the Respondent