



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 79 OF 2011**

**LINUS NGANGA KIONGO.....1<sup>ST</sup> PLAINTIFF**

**EPHARAIM ANTHONY KIRAGU.....2<sup>ND</sup> PLAINTIFF**

**JANE WANJIRU THIONGO.....3<sup>RD</sup> PLAINTIFF**

**LAWRENCE GITHINJI KIONGO.....4<sup>TH</sup> PLAINTIFF**

**(Suing as the legal representative/administrators of the estate of CRISPUS Kiongo Waweru  
(Deceased))**

**VERSUS**

**TOWN COUNCIL OF KIKUYU.....DEFENDANT**

**JUDGEMENT**

This suit was instituted by way of a plain dated 2<sup>nd</sup> March 2011 and filed in this Court on 8<sup>th</sup> March 2012. By the said pleading the plaintiffs who claim to be legal representatives/administrators of the estate of **Crispus Kiongo Waweru** (hereinafter referred to as the deceased) seek judgement against the defendant for the sum of Kshs. 1,100,000.00, costs of the suit and interest on the same.

Their claim is based on the fact that the deceased who was the registered proprietor of land parcel No. LR No. 182/32 situated in Kiambu County surrendered a portion thereof measuring 0.0641 Ha being LR No. 182/14 to the defendant in the year 1985 for the purposes of a road reserve. The deceased apparently passed on in the year 1996 and the plaintiffs herein as his administrators transferred the said portion to the defendant in the year 2004. According to the plaintiffs the said portion was valued at Kshs. 1,100,000/- a sum which the defendant agreed to compensate the plaintiff. However, the defendant has failed to honour that agreement hence the institution of these proceedings.

From the records there are affidavits of service indicating that the defendant was duly served but failed to enter appearance or file the defence. Eventually on 20<sup>th</sup> December 2011, an interlocutory judgement was entered and the matter fixed for “formal proof”.

In his witness statement which was adopted as part of the examination in chief as well as his oral testimony in Court, PW-1-**Linus Nganga Kiongo** who is the first plaintiff herein states that he resides in Kikuyu County where he is a peasant farmer. Sometimes in the year 1985 the deceased agreed to transfer a portion land LR No. 182/32 to the defendant measuring 0.0641. The deceased passed on 7<sup>th</sup> April 1996 and letters of administration in respect of his estate were issued on 27<sup>th</sup> October 2004 to the plaintiffs, who proceeded to transfer the said portion known as LR No. 182/14 to the defendant valued at Kshs. 1,100,000/-. After the said transfer the defendant agreed to compensate the plaintiffs for the value of the said land but has since not done so despite several demands.

From the evidence initially the defendant had resolved to give the deceased an alternative land of the same value and on 29<sup>th</sup> May 1998, the defendant intimated that it was processing the compensation. In 2008 the defendant sought for valuation report of the transferred land which was duly transmitted. Despite demands, the defendant has refused to settle the same. The plaintiffs have relied on their documents which were filed in Court on 18<sup>th</sup> March 2011 which were produced in Court as Plaintiffs' exhibits 1-10.

The said documents are letters and minutes of the council confirming that the deceased did offer his parcel of land as road reserve and that the deceased was to be compensated by an alternative parcel of land. There is a letter dated 29<sup>th</sup> May 1998 from the defendant to PW-1 confirming that the defendant was processing compensation. There is also a letter dated 8<sup>th</sup> April 2003 from the defendant to the District Land Valuer, Kiambu requesting the latter to value the said road access for further necessary action. Vide a letter dated 4<sup>th</sup> December 2008, the valuer valued the same at Kshs. 1,100,000.00. Suffice to say that the other plaintiffs simply confirmed the evidence of PW-1.

Although the letters of administration were not exhibited, since the standard of proof in civil matters is on a balance of probabilities and as there is an interlocutory judgement on record, the issue of liability does not fall for determination.

Pursuant to the foregoing the plaintiff's averments in light of the letter dated 4<sup>th</sup> December 2008 placing the value of the suit land at Kshs. 1,100,000.00 remain wholly uncontroverted. What are the consequences of a party failing to adduce evidence? In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002** Justice Lesiit, citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998** stated:

**“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.**

Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia, J. held:

**“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the 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”.**

The case of **Janet Kaphiphe Ouma & Another vs. Marie Stopes International** (Kenya) Kisumu HCCC No. 68 of 2007 **Ali-Aroni, J.** citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter** Civil Appeal No. 23 of 1997 said:

**“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.**

Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000 Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General** Nairobi HCCC No. 2666 of 1996 where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

The plaintiffs have given evidence on oath supported by documentary evidence which go to prove their case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiffs are entitled to succeed.

In the premises I enter judgement for the plaintiffs against the defendant in the said sum of Kshs. 1,100,000.00 together with interest at Court rates from the date of filing suit till payment in full. The plaintiffs will also have the costs of this suit but at the subordinate Court scale since the claim herein could have been filed in the subordinate court.

**Judgment read, signed and delivered in court this 25<sup>th</sup> day of June 2012**

**G.V. ODUNGA**

**JUDGE**

In the absence of the parties.