



**Kenga v Kaviha (Environment & Land Case 131 of 2018)
[2022] KEELC 14857 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 131 OF 2018
MAO ODENY, J
NOVEMBER 17, 2022**

BETWEEN

JOHN LUWALI MULAZO KENGA PLAINTIFF

AND

KADZO KAVIHA DEFENDANT

JUDGMENT

1. By a plaint dated June 12, 2018, the plaintiff sought the following orders; -
 - a. A declaration that the plaintiff is the legal and/or entitled owner of all that parcel of land on plot number 918 Ngomeni Scheme.
 - b. A permanent injunction restraining the defendant herein, her agents, servants and/or any other person acting under her, from trespassing, cultivating, building, selling or otherwise dealing with the suit property in any manner whatsoever.
 - c. Costs of this suit.
 - d. Any other relief this honourable court deems fit to grant.
2. The defendant despite being served with summons to enter appearance neither filed a memorandum of appearance nor a defence. He also did not participate in the proceedings and therefore the suit proceeded undefended.
3. PW1 John Luwali Mulazo Kenga adopted his witness statement and stated that he bought the suit land for Kshs. 60,000/- from Dama Mulanda Tsawe Konde who is deceased.
4. PW 1 also stated that he bought the suit land while the defendant was in occupation and has refused to move out of the land. PW1 produced agreements of sale with the late Dama Mulanda Konde.



Analysis And Determination

5. The issue for determination is whether the plaintiff has proved that he is the rightful owner of the suit land.
6. The plaintiff stated that he bought the suit land from one Dama Mulanda Tsawe Konde (deceased) for a consideration of Kshs 60,000/- and that the Defendant was in occupation when he purchased it. The Plaintiff further stated in the plaint and in his evidence that the said Dama Konde (deceased) is the registered owner of the suit land. Neither a title nor a search was exhibited to ascertain the ownership of the suit land.
7. I notice that the plaintiff is seeking for a declaration that he is the rightful and legal owner of the suit land and a permanent injunction restraining the defendant from dealing with the land. The law states that he who alleges must prove. It is incumbent upon the Plaintiff to prove what he has alleged that he is the rightful owner of the suit land.
8. The court cannot countenance a situation where it has given an order that the suit land belongs to the Plaintiff while there are real owners with the title deed which the plaintiff has neither produced or proven.
9. In one breath the plaintiff states that the land belongs to him and another that the land is registered in the name of one Dama Konde deceased whose legal representative is not in the picture. He also admits that the defendant was in occupation of the suit land when he bought the land. Even though the plaintiff's case is undefended and uncontroverted, this does not mean that the burden of proof is also thrown out of the window.
10. The plaintiff is still under a duty to prove his case of a balance of probabilities as was held in the case of *Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR, where the court stated: -

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it as truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”
11. I have considered the plaint, the evidence and submissions by counsel and come to the conclusion that the plaintiff has not proved his case on a balance of probabilities and is therefore dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

