



**Kauli v Mwakauli & another (Environment & Land Case 80 of 2017)
[2022] KEELC 15025 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15025 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 80 OF 2017
NA MATHEKA, J
NOVEMBER 23, 2022**

BETWEEN

YUSUF SAID KAULI PLAINTIFF

AND

MOHAMED JUMA MWAKAULI 1ST DEFENDANT

ABDALLA MWATUNU 2ND DEFENDANT

JUDGMENT

1. This case is that at all material times to this suit, the Plaintiff is the owner of the rooms of a house situated within Plot No. 3606 situated within Digirika Diani and also the owner of the undivided portion of plot No. 3606 measuring approximately 39feet by 35 feet situated also within Digirika in Kwale within Kwale County.
2. The Plaintiff avers and states that the 1st Defendant sold the Plaintiff's two (2) rooms and the portion of Plot No. 3606 measuring approximately 39 feet by 35 feet to the 2nd Defendant without the knowledge of the Plaintiff and/or his express consent. The Plaintiff avers and states that the 1st Defendant who is his paternal uncle forced him to vacate his two (2) rooms of the house within Digirika area and handed over the two rooms to the 2nd Defendant against his wish. The Plaintiff's claim against the Defendants is for vacant possession of the Plaintiff's two rooms and the undivided portion of Plot No. 3606 measuring approximately 39 feet by 35 feet which the Defendants have dispossessed the Plaintiff and forcefully taken and forced him to vacate the same.
3. The Plaintiff's further claim against the Defendants is an order of injunction preventing the Defendants from further dispossessing the Plaintiff's two(2) rooms and his plot measuring approximately 39 feet. by 35 feet the property of the Plaintiff. The Plaintiff prays for: -
 1. A Mandatory Injunction to issue against the Defendants, their servants, employees, agents and/or whomsoever is acting on their behalf not to dispose, sell demolish, develop and/or



part with possession of two(2) rooms and the undivided portion of plot No.3606 measuring approximately 39feet by 35 feet within Digirika in Diani within Kwale County.

2. Vacant possession.
3. Costs and interests of the suit
4. The 1st Defendant denies that the Plaintiff is the owner of rooms of a house situated within Plot no.3606 within Digirika Diani or the owner of the undivided portion of plot no. 3606 measuring 39 feet by 35 feet. The 1st Defendant denies that he sold the Plaintiff's two rooms or the portion of Plot No. 3606 to the 2nd Defendant without the knowledge of the Plaintiff or his express consent The 1st Defendant avers that he has never been and is not the registered owner of the alleged two rooms or Plot No. 3606 and at no time did the 1st Defendant sell the same to the Plaintiff or the 2nd Defendant. The Plaintiff's claim against the 1st Defendant for an order of injunction is unfounded as the Plaintiff has no rights, legal or otherwise, known in law over the suit property and the 1st Defendant has been improperly joined herein rendering the suit incompetent and fatally defective.
5. This court has considered the evidence and the submissions therein. The Plaintiff filed the suit on 9th March 2017 against the 1st and 2nd Defendants. The Plaintiff withdrew the suit against the 2nd Defendant upon his demise. The Plaintiff testified that he is the owner of the rooms of a house situated within Plot No. 3606 situated within Digirika Diani and also the owner of the undivided portion of Plot No. 3606 measuring approximately 39feet by 35 feet situated also within Digirika in Kwale within Kwale County. The Plaintiff avers and states that the 1st Defendant sold the Plaintiff's two (2) rooms and the portion of plot No. 3606 measuring approximately 39feet by 35feet to the 2nd Defendant without the knowledge of the Plaintiff and/or his express consent. The Plaintiff avers and states that the 1st Defendant who is his paternal uncle forced him to vacate his two (2) rooms of the house within Digirika area and handed over the two rooms to the 2nd Defendant against his wish. The Defendant submitted that the suit plot belonged to his brother one Said Juma Kauli now deceased who was the Plaintiff's father. The suit plot was sold by one Abdalla Hamisi Tsimbarugu who was the registered owner to Mohammed Abdalla Mwatunu who died in 2014 pursuant to a court order. I find that no evidence has been adduced before me to prove ownership of the suit land. No search certificate or title was produced as evidence. The 2nd Defendant who allegedly bought the suit land has since died and the case withdrawn against him so how can any order if issued be enforced?
6. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist”.
7. This is the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same *Act* 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 the 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 the fact is upon him.”



8. In the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* (2005) 1 EA 334, the Court held that:

As a general proposition under section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the *Act*.”

9. This means that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendants, depending on the circumstances of the case. In the case of *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR it was held that:

As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

10. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* (2010) 1 KLE 526 stated that:

In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

11. In the instant case, the only evidence on record was the Plaintiff's averments that the 1st Defendant sold the Plaintiff's two (2) rooms and the portion of Plot No. 3606 measuring approximately 39 feet by 35 feet to the 2nd Defendant without the knowledge of the Plaintiff and/or his express consent. The sale agreements adduced as evidence do not show the location and size of the suit land. No evidence has been adduced that 1st Defendant was ever the registered owner of the alleged two rooms or plot no. 3606 and at no time did the 1st Defendant sell the same to the Plaintiff or the 2nd Defendant. PEX4 the sale agreement is not signed by the parties mentioned therein. The Plaintiff's claim against the 1st Defendant for an order of injunction cannot stand as the Plaintiff has not established any rights over the suit property.

12. I find that the Plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with cost to the Defendant.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF NOVEMBER 2022.

N.A. MATHEKA

JUDGE

