



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1010 of 2007**

**LUCY WANJIRU KUNG’U.....PLAINTIFF**

**VERSUS**

**JOHN NJUDUNA NDARUA.....DEFENDANT**

**JUDGEMENT**

A perusal of the court, record reveals that the plaintiff herein had first of all filed her claim in the Senior Resident Magistrate’s court, at Githunguri vide civil suit No. 50 of 2000. A brief scheming through the plaint reveals that vide paragraph 3, the plaintiff had averred that the plaintiff and the defendant are joint registered owners of plot No. Githunguri/Githunguri/1274.

- That she plaintiff had constructed a permanent house on the said plot.
- That the defendant had failed to refund to her his half share contribution for the construction costs.

By reason of that grievance, the plaintiff had sought “*a permanent injunction restraining the defendant, his servants, and or agents from interfering with or harassing and collecting rent in plot number Githunguri/Githunguri/1274 until the defendant has completely refused to refund half of the costs incurred in erecting the permanent house on the said plot number Githunguri/Githunguri/1274, cost of the suit and interest on the half cost incurred on constructing of the said house or plot and any other relief as the court may deem fit to grant*”.

Simultaneously filed with the said suit was an exparte chamber summons seeking the injunctive relief which this court, was informed by the defendant in his testimony that it had been granted. The court record reveals that the suit was withdrawn on the 28/9/01.

Following that withdrawal, the plaintiff moved to this court, and presented a plaint dated 16<sup>th</sup> April 2003 and filed the same date. The salient features of the same are as follows:-

- Vide paragraph 7 thereof, that she sourced funds on her own, and purchased the suit plot on her own, which plot vide paragraph 8 was purchased using her gratuity of Kshs. 150,000.00.
- Vide paragraph 5, 6, 9,10,11,12 of the plaint, both the plaintiff and the defendant are clinical officers. They reached an agreement to pool funds and open Westlands clinic at Kambaa Trading Centre. The understanding was that the defendant would also resign from his job, team up with the plaintiff, so that they mann each one clinic. Instead the defendant did not resign from his job forcing the plaintiff to close down one clinic in order to concentrate onto westlands clinic.

- Vide paragraph 13, that the joint registration of the defendant in the Githunguri/Githunguri/1274 plot was solely based on the understanding that the two would continue in the clinic business partnership.

- It is her stand that when the partnership did not fructify she solely undertook the construction and or development of the said plot. The said construction was facilitated with the help of funds from the plaintiff's husband, bank loans and credit from suppliers.

- It is after her husbands' death that the defendant started claiming to be equal owner and threatened forceful entry and had infact started harassing the plaintiff hence the proceedings herein. In consequence thereof she sought from the court:-

1. *Permanent orders to be issued by this honourable court, to restrain the defendant either by himself, his agent and or servants or anybody claiming through him from making forceful entry into the premises or in any other manner interfering with the plaintiff premises being plot number Githunguri/Githunguri/1274.*

2. *An order that the land Registrar Kiambu District land Registry do remove the defendants name John Njuguna Ndarua as a joint owner of LR.NO. Githunguri/Githunguri/1274.*

3. *Cost of the suit.*

The defendant was served with the summons to enter appearance, which was entered on 5<sup>th</sup> day of May 2003, and dated the same date. The defence and counterclaim is dated 19<sup>th</sup> May 2003, and filed on 22<sup>nd</sup> May 2003. The salient features of the defence are:-

- The Westlands clinic was opened jointly by them and each of them held equal shares and the contribution of the share capital was equal.

- The clinic came out in the plaintiffs name only because the defendant was still in the government service and could only be allowed to work at the clinic part time.

- Despite the part time working at the clinic, by reason of their agreement he was an equal partner with the plaintiff.

- Contend the Githunguri plot was purchased and developed using funds from the profits earned from the Westlands Clinic, and that is why it was registered in the joint names.

- Him defendant opted out of the Westlands Clinic operations because of misunderstanding between them.

- The plaintiff is put to strict proof on her allegation that she developed the Githunguri plot with help from her deceased husband, and her adult son and she is put to strict proof. But that notwithstanding he acknowledges the partnership receiving 100,000.00/= in form of a friendly loan from the late husband of the plaintiff, which to his knowledge was repaid off using the rentals from the same building. Also admits a loan of 200,000.00/= from Barclays bank which was fully repaid by the partnership.

- The partnership was frustrated when the plaintiff opened another clinic at Kambaa and failed to account for proceeds of rent from the Githunguri plot.

- Maintains he owns the rooms on the right while the plaintiff owns the rooms on the left.

- Contends that the plaintiff has been attempting to evict him from his portions of the premises.

By reasons of what has been averred in the plaint the defendant counterclaimed for the following:-

- That he is an equal owner of the Githunguri plot and counterclaim the following order.

(a) *The plaintiffs suit to be dismissed with costs*

(b) A permanent injunction restraining the plaintiff, her servants and or agents from interfering with the plaintiffs proprietary and possession rights over half of LR Githunguri/Githunguri/1274

(c) Kshs. 292, 400.00 rent arrears from half of plot No. Githunguri/Githunguri/1274

(d) Any other relief this honourable court, may deem fit to grant.

The plaintiffs' reply to defence and defence to counterclaim is dated 11<sup>th</sup> June 2003 and filed on the 13<sup>th</sup> day of June 2003. The salient features of the same are as follows:-

- Denied that the clinic was jointly owned by her and the defendant in equal shares, denied any agreement between the two to have the licence issued in the plaintiffs' name only for the joint partnership, and the defendant is put to strict proof of the same.
- Asserts the correct position is that since the defendant, was in the government service, he lacked capacity to be issued with a licence to run a clinic. But admits that the defendant did work at the plaintiffs' clinic on a part time basis.
- Denied the share capital contribution of 9,000/= by the defendant and 6,000/= and then 3,000/= by herself and the defendant is put to strict proof.
- Joined issue with the plaintiff on paragraphs, 11,13,14,15,16,17,18,19 and 20 of the defence to strict proof and reiterate the content of her plaint that she solely sourced funds for the purchase and development of the Githunguri plot and at no time did the defendant contribute to the development of the Githunguri plot. Further denied that loans were repaid for by rents from the Githunguri plot or that 200,000.00 was repaid by the partnership profits.
- Denied assertion by the defendant that he has rights of occupation over the Githunguri plot and maintains that the defendant made nil contribution to the construction of the Githunguri plot.
- Maintains the defendant has never been in possession of the Githunguri plot.
- The only joint efforts the two did together were when they pooled funds and purchased shares at Mwhika Farmers Co. Limited which is yielded plot number 934 and 935 which were registered in their individual names.

It is noted from the record that on 21/7/08 Osiemo J deferred the hearing of the matter because Githunguri SRM court 50/01 had not been availed, and advised parties to take convenient dates at the Registry as soon as the said file had been availed. On 1/8/08 the defendant took a hearing date at the Registry for hearing on the 19<sup>th</sup> day of November 2008, with notice to issue. The record does not show what transpired on the 19<sup>th</sup> November 2008. A date was however taken on 21/1/09 when the matter was fixed for hearing today and notice was to issue. Indeed today the defendant appeared in court, with his lawyer. A return of service sworn by one Robert M. Nyagah is on record having been sworn on the first June 2009 and filed on 9<sup>th</sup> June 2009. There is a hearing notice attached to it dated 9<sup>th</sup> day of February 2009 bearing a rubber stamp alleged to be for counsel of the plaintiff showing the notice was received on the 9<sup>th</sup> day of February 2009.

Today when the matter came up for hearing, the file was called out at 9.30 a.m., the plaintiff and her advocates were not present. The matter was adjourned to 12.00 noon to allow the plaintiff attend court. By 12.34 noon they had not shown up, and the court, being satisfied that they had due notice of the hearing date, allowed the defendant to proceed *ex parte*.

The plaintiffs counsel applied to have the plaintiff's suit, dismissed for want of prosecution which

order was granted. Thereafter the defendant presented his testimony on the counter claim. The sum total of his evidence is that he had a business relationship with the plaintiff, namely a medical clinic. The terms were equal shares, capital contribution and equal shares of the profits. On the same basis, they purchased a plot Githunguri/Githunguri/1274, they jointly developed by putting up 12 rooms and each was to get benefits from 6. Later on the relationship become sour, where by the partnership brake up. He was locked out of the rental profits from their plot, when the plaintiff moved to the Githunguri court, and obtained an order restraining the defendant from collecting any rent from the said plot. His plea to the court, is that the court, to order that the plot be shared between the two of them so that each can collect rent from his/her side. He also prays for an order that he be paid rent arrears he has claimed. He produced a copy of the title deed and a copy of the injunctive order in the Githunguri case.

Due consideration has been made by this court of the defendants evidence in consideration with the pleadings of both sides. The question for determination by the court is whether on the basis of the evidence adduced, the defendant has proved his case to the required standard, to warrant him being granted the reliefs being sought by him, in view of the fact that there is no contrary evidence to the counterclaim, except the defence to it. Case law has provided guidelines.

There is the case of **BACHU VERSUS WAINAINA (1982) KLR 108** where the CA held inter alia that “*at the exparte hearing the plaintiff was under a legal duty to prove his case against both the defendants.*”

*(2) That the burden of formal proof is the same as that required in any civil case.”*

There is also the case of **KARUGI AND ANOTHER VERSUS KABIYA AND 3 OTHERS 91987) KLR 347**, also a court of appeal decision, in which the CA held inter alia that “*the burden on a plaintiff to prove his case remains the same throughout the proceedings, even though, the burden only becomes easier to discharge when the matter is not validity defended. The burden of proof is in no way less and because the case is heard by way of a formal proof.*”

Also the case of **M.A. BAYUFU AND SONS LIMITED VERSUS ATTORNEY GENERAL (2002) 2KLR 279**, where it was held inter alia that, “*the consequences of default is that under order 9A rule 3 a final judgement, in respect of a liquidated claim will be entered on an application by the plaintiff.*”

Applying these guiding principles to the proceedings herein, the court, moves to make the following findings:-

1. That right from the pleadings in Githunguri SRMCC 50/01 to the pleadings of both sides herein, it is common ground that there is no dispute that the disputants are joint holders of the Githunguri plot. This has been confirmed by production of the copy of the title deed exhibit D1
2. There is no dispute that the defendant in his counterclaim asserts entitlement through joint ownership, where as the plaintiff disputes the same.
3. All that the court, has in opposition to the defendant’s assertion, is the plaintiffs’ defence to it. It is not evidence but a pleading. It is now trite law that this court, has judicial notice of, that a pleading is not a piece of evidence as the same does not have the benefit of being refined through cross-examination. As such, it cannot operate to oust the defendants sworn but exparte evidence as supported by the documentary proof.

In view of the above reasoning, the court, is satisfied that the defendant has proved his counterclaim on a balance of probability, and the court, is inclined to enter judgement for him on the counterclaim as follows:-

1. The plaintiff’s suit filed against the defendant stands dismissed for want of prosecution as earlier ordered herein.

2. The defendant will have costs of the dismissed suit.

3. An order be and is hereby made under any other relief that this honourable court, may deem fit to grant to the effect that the title to LR.NO. Githunguri/Githunguri/1274 which has, hitherto been owned jointly by the defendant and the plaintiff in equal undivided shares be and is hereby ordered to be canceled.

(i) That the said title be and is hereby ordered to be subdivided into two equal portions.

(ii) That each of the said two equal portions to be registered separately as distinct and separate title.

(iii) That one portion to be registered in the name of the defendant, whereas the other to be registered in the names of the plaintiff.

4. An order be and is hereby made to the effect that a permanent injunction be and is hereby made restraining the plaintiff, her servants, and or agents from interfering with the plaintiffs proprietor's and possessionary interest over the half and equal portion registered as separate and distinct in his name as a resultant subdivisions of L.R.NO. Githunguri/Githunguri /1274 and more particularly from imposing and installing tenants against the wish of the defendant, and collecting rents from the said tenants.

5. An order be and is hereby made that the said plaintiff do pay the defendant Kshs. 292,400.00 prayed for in prayer (c) being arrears of rent received by the said plaintiff on behalf of the defendant but which was not remitted to the defendant by the said plaintiff.

6. There will be no order for interest on the amount decreed in No. 5 above as the same has not been prayed for in the counter claim.

7. There will be no award for costs on the counterclaim as the same was not sought by the counterclaim.

**DATED, READ AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE 2009.**

**R.N. NAMBUYE**

**JUDGE**