



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Murichu (Environment & Land Case 991 of 2015)
[2022] KEELC 2816 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 991 OF 2015
OA ANGOTE, J
JUNE 30, 2022**

BETWEEN

MILLICENT MUTHONI MAINA PLAINTIFF

AND

MARY NYAKINYUA MURICHU DEFENDANT

JUDGMENT

Background

1. The Plaintiff instituted this suit against the Defendant vide a Plaint dated 8th October, 2015 seeking the following reliefs;
 - a) A declaration that the Plaintiff is the bona fide purchaser for value and owner of Plot No. 191, Kwa Miwaa, Umoja III with effect from 24th November, 2011.
 - b) A Permanent injunction restraining the Defendant by herself, her servants, agents or employees from in any way dealing or interfering with the Plaintiff's rights in the property by trespassing, disposing off, wasting, damaging, alienating, dealing, selling, transferring, constructing or in any other way encumbering the land known as Plot 191 situate at Kwa Miwaa, Umoja III.
 - c) Costs of the suit.
 - d) And any other or further relief or order that meets the end of justice be made as this Honourable Court may deem fit to grant.
2. The Plaintiff's case is that she is the bonafide purchaser for value and owner of all that parcel of land known as Plot No 191, Kwa Miwaa, Umoja III (hereinafter the suit property) of Kwa Umoja III Welfare Group having purchased the same from one Grace Muthoni Karanja whose ownership is illustrated by a share certificate issued to her by Kwa Miwaa Umoja III Welfare Group.



3. It was averred in the Plaint that the Plaintiff and Grace Muthoni Karanja executed a sale agreement on 10th November, 2011 and thereafter a transfer on 24th November, 2011; that the Plaintiff was thereafter issued with a Plot Formalization Card serial number 3268 by the City Council of Nairobi and that the card aforesaid has been signed and stamped by the Assistant Director of Community Division and the Director of Housing and Development.
4. The Plaintiff averred in the Plaint that sometime in March, 2012, her and Grace Muthoni Karanja decided to formalize the transfer process with an advocate and to that end, approached Ms Chacha & Co Advocates, who prepared a special power of Attorney which was subsequently registered at the Registrar of Documents at Lands office, and that on or about 26th September, 2015, she received information that construction was ongoing on her plot.
5. It is the Plaintiff's case that on 27th September, 2015, she, together with her husband went to the suit property and found it fenced with iron sheets which they pulled down; that she reported the matter to the Chief who summoned the Defendant and asked her to cease construction until the dispute was resolved and that despite the directive by the Chief, and further summons with respect to the same, the Defendant continued construction on the suit property, which construction continues to date causing her untold anxiety.
6. The Defendant filed a Statement of Defence in which she averred that she is the lawful proprietor of L.R No 11379/3 (Plot No 3177) measuring 20*50 feet. which she purchased from Kiambu Dandora Farmers on 20th March, 2013; that she is a member of the said Kiambu Dandora Farmers with a valid share certificate and that Kiambu Dandora Farmers society is in the business of purchasing and transferring property.
7. According to the Defendant, the purported plot number 191 owned by Kwa Miwaa Umoja III does not exist; that Kwa Miwaa Umoja III is a non-existent society; that she has been in actual physical possession of the suit property since March, 2013 without any interference from any person and that the Plaintiff is not entitled to the orders sought in the Plaint.

Hearing & Evidence

8. The Plaintiff, PW1, informed the court that she purchased the suit property from one Grace Muthoni Karanja vide a sale agreement dated 10th November, 2011 after which they executed the transfer on 24th November, 2011 and proceeded to formalize the process of transfer through the preparation of a special power of Attorney that was registered at the Registrar of Documents and that she was issued with a Plot Formalization Card.
9. It was the evidence of PW1 that on or about 2nd October, 2012, she received a letter from Kwa Miwaa Umoja III Welfare Group asking her to make payments to secure the suit property as National Bank, the duly registered owner as chargee of the mother title, was offering to sell the entire property to the society, which she did and that sometime in 2015, it came to her attention that the Defendant was constructing on the suit property.
10. According to PW1, despite being advised to stop the construction, the Defendant continuous to do so to date and has recently opened a hardware shop on the suit property in blatant disregard of the temporary injunctive orders issued by this court.
11. PW2 was the Plaintiffs' husband. PW2 stated that on or about 27th September, 2015, him, together with his wife were informed that construction was going on his wife's property; that when they went to the suit property, they found iron sheets erected thereon; that they pulled down the iron sheets and



lodged a complaint with the Chief and that the Defendant was summoned by the Chief who asked her to produce the documents she had in respect to the suit property. The Defendant did not participate in the hearing.

Submissions

12. The Plaintiff through her counsel submitted that the Plaintiff is the registered owner of the suit property and is protected pursuant to Sections 24 and 26 of the *Land Registration Act*, 2012 and that as expressed by the Court in *Daudi Kiptugen vs Commissioner of Lands & 4 Others* [2015] eKLR, where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds was properly acquired, which obligation the Plaintiff had discharged.

Analysis & Determination

13. Having considered the pleadings, the evidence and submissions, the following arise as the issues for determination;
 - i. Whether the Plaintiff has proved her case against the Defendant on a balance of probabilities and if so?
 - ii. What are the appropriate orders to issue?
14. The Plaintiff instituted this suit against the Defendant seeking, inter alia, for a declaration that she is the bona-fide purchaser for value and owner of the suit property and a permanent injunction restraining the Defendant from interfering with the suit property.
15. Although the Defendant entered Appearance and filed a Statement of Defence, she did not participate in the trial. Consequently, she failed to substantiate the allegations made in her Defence and failed to produce any evidence to counter the Plaintiff's testimony. It therefore follows that the Defence on record remains mere allegations and the Plaintiff's evidence is uncontroverted and unchallenged.
16. The above notwithstanding, it is common ground that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove her case remains the same and that burden of proof is in no way lessened because the Defendant did not adduce any evidence. As expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR;

“The suggestion, however implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance probabilities cannot possibly be correct..While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

17. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. The same is set out under 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.”

18. Sections 109 and 112 of the same Act provides 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.”

19. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in Mumbi M’Nabea vs David M. Wachira [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of 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.”

20. The Plaintiff testified that she is the lawful proprietor of the suit property having purchased the same from one Grace Muthoni Karanja, a member of Kwa Miwa Umoja III Welfare Group. To prove her claim, she produced a duly executed sale agreement and Transfer form dated 10th November, 2011 and 24th April, 2011 respectively, the Plot Certificate from Kwa Miwaa Umoja III Welfare Group issued on 26th October, 2011 and a Plot Formalization Card.

21. In addition, the Plaintiff produced in evidence a special power of Attorney dated 30th March, 2012, a letter of offer from Kwa Umoja III Welfare Group dated 2nd September, 2012 asking her to secure her plot-by paying monies to the group to enable them purchase the whole property from National Bank, and a sale agreement between her and Goldseal Corporation on behalf of National Bank dated 11th April, 2016, for the purchase of the plot and receipt for payment of the same dated 30th June, 2016.

22. The Plaintiff also adduced a letter from Kwa Umoja III Welfare Group affirming her membership of the group; a letter from Goldseal Corporation Limited dated 10th January, 2017 affirming that she is the bonafide owner of the suit property, the copy of the mother title and a search for L.R No 209/9499.

23. While the mother title to the property within which the suit property is situate has been adduced in evidence, it is apparent that individual titles have not been issued with respect to the plots within the property. As such, the property in dispute is untitled. Nevertheless, the fact the suit property does not have a title does not mean that no rights can accrue thereon. That is the position that Onguto J took in the case of Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others [2015] eKLR where he held 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.”

24. Having regard to the entirety of the evidence, there can be no doubt that the Plaintiff has ably demonstrated the root of her ownership of the suit property. She has produced the sale agreement, the Transfer and the special power of Attorney essentially granting her all rights to the suit property, the Plot Formalization Card issued to her as well as correspondence from Kwa Umoja III affirming her membership and proprietorship of the plot.
25. Further, the Plaintiff has adduced correspondence from Kwa Miwa Umoja III welfare group asking her to secure the plot through payment of funds to enable the society purchase the property from the chargee, National Bank of Kenya, which offer she took up vide an agreement of 11th April, 2016. No evidence was adduced by the defence to show that the Plaintiff’s documents are forgeries.
26. From the foregoing, the court finds that the Plaintiff is the rightful owner of the suit property. For those reasons, the Plaintiff’s suit is allowed as follows:
 - a) A declaration be and hereby issued that the Plaintiff is the bona fide purchaser for value and owner of Plot No. 191, Kwa Miwaa, Umoja III.
 - b) A Permanent injunction be and is hereby issued restraining the Defendant by herself, her servants, agents or employees from in any way dealing or interfering, trespassing, disposing off, wasting, damaging, alienating, dealing, selling, transferring, constructing or in any other way encumbering the Plaintiff’s rights in land known as Plot 191 situate at Kwa Miwaa, Umoja III.
 - c) The Defendant shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 30TH DAY OF JUNE, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Onyango for the Plaintiff

No appearance for the Defendant

Court Assistant – June/Tracy

