



**Afyare Enterprises Company Limited v Mugambi & 2 others;
Mugambi (Interested Party) (Environment and Land Case Civil Suit
1626 of 2016) [2022] KEELC 13612 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13612 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1626 OF 2016
EK WABWOTO, J
OCTOBER 13, 2022**

BETWEEN

AFYARE ENTERPRISES COMPANY LIMITED PLAINTIFF

AND

GIDEON KIREMAH MUGAMBI 1ST DEFENDANT

MAX GAS AND LOGISTICS LIMITED 2ND DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI 3RD DEFENDANT

AND

GLADYS KALUYU MUGAMBI INTERESTED PARTY

JUDGMENT

1. This suit was instituted vide a plaint dated December 22, 2016 seeking for the following reliefs against the defendants: -
 - a. A declaration that the subsequent sale agreement entered into between the 1st defendant and the 2nd defendant for the sale and purchase of land no Nairobi 36/VII/403 (Original number 36/8) together with the developments therein is an illegality that is null and void by virtue of the prior existence of the sale agreement dated September 1, 2014 between the plaintiff and the 1st defendant.
 - b. An order nullifying and cancelling the transfer effected to the 2nd defendant in respect to parcel of land number Nairobi 36/VII/403 (Original number 36/8) together with the developments therein.



- c. An order directing the 3rd defendant to effect a transfer in the register of parcel of land number Nairobi 36/VIII/403 (Original number 36/8) together with the developments therein to the plaintiff and the deputy registrar of this honourable court be ordered to execute all the relevant transfer documents on behalf of the 1st defendant in terms of completion of the sale agreement dated September 1, 2014 upon which the plaintiff should be obliged to pay the 1st defendant the total balance of purchase price of ksh 102,600,000/=
 - d. The honourable court be pleased to order the 1st and 2nd defendants to render vacant possession of the suit premises.
 - e. An order for the payment of damages incurred by the plaintiff subsequent to the suspension of the sale agreement dated September 1, 2014 between the plaintiff and the 1st defendant.
 - f. Interest on prayer (e) above from the date of filing of this suit till payment in full.
 - g. Costs of this suit.
2. Upon being served with the Plaint and summons to enter appearance, the defendants herein duly entered appearance. The 1st defendant filed a statement of defence dated March 7, 2017 while the 2nd defendant initially filed a statement of defence dated March 15, 2017 and later filed an amended statement of defence and counterclaim dated October 28, 2021. The 2nd defendant herein sought the following prayers in its counterclaim: -
 - a. Special damages on valuation costs and other incidental costs incurred in valuing of the suit property ksh 500,000/=
 - b. A declaration that the 2nd defendant is the legitimate owner of the suit property.
 - c. A declaration that the 2nd defendant obtained good and lawful title to the suit property.
 - d. Costs of the suit.
 - e. Any other relief as this honourable court shall deem fair, just and equitable to grant.
 3. The plaintiff's suit was dismissed on October 4, 2022 when the matter was scheduled for hearing of the main suit. The matter subsequently proceeded for hearing of the 2nd defendant's counter claim.

The evidence

4. Two witness testified on behalf of the 2nd defendant. The first witness was Mr Shukri Osman Isaac who testified as the Valuer and Mr Abshir Hachi Afrah who testified as the director of the 2nd defendant.
5. Mr Shukri Osman Isaac produced a valuation report dated September 13, 2021 which valued the property at ksh 445,000,000/ and further confirmed that the property had been registered in the names of the 2nd defendant.
6. Mr Abshir Hachi Afrah adopted his witness statement dated October 28, 2021 and also produced the list and bundle of documents dated the same day. It was his testimony that the 2nd defendant is the registered proprietor of the suit property known as LR no 36/VIII/403 situate along 1st Avenue Eastleigh in Nairobi. The same was purchased from the 1st defendant and the Interested party pursuant to a sale agreement dated September 24, 2014 wherein the purchase price was paid in full and due process followed. It was also stated that the 1st defendant and the interested party had filed a consent in court on October 9, 2014 in Civil Case no 9 of 2005 (O S) allowing the sale and transfer of the



suit property to the 2nd defendant which was adopted in court. He urged the court to grant the reliefs sought in the 2nd defendant's counterclaim.

7. On cross-examination by counsel for the 1st defendant Mr Gichuru Advocate, he stated that the 2nd defendant had no claim whatsoever against the 1st defendant.
8. The plaintiff never called any witness during the hearing of the counter claim.

Submissions by the 2nd defendant

9. The 2nd defendant filed its written submissions dated October 2022 through the firm of Hassan Bulle & Co Advocates. Counsel outlined one singular issue for determination being on whether the 2nd defendant is entitled to the reliefs sought in the counterclaim. It was submitted that the 2nd defendant had proved and established its interest in the suit property and hence the prayers sought in the counterclaim ought to be allowed. Counsel cited the cases of *Joseph Muriithi Njeru vs Mary Wanjiru Njuguna & Another* [2019] eKLR and *Weston Gitonga & 10 Others vs Peter Rugu Gikanda & Another* in support of the position advanced in the 2nd defendant's case.

Issues for determination.

10. I have considered the pleadings, evidence and submissions before court. The plaintiff's suit having been dismissed, the main issue for determination is whether the 2nd defendant's counter claim has been proved to the required standard and whether the 2nd defendant is entitled to the reliefs sought.
11. In the absence of any defence and/or controverting evidence, the court is satisfied that the 2nd defendant has proved its counterclaim on a balance of probabilities in so far as ownership of the suit property is concerned. I am persuaded from the evidence on record that the 2nd defendant is the genuine and lawful owner of the suit property and hence deserving of the prayers sought in its counterclaim. The plaintiff never called any witness to controvert the allegations made against them by the 2nd defendant.
12. The court is granted discretion under section 27 of the *Civil Procedure Act* to award costs. Evidently, costs usually follow the events unless special circumstances present themselves. The 2nd defendant, herein has succeeded in making its case and getting orders as outlined above. The 2nd defendant being the successful litigant is entitled to costs of this counterclaim to be borne by the plaintiff herein.

Final orders

13. In conclusion, the 2nd defendant's counterclaim dated October 28, 2021 is merited. I therefore enter judgment against the plaintiff and issue the following final orders: -
 - a. Special damages on valuation costs of the suit property for ksh 500,000/=
 - b. A declaration that the 2nd defendant is the legitimate owner of the suit property.
 - c. The plaintiff shall bear the costs of the suit and the counter claim.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF OCTOBER 2022

E K WABWOTO

JUDGE

In the presence of: -



N/A for the plaintiff.

Mr Gichuru D N the 1st defendant.

Mr Omondi h/b for Mr Bulle the 2nd defendant.

N/A for the 3rd defendant.

Ms Ndirangu for the interested party.

Court assistant; Caroline Nafuna.

E K WABWOTO

JUDGE

