



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO 615 OF 2017

**PURITY WANJIRU NJUGUNA(SUING ON HER OWN AND ON BEHALF OF
THE ESTATE OF ALEX DAVID NJUGUNA NJATHI DCD),.....PLAINTIFF**

VERSUS

GEORGE KIARIE MACHUA..... 1ST DEFENDANT

JAMES KIMANI WAMBUI2ND DEFENDANT

NATIONAL LAND COMMISSION..... 3RD DEFENDANT

JUDGMENT

1. Vide her amended Complaint dated 14/3/2019 the Plaintiff prayed for orders inter alia THAT;

a. A permanent injunction restraining the 1st and 2nd Defendants whether by themselves, their servants, employees, persons claiming under them or through them from interfering with the Plaintiff's quiet possession and/or ownership of the suit until the hearing and determination of this suit. (sic)

b. The suit land L.R No. 125/74 RUIRU MUNICIPALITY (now parcel 115) registered in the name of BANTA SINGH be registered in the name of the Plaintiff herein PURITY WANJIRU NJUGUNA.

c. General damages for demolition of the building that had been erected on the suit land.

d. Costs of the suit and interests.

2. The gist of the Plaintiff's suit in summary is that she is the widow and Administrator of the estate of the late Alex David Njuguna Njathi vide Thika Magistrate's Court Succession Cause No. 343 of 2010. That on 25/6/1973 the deceased purchased and took possession of L.R No. 125/4 RUIRU MUNICIPALITY now parcel 115 (*the suit land*) from one Banta Singh. That there was a permanent building thereon and the deceased used to operate a milling company, Ruiru Milling Company until his demise in 2004. That in 2016 she applied for rectification of her Grant to include the suit land after it was inadvertently left out of the succession proceedings.

3. That in 2015 unknown persons began claiming ownership of the suit land and further demolished the building thereon. Upon the office of the Deputy County Commissioner carrying out investigations, it was discovered that the said persons were the 1st and 2nd Defendants herein. That upon receiving the entire purchase price, Banta Singh relocated to the United Kingdom with the understanding that he would come back to effect transfer of the suit land but never returned hence the suit.

4. The matter was set down for formal proof hearing against the 1st and 2nd Defendants on 4/10/2021 who neither entered appearance nor filed any defence.

5. There is the Plaintiff's Reply to 3rd Defendant's Statement of Defence dated 22/7/2019 but I am unable to sight the actual Statement of Defence on record.

6. The Plaintiff solely testified as PW1. She produced copies of her documents as listed in the List of Documents dated 21/6/2017 including the amended Grant in respect of her late husband's estate and memorandum of sale between Banta Singh and her husband. She told the Court

that after the death of her husband, she realized that the go downs and buildings on the suit land were demolished. That she visited the lands registry to pay for her extension of lease but was told to pay for the title deed.

7. PW1 informed the Court that the 1st and 2nd Defendants are in possession of the suit property. The Plaintiff closed her case at that point.

8. The 3rd Defendant despite service did not attend the hearing nor call any witness.

9. The firm of **Daniel Henry & Co. Advocates** filed submissions dated 26/11/2021 on behalf of the Plaintiff. Two issues were drawn for determination; whether the Plaintiff has proven her case to grant Permanent injunction and whether the Plaintiff has a right to have the suit land registered in her name. On the first issue, it was submitted that the 1st and 2nd Defendants failed to enter appearance as required prompting the Plaintiff to apply for interlocutory judgment against them. That the suit nevertheless proceeded for formal proof hearing and her evidence remains uncontroverted. The Plaintiff urged that she was duly clothed with locus to sue for the suit land in her capacity as the Administrator of her late husband.

10. Additionally, the Plaintiff maintained that the contract between her late husband and Banta Singh was validly entered into, consideration of payment was done before her late husband took possession thereof. That she has been paying the relevant land rent for the suit land and even sought an extension of lease but was advised to process her own title. That she had proven her case on a balance of probability to Grant the injunctive orders sought and relied on Sections 80 and 26 LRA and the cases of **Kenya Evangelical Lutheran Church Trustees v Ngowa Mweru & Anor. [2021] eKLR**, **Nelius Muthoni Thegetha v Julius Ndungu Mwangi & anor. [2020] eKLR**.

11. The main issue for determination is whether the Plaintiff has proven her case as prayed.

12. Sections 107 and 108 of the Evidence Act Cap 80 provide for burden of proof and who is to prove it that;

107. Burden of proof

(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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

13. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.

14. The burden of proof is not lessened even in undefended cases like the instant case. See the case of **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR** where it was stated that a Court should not take a Plaintiff’s case as truthful without interrogation for the reason only that it is uncontroverted.

15. In the case of **Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347** the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a Plaintiff of the duty to prove the case to the required standard.”

16. The Plaintiff’s claim is mainly that her late husband purchased the suit land for Kshs. 90,000/= from Banta Singh as evidenced by the memorandum of sale produced in Court. That after her husband’s death, she obtained a certificate of Grant for his estate on 20/7/2011. The Grant would be amended five years later on 8/1/2016 to include the suit land that was said to have been left out. In my view, the explanation that the suit land of this magnitude, a milling company, in such a prime area was not satisfactory for it to be left out if indeed it belonged to the late Alex. Furthermore, the Plaintiff did not explain any steps if at all, that her late husband took to have the suit land registered in his name during his lifetime having bought it as alleged.

17. Additionally, the Plaintiff relied on correspondence from the Commissioner of Lands at the time, which appear to have approved her application for extension of lease. That if the Defendants had any interests on the suit land, nothing would have stopped them or the Council from declining the application for extension of lease. However, when she took the stand in Court, PW1 did not produce any proof of the said application for extension of the lease and receipts for payment if any.

18. Notably, the Plaintiff also relied on P.exh 6, letter dated 26/8/2011 from the Commissioner of lands to DC Ruiru that confirmed the suit land had been leased to **Banta for a period of 30 years** from the 1/1/1967. It follows that the lease expired on the 31/12/1997. The Plaintiff failed to lead evidence to demonstrate that the said lease was extended and for what period.

19. The Court has not been shown that the Plaintiff or her deceased husband applied for the extension of lease for the property and what the outcome of such a request was.

20. The Plaintiff did not call any witness from the Lands Office to buttress her claim over the suit land. She did not produce copies of official search or green card to shed light on the current ownership and history of the suit land respectively. The Plaintiff relied on Sections 26 and 80 of the Land Registration Act which provide;

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

80. Rectification by order of Court

(1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

21. In the instant case, there is no title that was produced to call for its protection under Section 26 LRA above. Moreover, the Court's power to order for rectification cannot be exercised whimsically even without looking at such a register which as I have stated, was not produced. The Plaintiff alluded to tenants being in occupation of the suit land but none of them was enjoined in this suit for them to defend their interests if at all.

22. In the persuasive authority in the case of **Jennifer Kobil Kandie v James Ondiek [2019] eKLR** the Court in dismissing the Plaintiff's claim for permanent injunction against the Defendants on her alleged land, held that acquisition of a title to land is the end product and the process of acquisition is very important and must be procedural. Further the Court observed that a prayer for permanent injunction alone would not suffice where Defendants are already in occupation without a prayer for their eviction.

23. The totality of the Plaintiff's evidence in my considered view, is that the Plaintiff has failed to prove her case on a balance of probabilities for this Court to Grant the orders sought.

24. The suit is for dismissal. It is dismissed with no orders as to costs.

25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 21ST DAY OF APRIL, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kagii Nyamu H/b for Gachau for the Plaintiff

Defendants: Absent

Court Assistant: Phyllis