



REPUBLIC OF KENYA



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**Gichu v Magirori & 5 others (Environment & Land Case 143 of 2014)
[2022] KEELC 15335 (KLR) (13 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 143 OF 2014**

**MD MWANGI, J
DECEMBER 13, 2022**

BETWEEN

GEORGE GICHU PLAINTIFF

AND

ISAACK K. MAGIRORI 1ST DEFENDANT

DICK NYAMETA MOCHACHE 2ND DEFENDANT

WILSON KAMAU MUCHINA 3RD DEFENDANT

PHARMADA INVESTMENTS PLC LTD 4TH DEFENDANT

WILLIAM GAKUO NDEGWA 5TH DEFENDANT

DORCAS WANJIKU MURUTHI 6TH DEFENDANT

JUDGMENT

1. By a Complaint dated February 3, 2014 and amended on the May 23, 2016 and on May 28, 2016, the Plaintiff, George Gichu filed the suit herein seeking the reliefs listed hereunder.
2. The Plaintiff's claim is premised on the ground that on or about June 17, 1992, Pharmada Investments PV Limited, the 4th Defendant herein, by a letter dated June 17, 1992 informed him that the subdivision of LR 6845 was due to be completed by June 1992. The Plaintiff further averred that the said letter confirmed his full payment for the plot No 21 (LR No 17968), hereinafter referred to as 'the suit premises'.
3. The Plaintiff alleged that the 4th Defendant allocated him the Plot No 17968 on April 14, 1993 and thereafter showed him the beacons of the plot through its surveyor known as Mr Wainaina on April 24, 1993.



4. The Plaintiff averred that in the year 2013 while on a routine visit to the suit premises, he was shocked to find out that the 1st Defendant had actually occupied the suit premises without his authority. On enquiry, the 1st Defendant informed him that he had been allocated the said premises by the 2nd and 3rd Defendants who were the Chairman and Secretary of the 4th Defendant company respectively.
5. Later, and after the institution of this suit, the Plaintiff discovered that the 1st Defendant had sold the suit premises to the 5th and 6th Defendants on November 2, 2009.
6. For the foregoing reasons, the Plaintiff sought the following reliefs: -
 - a. Declaration that Plot No LR No 17968 belongs to the Plaintiff having been allocated the said plot by the 4th Defendant and having fully paid the allotment fee.
 - b. Order of eviction against the 5th and 6th Defendants from LR No 17968 Embakasi.
 - c. Costs of this suit.

Responses by the Defendants

7. Vide their Amended Joint Statement of Defence and Counterclaim dated July 12, 2019, the Defendant denied all the allegations leveled against them by the Plaintiff and put him to strict proof of his allegations. The Defendants averred that the Plaintiff was actually a director of the 4th Defendant company and thus legally bound by all acts of the said company.
8. The 1st Defendant while denying being a member of the 4th Defendant company averred that he was offered the suit premises by the 4th Defendant. He purchased the suit premises with the full knowledge of the Plaintiff and later erected on it a permanent house. Upon taking possession of the suit property, he peacefully and openly occupied it until November 2, 2009 when he sold the same for value to the 5th and 6th Defendants who likewise took possession and occupation of the same.
9. The 5th and 6th Defendants on their part assert that they jointly purchased the suit premises from the 1st Defendant on November 2, 2009 and took possession. They have since then openly and peacefully and without any interruption from the Plaintiff or any other person remained in possession of the suit premises. Therefore, the 5th and 6th Defendants claim that in any event they have acquired a good title against the Plaintiff by way of adverse possession.
10. The 2nd and 3rd Defendants on their part stated that the Letter dated June 17, 1992 which the Plaintiff referred to as an allotment letter was actually a General Notice addressed to all members of the company informing them of the subdivision of LR No 17968 which had been purchased by the 4th Defendant for purposes of subdivision and re-sale. It was not specifically addressed to the Plaintiff as he purported.
11. The 4th Defendant clarified that the Plaintiff had indeed been allotted Plot No 21, which was a resultant subdivision of LR No 17968, but with the condition to fully pay for the plot within a reasonable time. The Plaintiff failed to comply and the plot was forfeited by the company and subsequently sold to the 1st Defendant with the Plaintiff's full knowledge as a Director of the company. The 2nd and 3rd Defendant asserted that the Plaintiff never owned the suit premises and his claim is therefore misconceived and baseless in law and in fact.

Defendant's Counterclaim

12. In their counterclaim, the 1st, 5th and 6th Defendants reiterated the contents of their Defence. The 1st Defendant restated that he purchased the suit property from the 4th Defendant in 1993, took possession and erected a house thereon. This was done with the full knowledge and concurrence of the



Plaintiff who was a director of the 4th Defendant company then. The 1st Defendant subsequently sold the suit premises to the 5th and 6th Defendants who are bona fide owners as purchasers for value.

13. In the alternative, the Defendants argued that the 1st Defendant had occupied the suit premises without the permission of the Plaintiff and without any interruption whatsoever for over 16 years and thus had acquired a title by way of adverse possession before selling it to the 5th and 6th Defendants.
14. On their part, the 5th and 6th Defendants stated that they jointly purchased the suit premises already developed with a permanent house thereon from the 1st Defendant. This was without any fraud on their part and they have since then openly and continuously occupied it for a period of over 10 years without any interruption or claim from the Plaintiff.
15. The Defendants therefore pray that the Plaintiff's suit be dismissed with costs and a declaration do issue that the 5th and 6th Defendants are bona fide owners of all that parcel of land known as Plot No 17968 situate within Embakasi Nairobi.

Defence to Counterclaim

16. In his Defence to Counterclaim filed on the November 7, 2019, the Plaintiff denied all the averments contained in the Defendants' counterclaim. The Plaintiff reiterated that he was allocated the suit premises on April 14, 1993 by the 4th Defendant. He denied that the suit premises was developed in 1998 by the 1st Defendant as alleged. He averred that he constantly maintained suit premises through his agents and the 1st Defendant was never in possession for the alleged 16 years. The developments therein, if any by the 5th and 6th Defendant were done without his consent. He prays that Judgement be entered as prayed for in his Further Amended Plaintiff of May 28, 2019 and the Counterclaim be dismissed and the costs of the suit.

Evidence Adduced

The Plaintiff's Case

17. When the case came up for hearing, the Plaintiff in his testimony reiterated the averments contained in his Plaintiff and produced the documents on his list of documents dated February 3, 2014 as Plaintiff's Exhibit 1-3. He also adopted his Witness Statement filed in Court on the February 13, 2014 as his evidence in-chief.
18. The Plaintiff testified that he made payments for the purchase of the suit premise through payroll deductions (check-off) by the Co-operative Society. The Secretary of the 4th Defendant, one Wilson Kamau Muchina (now deceased) used to keep records of the same.
19. In cross-examination by the Defendants' Counsel, the Plaintiff confirmed that he was still a director of the 4th Defendant company. He confirmed that in that capacity he in fact participated in the purchase and subdivision of the block of land out of which the suit premises was excised. He too acknowledged that the Letter dated April 14, 1993, was a general notice sent to all shareholders. It was not a letter specifically addressed to him.
20. Though the Plaintiff alleged that he used to effect payments for the purchase of the plot through payroll deductions which reflected on his payslips, he had not produced any of his payslips as evidence to confirm the said deductions as evidence of payment for the plot. He could not also remember the number of installments he paid nor the amount of monthly deductions he made from his pay slip. He did not exhibit the written authority he had issued to allow the deduction of the monthly installments from his payslip towards the purchase of the plot.



21. He was allegedly not issued with any receipts since the Company was not issuing receipts by then. He however, upon being shown the receipts issued to the 1st Defendant confirmed that they bore the Letter-head of Pharmada Investments PV Limited, the 4th Defendant company. They too had the signature of the Secretary, Wilson Muchina.
22. The Plaintiff stated that his specific claim against the Defendants was fraudulent transfer of the suit premises.

The Defence case

23. It is important to point out that, at the time of hearing this suit, the 3rd Defendant was already deceased and the suit against him had abated.
24. Isaac K Magirori testified as DW1. He adopted his Witness Statement dated July 6, 2016 as his evidence in-chief. He produced the documents on the Defendants' List of Documents which were marked as DE 1-5 in support of the Defendants' case.
25. He further testified that the Plaintiff and himself had worked together as employees of Dawa Pharmaceuticals. He reiterated that he bought the suit property from the 4th Defendant company. He moved in in 1998 and stayed there for 11 years before selling it to the 5th and 6th Defendants.
26. He bought the suit premises for a sum of Kshs 70,000/- and was issued with a receipt by the company. Upon completion of payment of the entire purchase price, he was issued with an ownership certificate.
27. He asserts that he constructed a semi-permanent house and planted a fence around it and that was the state in which he had sold it to the 5th and 6th Defendants.
28. During cross-examination DW1 stated that he was not a director of the 4th Defendant company. He was issued with a Certificate of Ownership of the Plot which he surrendered after selling the plot to the 5th and 6th Defendants. That the receipts he adduced in court confirm that he was paying for a plot in Embakasi. The Plaintiff was the one who was a Director of the company.
29. In re-examination, the witness confirmed that he had produced receipts amounting to Kshs 70,000/- as evidence in support of his case. He also confirmed producing an extract of the register showing the cancellation of his name and substitution with the 5th and 6th Defendant's names.
30. DW2 was Dick Nyamete Mochache, the 2nd Defendant herein. He adopted his Witness Statement recorded on March 29, 2022 as his evidence in-chief. He confirmed that the Plaintiff did not purchase any plot at Embakasi. He never effected any payment for a plot in Embakasi. The policy was that all payments were made in cash and directly to the company which issued receipts in acknowledgement accordingly. There was at the time no check off system at all. In any event, the 4th Defendant was a different entity from the Sacco and no payments could therefore have been made through the Sacco.
31. DW 2 further testified that the 1st Defendant was the rightful owner of the suit premises having bought and paid for it fully. He confirmed that the 1st Defendant paid the purchase price as agreed. He asserted that PE 1 was not an Allotment Letter but rather a general letter to all members. Allotment letters were only issued after completion of the payments. He confirmed that the receipts produced as DE 2, were actually issued by the company to the 1st Defendant. When the 1st Defendant sold the land, he informed the company through its officials and they effected the transfer accordingly as shown on the extract of the register.



32. It was DW 2 evidence in cross-examination that he and the Plaintiff were directors in the company. As directors, they agreed to subdivide the Block and sell the resultant plots. However, he had no minutes to that effect.
33. The witness confirmed that the 1st Defendant made payments for the plot as shown on DE 5. The receipts produced and marked as DE 2, showed that the payment were in respect of a plot in Embakasi though they did not indicate the specific plot. He accused the Plaintiff of forging the Letter adduced as P Ex 1 as it did not exist in the company's records.
34. He confirmed issuing a Certificate of Ownership to the 1st Defendant and later showing him the physical location of the Plot.
35. The final Defence Witness was William Gakuo Ndegwa, the 5th Defendant, who testified as DW 3. He also testified on behalf of the 6th Defendant. He adopted his witness statement dated March 14, 2022 as his evidence in-chief. He further stated that he purchased the suit property from the 1st Defendant in the presence of the deceased Secretary of the Company. He paid the purchase price as agreed and the transfer was effected to them by the 4th Defendant. He therefore prays for a declaration that they are the rightful owners of the suit property.
36. In cross-examination, DW3 confirmed that he had produced the Sale Agreement and receipts confirming payment of the purchase price. He stated that he was issued with a Certificate of Ownership for the suit property as well as the Transfer.
37. In re-examination, DW 3 stated that they were yet to be issued with a Title Deed although they have paid the processing fees.

Court's direction

38. Upon the conclusion of the hearing, the court directed parties to file written submissions. Both parties complied. The Plaintiffs submissions are dated July 22, 2022 whereas the joint submissions by the Defendants are dated August 1, 2022. The court has had the opportunity to read the submissions.

Issues for Determination

39. Considering the pleadings filed in this case, the evidence adduced and the respective submissions of the parties, the court is of the view that the issues for determination in this case are; -
 - A. Who is the rightful owner of the suit property?
 - B. Which reliefs should the court issue

Analysis and Determination

A. Who is the rightful owner of the suit property?

40. Justice Onguto (as he then was) in the case of *Danson Kimani Gacina & another v Embakasi Ranching Company Ltd [2014] eKLR* stated that

' The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities



but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.'

41. It is settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

' Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'

42. Further, Section 108 of the Act states thus:

' The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'

43. Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

' 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 that fact shall lie on any particular person.'

44. In the instant case, the burden of proof lay on the Plaintiff who claimed to be the rightful owner of the suit premises. His claim was that he purchased it from the 4th Defendant company. It was his evidence that on June 17, 1992, Pharmada Investments PV Limited, the 4th Defendant herein, wrote to him informing him that the subdivision of the parcel of land at Embakasi, LR 6845 was in progress and that the same was to be completed by end of June 1992. The said letter according to the Plaintiff confirmed full payment of Plot No 21 (LR No 17968) by the Plaintiff. It was his evidence that on April 14, 1993 after he submitted a copy of his National Identity Card he was shown the beacons of his Plot by the 4th Defendant's Surveyor.

45. DW 2 testified that the Letter dated June 17, 1992 was a General Notice to members of the company informing them of the subdivision of LR No 17968 which had been purchased by the 4th Defendant for purposes of subdivision and re-sale to its members. Apparently, the Plaintiff had been allotted Plot No 21, a resultant subdivision of LR No 17968 with conditions to fully pay for the plot within reasonable time. The Plaintiff failed to comply and the plot was subsequently forfeited by the company and sold to the 1st Defendant with the Plaintiff's full knowledge as a Director. The 2nd and 3rd Defendant in the statement of Defence asserted that the Plaintiff had never owned the suit and his claim is baseless.

46. It was incumbent upon the Plaintiff to prove that he indeed paid for the said allotment. Although he alleged to have paid through a Check off system, the Plaintiff did not produce any of his Pay slips or any form of evidence to prove the alleged deductions. He could not even recall the amount of monthly deductions or the number of installments he made. His, was but a mere allegation without any back up in form of documentary evidence or even oral evidence of a former co-employee or co-director. He did not have any receipts to evidence the alleged payments unlike the 1st Defendant.

47. The 1st Defendant produced receipts confirming payment of the purchase price. The Plaintiff in cross-examination did confirm that the receipts were in deed issued by the 4th Defendant company. The Defendants even adduced the extract of the 4th Defendant's register confirming the 1st Defendant as the owner of the suit property.



48. Although the Plaintiff alleged fraud against the Defendants, he did not demonstrate any fraud or misrepresentation against any of the Defendants to the required standards. No particulars were pleaded in the further amended plaint by the Plaintiff.
49. The 5th and the 6th Defendants on their part stated that they purchased the suit property from the 1st Defendant in the presence of the 3rd Defendant who was the Secretary of the company - now, deceased. They paid the purchase price as agreed and the transfer was effected in their favour by the 4th Defendant. They produced the Sale Agreement which was duly executed, a transfer agreement from the 1st Defendant and receipts confirming payment of the purchase price. They therefore prayed, in their counterclaim, for a declaration that they were the rightful owners of the suit property.
50. Evidence as adduced by DW 2 during his testimony confirms that in deed the transfer between the 1st Defendant on one side and the 5th and 6th Defendant was effected in their records. According to their records, the 5th and 6th Defendants are the rightful owners of the suit property.
51. Without proof of any fraud on the part of the 1st Defendant, the court is unable to fault the 5th and 6th Defendants' ownership of the suit property. The 1st Defendant passed a good title to the 5th and 6th Defendants who were bona fide purchasers of the suit property.
52. Having carefully considered the pleadings by the parties, and the evidence adduced, the Court finds and holds that the Plaintiff has failed to prove his case on a balance of probabilities and therefore his claim is dismissed entirely. On the other hand, the court finds the Counterclaim by the 5th and 6th Defendant merited.
53. Consequently, the court makes the following orders; -
 - a. The Plaintiff's suit be and is hereby dismissed with costs.
 - b. The 5th and 6th Defendants' counter-claim is hereby allowed with costs.
 - c. A Declaration be and is hereby issued that the 5th and 6th Defendants are bonafide owners of all that parcel of land known as Plot No 17968 situate within Embakasi Nairobi.
 - d. That Plaintiff shall bear the costs of both the suit and the Counterclaim.

It is so ordered.

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

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Nyachoti for the Defendants.

No appearance for the Plaintiff.

Court Assistant: Hilda/Yvette.

M.D. MWANGI

JUDGE

