



**Benson v Kinuthia (Environment and Land Case Civil Suit
292 of 2012) [2022] KEELC 3272 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 292 OF 2012**

SO OKONG'O, J

JULY 25, 2022

BETWEEN

JULIUS KINYUA BENSON PLAINTIFF

AND

CAROLINE W KINUTHIA DEFENDANT

JUDGMENT

1. This suit was commenced by way of a plaint dated 25th May 2012. The plaint was amended on 28th October 2015. In the amended plaint, the Plaintiff sought the following reliefs;
 1. A declaration that the Plaintiff is the bona fide owner of the parcel of land known as Plot No. A238 (hereinafter referred to as “the suit property”) within L.R. No.18280/81/82/83 (hereinafter referred to as “the association’s land”) that was owned by Omega Jua Kali Association.
 2. A permanent injunction restraining the Defendant by herself, her agents, servants and/or employees and any other person acting for her from howsoever dealing, entering into, remaining on or in any way whatsoever interfering with the Plaintiff’s quiet possession of the suit property.
 3. Any other relief or remedy the court may deem fit to grant.
 4. Costs of the suit.

The Plaintiff’s case

2. The Plaintiff averred that at all material times he was and still is the bona fide owner of the suit property which was originally known as Plot No. BE014 which was allocated to him by Omega Jua Kali Association (hereinafter referred to as “the association”). The Plaintiff averred that he purchased the suit property from one, Patrick Gitau Kimani, a member of the association who described the suit



property as Plot No. BE021. The Plaintiff averred that the association issued him with a membership certificate, membership card and ballot paper for Plot No. BE021.

3. The Plaintiff averred that the association later informed him that the Plot No. BE021 had double entries. The Plaintiff averred that he was informed that one, Alex K. Philip was the bona fide owner of Plot BE021 and that his parcel of land was Plot No. BE014. The Plaintiff averred that as a result of this development, he surrendered all documents of title relating to Plot No. BE021 and was issued with new documents for Plot No. BE014. The Plaintiff averred that upon subdivision of the association's land, Plot No. BE014 became Plot No. A238(the suit property). The Plaintiff averred that he was the bona fide owner of the suit property. The Plaintiff averred that he was informed that the Defendant was a stranger to the association and as such she could not lay a claim to the suit property.
4. At the trial, the Plaintiff testified as PW1. He adopted his witness statement as his evidence in chief and produced the documents in his bundle of documents as exhibits. In his witness statement, he reiterated his case as set out in the plaint the contents of which I have highlighted in the preceding paragraphs. On cross-examination by the Defendant's advocate, the Plaintiff stated as follows: He was not the original allottee of the suit property. He bought the property from one, Patrick Gitau Kimani. The transaction was approved by the association. He was given a ballot paper, membership certificate and membership card. These were the documents of title that the association used to give its members. Patrick Gitau Kimani showed him the suit property but the association which had records of the larger parcel (the association's land) was to confirm the location. He was later informed by the association that his land parcel was No. BE014 and not No. BE021. The explanation that was given to him by the association for these changes in plot numbering was that they had duplicated some plot numbers. He stated that the parcel of land he purchased from Patrick Kimani bore No. BE021. He was told that No. BE021 had been assigned to a parcel of land belonging to another person. He stated that the location of his parcel on the ground did not change despite these changes in numbering. He reiterated that it was this Plot No. BE014 that became Plot No. A238 upon survey of the association's land.
5. He stated further that he did not sue the association. He stated that although the association's office was still in Njiru, the officials of the association who were in office when he purchased the suit property had left. He stated that the Defendant had produced neither an allotment letter nor a ballot card in proof of how she acquired the suit property. He stated that the Defendant had only produced Plot Card from the Nairobi City Council. On examination by the court he stated that he was shown a vacant plot. He stated that after purchasing the plot in 2004 he dug trenches and deposited building stones on the suit property in 2005. He stated further that in 2010, he brought building materials with the intention of commencing construction on the plot. He stated that in 2012 before he could start construction works on the plot, he was informed of the Defendant's claim over the land.

The Defendant's case

6. The Defendant filed an amended defence dated 9th November 2015. She stated her case as follows: She was the rightful allottee of the suit property. The Plaintiff purchased Plot No. BE021 from Patrick Gitau Kimani in 2004. The plot that was purchased by the plaintiff was distinct from the suit property. Following subdivision of the association's land, Plot No. BE021 owned by the Plaintiff became Plot No. A241 while Plot No. BE014 owned by the Defendant became Plot No. A238. The Plaintiff thereafter brought construction materials and wrongly deposited them on the suit property. The Plaintiff was asked to stop activities on the suit property by the Nairobi City Council as the records at the Nairobi City Council did not recognise the Plaintiff as the owner of the property but the Plaintiff refused to do so. The Defendant stated that the Nairobi City Council Enforcement and Inspectorate



Department ultimately stopped the Plaintiff from continuing with illegal construction works on the suit property.

7. At the trial, the Defendant gave evidence as DW1. The Defendant adopted her witness statement as part of her evidence in chief and produced the documents in her bundle of documents as exhibits. In her oral testimony, the Defendant stated as follows: She was the owner of the suit property (Plot No. A238 formally Plot No. BE014) having purchased the same from the association in 2008. In 2012 she went to the suit property and found thereon building materials belonging to the Plaintiff. The Nairobi City Council issued the Plaintiff with an enforcement notice requiring him to stop the activities he was carrying out on the suit property. The Plaintiff's structures on the suit property were subsequently demolished but she did not know who carried out the demolition. The Defendant stated that she had put up temporary structures on the suit property.
8. On cross-examination by the Plaintiff's advocate, the Defendant admitted that she had not stated in her witness statement from whom she had purchased the suit property or the purchase price. The Defendant stated that she was an allottee of the suit property. She admitted however that she had not produced her allotment letter or the ballot. The Defendant admitted further that she was not a member of the association and as such she did not have a membership card. The Defendant claimed further that she purchased the property from the association. On being asked whether she was aware that the association was not selling plots, she stated that she was not aware of that fact.
9. The Defendant admitted that she had no document from the association showing that she was the owner of the suit property. The Defendant stated that she had a Plot Formalization Card from the City Council of Nairobi which showed that she was the owner of the suit property. She admitted that the Card did not bear her signature or address and that several particulars were missing. On re-examination, the Defendant stated that both the association and the City Council of Nairobi confirmed that she was the owner of the suit property. The Defendant claimed that she was issued with the said Formalization Card by the association.
10. On examination by the court, she stated that she had no receipts for the payments indicated on the Plot Formalization Card. She stated that she could not remember the persons she dealt with at the association but she could recall that Boniface Ngige was one of them. She stated that she purchased the suit property through her husband one, Peter Kinuthia and that it was her husband who dealt with the said Boniface Ngige. She stated that they paid Shs. 10,000/- to the association for the suit property. The Defendant stated that she had put up iron sheet structures on the suit property.

The Submissions

11. The Plaintiff filed his submissions on 9th September 2021. The Plaintiff submitted that his claim against the Defendant should be allowed. The Plaintiff submitted that the Defendant had not proved ownership of the suit property. The Plaintiff submitted that the Defendant had no letter of allotment in respect of the suit property. The Plaintiff submitted further that the Defendant claimed to have bought the suit property from the association yet the association was not selling land. The Plaintiff submitted that the association used to allot land to members through ballot system. The Plaintiff submitted further that the Defendant did not prove that she had purchased the suit property from a registered member of the association.
12. The Defendant filed her submissions on 18th October 2021. Relying on Sections 107 and 108 of the *Evidence Act*, Chapter 80 Laws of Kenya, the Defendant submitted that the association's land from which the suit property originated belonged to the association. The Defendant submitted that since no titles had been issued for the subdivisions, it was only the association or the City Council of Nairobi



that could authenticate the ownership of any plot arising from the association's land including the suit property. The Defendant submitted that the Plaintiff never tendered evidence from the association or the council. The Defendant submitted that in any event, the Plaintiff's evidence was contradictory as he produced documents showing that he purchased Plot No. BE021 which later became Plot No. A241. The Defendant submitted that both the association and the council confirmed that the suit property was owned by the Defendant. The Defendant urged the court to dismiss the Plaintiff's suit since the same had not been proved on a balance of probabilities.

Analysis and Determination of the issues arising:

13. I have considered the evidence on record and the submissions by the advocates for both parties. In my view, the issues arising for determination in this suit are the following;
1. Who as between the Plaintiff and the Defendant owns the suit property?
 2. Whether the Plaintiff is entitled to the reliefs sought.
 3. Who is liable for the costs of the suit?

Who as between the Plaintiff and the Defendant owns the suit property?

14. Section 107 (1) of the *Evidence Act*, Chapter 80 Laws of Kenya provides that:

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

15. In *Munyu Maina v Hiram Gathiha Maina*[2013]eKLR the court stated that:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

16. In *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

17. I am satisfied from the evidence on record that the Plaintiff has proved that he is the owner of all that parcel of land known as Plot No. A238(the suit property). The Plaintiff has given convincing evidence on how he acquired the suit property. It is common ground that the suit property is a portion of a hitherto larger parcel of land known as L.R No. 18280/81/82/83(the association's land) owned by an entity known as Omega Jua Kali Association (the association). It is common ground that the association was a membership group. It is common ground that the association subdivided the association's land and allocated the same to its members.



18. It is common ground that one, Patrick Gitau Kimani was a member of the association. It is also common ground that the said Patrick Kimani was allocated a parcel of land known as Plot No. BE021 by the association. It is also common ground that Patrick Gitau Kimani sold the said parcel of land known as Plot No. BE021 to the Plaintiff on 27th June 2004. It is common ground that that sale was approved by the association which issued the Plaintiff with a Membership Certificate, Membership Card and Ballot Card all in respect of Plot No. BE021.
19. The Plaintiff led uncontroverted evidence that when the association was finalising the process of subdivision of the association's land, the association noted that there was a problem with numbering of the parcel of land that the Plaintiff had purchased and now owned. The Plaintiff was summoned to the association's office by the association's secretary who informed him that the parcel of land that he owned was number BE014 and not BE021. The Plaintiff was informed that number BE021 was for a neighbouring plot that was owned by one, Alex Philip. The Plaintiff was told to surrender the documents of title that had been issued to him that bore number BE021 so that he could be issued with new ones bearing number BE014. The Plaintiff complied and was issued with fresh Membership Certificate, Membership Card and Ballot Card in respect of the suit property all bearing number BE014 by the association.
20. The Plaintiff was emphatic that the changes were only in respect of plot numbers and that the location of the parcel of land that he purchased and owned did not change. The Plaintiff led evidence that was not controverted that upon the completion of survey and subdivision of the association's land, the parcel of land bearing number BE014 was given a new number namely, A238. The Plaintiff's parcel of land therefore became Plot No. A238 (the suit property).
21. I am of the view that the Plaintiff having led evidence on how he acquired the suit property and having established that the suit property belonged to him, the burden shifted to the Defendant who was challenging the Plaintiff's title to establish her title over the suit property. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017 Raila Amolo Odinga & another v IEBC & 2 others [2017] eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 of the judgment:
 - “(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
 - (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law...”
22. I must say that the Defendant was at pains to explain how she acquired the suit property. Although the Defendant admitted that the suit property was a portion of the association's land, the Defendant who claimed to have acquired the suit property from the association did not produce any evidence of



such acquisition. When it was put to her that the association's land was only allocated to members and not sold to the general public, the Defendant had no comment having testified that she was not a member of the association. Prodded further as to who she dealt with at the association, the Defendant could not remember any save for Boniface Ngige who was actually a guard and who appears to have assisted her to get possession of the suit property from the Plaintiff. Pushed further, the Defendant claimed that she purchased the suit property through her husband and that it was her husband who dealt with Boniface Ngige.

23. The only document that was produced in evidence by the Defendant as evidence of her title to the suit property was a Plot Formalization Card in respect of the suit property that was issued by the City Council of Nairobi on unknown date. The Defendant did not tell the court why the City Council of Nairobi had issued such a card for land that was owned by the association. The card itself was lacking in several material particulars. The Defendant did not prove that the suit property was allocated to her by the association or that she purchased the same from a member of the association. Even if it is assumed that the property was allocated to her by the City Council of Nairobi, the Defendant did not produce any evidence of such allocation. The Defendant did not place before the court any evidence showing that she made any payment either to the association or the City Council of Nairobi. Due to the foregoing, I find no basis for the Defendant's claim over the suit property.
24. It is therefore my finding and I so hold that the Plaintiff is the lawful owner of the suit property.

Whether the Plaintiff is entitled to the reliefs sought.

25. The Plaintiff has proved that he is the owner of the suit property. The plaintiff has also proved that the Defendant is occupying the suit property illegally. The Defendant is therefore a trespasser on the suit property. I am satisfied from the foregoing that the Plaintiff is entitled to the declaratory and injunctive orders sought in his amended plaint.

Conclusion:

26. In conclusion, it is my finding that the Plaintiff has proved his case against the Defendant on a balance of probabilities. I therefore enter judgment for the Plaintiff against the Defendant as follows;
1. A declaration is issued that the Plaintiff is the bona fide owner of all that parcel of land known as Plot No. A238 ("the suit property") within L.R. No.18280/81/82/83, Off Kangundo Road, Nairobi that was owned by Omega Jua Kali Association.
 2. A permanent injunction is issued restraining the Defendant by herself, her agents, servants and/or employees and any other person acting for her from howsoever dealing, entering into, remaining on or in any way whatsoever interfering with the Plaintiff's quiet possession of the suit property.
 3. Costs of the suit.

DELIVERED AND DATED AT NAIROBI THIS 25TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff



Mr. Nyaiyo for the Defendant

Ms. C. Nyokabi-Court Assistant

