



REPUBLIC OF KENYA



KENYA LAW
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**Bashir v Doka & 2 others (Environment & Land Case 6 of 2017)
[2022] KEELC 2875 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 6 OF 2017**

JA MOGENI, J

MAY 30, 2022

BETWEEN

MAHAMAD RAJAB BASHIR PLAINTIFF

AND

KHADIJA IBRAHIM DOKA 1ST RESPONDENT

YUSUF 2ND RESPONDENT

ZAKIA ISSA SENUSI 3RD RESPONDENT

JUDGMENT

1. By a plaint dated 3/01/2017 the plaintiff has filed this suit against the defendants jointly and severally seeking:-
 - a. A permanent injunction restraining the defendants by themselves, their agents, employees, servants or any other person(s) claiming and or acting through them from entering, building, constructing, alienating and or interfering in any manner however and whatsoever with parcel of land Plot No. 82 Kibera-Makina area – Nairobi within Nairobi County.
 - b. A declaration order that the plaintiff is the sole and absolute owner of all that parcel of land Plot No. 82 Kibera-Makina Area Nairobi situated within Nairobi County.
 - c. A demolition order be issued against the defendants for demolition of all illegal, unlawful and unauthorized structures/premises put up by the defendants.
 - d. Cost and interest of the suit
 - e. Any other order that this Honorable court may deem fit and just to grant.
2. Upon being served with copies of plaint and summons to enter appearance, the defendants neglected to enter appearance and/or file defence within the prescribed period.



3. There are affidavits of service sworn by Benson Mutinda authorized court process server on 7/02/2017, Benson Anyango Nganyi authorized court process server on 10/01/2018, 30/11/2017, 27/03/2018, 21/12/2018, 19/08/2019, and on 2/11/2021 through Ms Mburia Advocate. The copies of affidavits of service are all filed in the court file and in the CTS and receipts of payments are attached.
4. Despite service they did not enter appearance and/or file defence. The matter was then set down for formal proof.
5. PW1, Mohammad Rajab Bashir the plaintiff adopted his witness statement dated 30/01/2017 and a list of documents as exhibits as part of his evidence. He told the court that he was the son the later Rajab Bashir Marjan whose estate was in dispute and that he was the legal representative of the estate vide letters of Administration-Ad Litem dated 22/12/2016.
6. That his deceased father settled on the disputed parcel of land plot No. 82 Kibera-Makina area on or about 1934 when he was allocated the disputed parcel of land by the British colonial administration. He was allocated the land by virtue of being ex-Sudanese soldier from Nubian Community during the colonial time and all the late Rajab Bashir Marjan were accorded security of tenure ownership documents.
7. PW1 further testified that allottees including the owner of unregistered parcel of land known as Plot Number 114 situated in Jamhuri Phase II Nairobi. The same was allotted to him by the 4th defendant vide a letter of allotment dated 13th February 1992. He paid the stand premium and rent due. He was issued with a beacon certificate dated 13th February 1992 whereby the 4th defendant certified having shown the plaintiff the beacons and size of the allotted plot.
8. PW1 further stated that on or about August-September 2016 the 1st and 2nd respondents entered into the plaintiff's parcel of and occupied land measuring approximately ¼ of an acre from his parcel of land Plot No. 82 Kibera-Makina and started constructing. Further that on or about 1st December 2016 the 3rd respondent without permission entered into the plaintiff's parcel of land and occupied land measuring approximately 50ft by 100ft and started putting up permanent illegal structures.
9. He re-stated that the entire dependents of estate of Rajab Bashir Marjan have resided on the disputed land since 1932 when they were allocated the said land by the British Colonial Administration. Further that his parcel of land is totally distinct and separate from other parcels of land in the neighbourhood and it is properly demarcated through survey plans building and shambas at Kibira.
10. He stated that he approached the Kenyan Nubian Council of elders to resolve the dispute but all this has been in vain. In support of his case he relied on the documents in the list of documents dated 19/01/2022. He produced the documents as exhibits P1 to P23 respectively. He produced a permit issued to the late Rajab Bashir to use Plot No. 82 and Article depicting share of properties in Kibra between the Nubian Community. He also produced the death certificate of his father the later Rajab Bashir. He produced other documents relating to the suit property.
11. The plaintiff's case has not been controverted. It is not clear how the 1st to 3rd defendants entered the land because the documentation presented only show that the plaintiff's deceased father was settled on the land as early as 1932.
12. PW2 – Musa Juma testified and stated that he is the neighbor of the plaintiff. He produced his statement dated 19/01/2022 which he asked the court to adopt as his evidence. He stated that he knew the plaintiff since birth, that he also knew his late father and his late grandfather. He testified that the plaintiff inherited the land from his father and that the court should give the land to the plaintiff and the encroachers should leave. He stated that he is a neighbor to the plaintiff and he occupies Plot



No. 84 and that he confirms that Plot No. 82 belongs to the plaintiff by virtue of his inheritance from his father. He stated that the defendants has encroached on the plaintiff's

13. PW3 – Ibrahim Ahmed testified and stated that he is the neighbor to the plaintiff and that he has resided in Kibra at Plot No. 81 for 63 years. He then stated that he can confirm that Plot No. 82 belongs to the plaintiff by virtue of his inheritance from his father and that the defendants are encroaching.
14. The defendants neglected and or refused to attend court.
15. Though the matter is not opposed, the Plaintiffs are the ones who have alleged and they had a duty to call sufficient evidence and prove their case on the required standard of balance of probabilities. See Section 107 & 109 of the Evidence Act which states:-

(107)

- (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.
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.

16. This issue about the plaintiff need to prove his case even where it is uncontroverted was discussed in the cases of Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, where it was held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

17. The fact that the Plaintiff's evidence is not challenged does not mean that the Court will not interrogate it. The Court still has an obligation to interrogate the tendered evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff had a duty to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”



Further in the case of *Gichinga Kibutha...Vs...Caroline Nduku* (2018) eKLR, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

18. Having considered the available evidence, the court finds the issue for determination is whether the Plaintiff is entitled to the orders sought.
19. The Plaintiff has averred that he is the rightful owner of the suit property having inherited it from the Late Rajab Barshir Marjan, who was the owner of the suit property. This Court has seen the shamba pass for Rajab Bashir Marjan and his certificate of discharge including the IR 14908 which is the communal title all which confirmed that the Late Rajab Bashir Marjan, was indeed the owner of the suit property. The Court has further seen grant of letter of Administration which in the absence of any evidence to the contrary, confirms that indeed the said Rajab Bashir Marjan is deceased. Further this Court has seen a Certificate of Confirmation of Grant dated 6/12/2016 and the Plaintiff has been listed as the sole administrator for purposes of prosecuting the instant suit.
20. With the above evidence, this Court has no doubt that indeed the suit property belongs to the deceased Rajab Bashir Marjan and the Plaintiff is therefore the rightful administrator of the property. The Plaintiff has further claimed that the Defendants have without justification or lawful authority entered into the plaintiff's parcel of land and wrongfully taken possession and are wrongfully erecting permanent structures on the said parcel of land. That they have trespassed on the land. Again without any evidence to controvert the Plaintiff's evidence, the Court has no choice but to find that this is the true position. See Order 2 Rule 11(1) of the *Civil Procedure Rules* 2010, which provides:-

“Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading.....”
21. The Defendant herein did not traverse the said allegations by way of a defence.
22. Therefore by entering into the Plaintiff's parcel of land without authority or his permission, the Defendants have committed an illegality. Consequently, the Court finds that the Plaintiff has proved his claim on a balance of probability and is therefore entitled to the orders of permanent injunction and that the Defendants should give the plaintiff vacant possession of the suit property by vacating the said land forthwith.
23. As already stated the defendants did not file any defence and as things stand the plaintiff's case is unchallenged and since the Defendants did not enter appearance nor file their Defence to controvert or challenge the Plaintiff's evidence, this Court finds no reasons to doubt the Plaintiff's evidence. I find that the plaintiff has proved his case on a balance of probabilities as against the defendants jointly and severally.
24. Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved his case on the required standard of balance of Probabilities. Consequently, the Court enters Judgement for the Plaintiff against the Defendants jointly and severally herein in terms of:
 1. An order of permanent injunction is hereby issued restraining the defendants by themselves, their agents, employees, servants or any other person(s) claiming and or acting through them from entering, building, constructing, alienating and or interfering in any manner however and whatsoever with parcel of land Plot No. 82 Kibera-Makina area – Nairobi within Nairobi County.



2. A declaration order is hereby issued that the plaintiff is the sole and absolute owner of all that parcel of land Plot No. 82 Kibera-Makina Area Nairobi situated within Nairobi County.
3. A demolition order is hereby issued against the defendants for demolition of all illegal, unlawful and unauthorized structures/premises put up by the defendants within the next 30 days.
4. The OCS of Kibra Police Station to supervise the implementation of this court judgment
5. Cost and interest of the suit from the date of this judgment

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 30TH DAY OF MAY 2022.

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MOGENI J

JUDGE

In the presence of

.....for the Plaintiff

.....for the 1st and 2nd Defendant

Mr. Vincent Owuor.....Court Assistant

