



**Macharia v Mwangi & another (Environment & Land Case
874 of 2017) [2022] KEELC 3609 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3609 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 874 OF 2017**

JG KEMEI, J

MAY 12, 2022

BETWEEN

G STEPHEN MWANGI MACHARIA PLAINTIFF

AND

MICHEAL NJEKE MWANGI 1ST DEFENDANT

ICHURA MWANGI 2ND DEFENDANT

JUDGMENT

1. On the December 29, 2017 the plaintiff filed suit against the defendants seeking the following orders;
 - a. An order of the court compelling the defendants to sign all the transmission documents so as to vest the ownership of parcel No Kiambaa/Thimbigua/2305 (suit land) on the plaintiff.
 - b. In the alternative the Deputy Registrar of the High Court be authorized by an order of the court to sign all transfer forms/documents in respect of the suit land.
 - c. Costs of the suit
2. It is the plaintiffs case that he purchased the suit land in 1995 from the defendants who were the beneficial owners of the suit land having inherited it from their father, the late George Karua Mwangi. That the land was transmitted to the two defendants who held title. It is his averment that the defendants failed to transfer the land to him despite signing the requisite documents of transfer.
3. The plaintiffs claim against the defendants is for an order compelling the defendants to execute the requisite documents of transfer to vest the property to the plaintiff and in the alternative the Deputy Registrar of the court be mandated to execute the same.
4. Despite service by way of substituted services the defendants did not enter appearance nor file any statement of defence. The suit therefore proceeded *ex parte*.



5. At the hearing the plaintiff singly testified and relied on his witness statement dated the July 12, 2017 and stated that he purchased the suit land from the plaintiffs in 1995 and that later the defendants disappeared before transferring the land to him. He produced documents marked as PEX No 1-8 in support of his case. He informed the court that he lives on the suit land since 2001. That he did not enter into any agreement for sale with the defendants and that he paid for the land through an advocate, the late Mr Gatimu. That he did not annex a copy of the title for the land.
6. Despite electing to file written submissions at the close of the plaintiff's case, the plaintiff failed to do so.
7. I have considered the pleadings in this case, the evidence adduced at the trial and the law and in my considered view the key issue is whether the plaintiff has proved title in the suit land.
8. Although the defendants failed to file defence and rebut the case of the plaintiff, the plaintiff retains the burden to prove his case however much it has not been challenged by the defendants.
9. The Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR stated that the evidential burden is the burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the *Evidence Act*, thus:

“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.

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.”

10. Similarly in the Court of Appeal case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR the court explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned judges cited with approval the same principle of law as amplified by the learned authors of *The Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

11. The provisions of section 3(3) of the *Law of Contract Act* provide as follows;

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless

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- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and



- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

12. In this case the plaintiff has urged the court to grant specific performance by compelling the defendant to execute the transmission documents so as to vest the property in his name. Granting of orders of specific performance is discretionary and as such the court should in deciding whether or not to grant the sought orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. In the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR, where the court held that:-

“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles”

“The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

13. In this case save for the averments that he purchased the suit land, the plaintiff has failed to produce any agreement of sale in support of the transaction. His claim as far as the law of contract in respect to sale of land must be in writing is unfounded.
14. The plaintiff also failed to produce any abstract of title to show that indeed the defendants are the registered owners of the suit land. I have seen the grant of letters of administration in the estate of George Karua Mwangi, the father of the defendants issued on the October 28, 1997 to Micheal Njeke, Ichura Mwangi and Peter Mwangi. The certificate of confirmation of grant dated the February 18, 1998 is illegible on the section of the property allocated. It is not known who was given this property and or whether the suit land was part of the estate of the late George Karua Mwangi. Further the plaintiff failed to produce a green card / register for the suit land for the court to form an opinion on the same as regards title ownership. It is therefore doubtful who the owner of the suit land is. In the absence of a certified copy of the title abstract it is doubtful if it is registered in the names of the defendants.
15. The plaintiff has relied on a faded copy of RL7 – transfer by personal representative to person entitled under a will or on an intestacy in support of his claim. The transfer is dated the February 25, 1998 - Michael Njeke and Ichura Mwangi to the plaintiff. For the reasons given in para 15 above, the court is unable to order specific performance in the manner sought by the plaintiff.
16. Having considered the plaint, the evidence adduced on trial and all the material placed before me and for the reasons given above it is the finding of this court that the plaintiff has failed to proof his case.
17. The same is dismissed with no orders as to costs.



18. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 12TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff - absent

Defendant – absent

Court Assistant - Phyllis

