



REPUBLIC OF KENYA



**Kinyua v Rukua & 3 others (Environment & Land Case 724 of 2016)
[2024] KEELC 618 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 724 OF 2016
LN MBUGUA, J
FEBRUARY 8, 2024**

BETWEEN

MICHAEL KINYUA PLAINTIFF

AND

SIMON CHEGE RUKUA 1ST DEFENDANT

WALACE MWARAGE 2ND DEFENDANT

**SALIM TUKUTU MAEMA (SUED AS OFFICERS OF RUAI CHOKAA
HOUSING SCHEME) 3RD DEFENDANT**

JAMES NYAGA 4TH DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by a plaint dated 29.6.2016 and amended on 28.2.2018. It is his case that on 3.10.2009, he purchased Plot No G3-05 within Ruai Chokaa Housing Scheme from Mrs Agnes Kagure Karumba who was the first allottee of the said plot at a consideration of Kshs. 140,000/=.
2. He contended that officials of the Housing Scheme subsequently effected an internal transfer of the suit property into his name but in 2010, the 4th defendant trespassed onto the suit property and erected structures thereon.
3. The plaintiff seeks the following orders:
 - a. A declaration that the plaintiff is the bonafide owner of Plot No G 3-05 situate in Ruai Chokaa Housing Scheme.
 - b. A permanent injunction to restrain the Defendants or their agents from interfering, trespassing, alienating or in any way dealing with Plot No. G3 situate in Ruai Chokaa Housing Scheme.



- c. An order against the 4th Defendant for mesne profits to be quantified during the hearing for illegal detainer of property from 2010 until payment in full.
 - d. An order for compensation of the plaintiff of the amounts to be quantified during the hearing of the suit spent in the follow up of this matter from 2010.
 - e. Any other relief this Honourable court shall deem fit to grant.
4. Initially, the case had proceeded to hearing as an undefended cause, culminating in the Judgement delivered on 15.1.2020 where prayer (b) in the plaint was allowed.
 5. Subsequently, the said judgment was set aside on 8.12.2021 upon the application by the 1st, 3rd and 4th Defendants, of which the said applicants were granted leave to file a defence out of time. They filed a joint statement of defence dated 15.12.2021, where they denied allegations levelled against them by the Plaintiff. They aver that Plot No. G3-05 is a subdivision of LR No. 11531/8 which has since been subdivided into more than 1500 plots. That Agnes Kagure was allotted Plot No. G3-05 by Ruai Chokaa Housing Scheme on condition that she would pay Ksh.450,000/= within 30 days, but she failed to pay thus the said plot automatically reverted to Chokaa Ruai Housing Scheme which allotted the plot to the 4th Defendant and issued him with a certificate of ownership on 17.7.2009.
 6. During the trial, the case of the Plaintiff was advanced by himself as PW1. He adopted his witness statement dated 12.6.2016 as well as his supporting affidavit dated 29.6.2016 as his evidence, and he produced the ownership certificate and the sale agreement as his exhibits.
 7. PW1's testimony is that he purchased the suit plot from Agnes Kagure Karumba who was the 1st allottee from Ruai Chokaa Housing Scheme. Subsequently, she transferred ownership of the said plot to him through the offices of the said housing scheme whose chair is the 1st Defendant while the 3rd Defendant is its secretary.
 8. That the Chairman (1st Defendant) issued him with a certificate of ownership and charged him Ksh.20,000/= and also demanded Ksh.10,000/= for issuance of a title deed which he paid through M-pesa but he was not issued with receipts.
 9. That he fenced the plot with iron sheets and wooden poles but the fence was brought down by the 4th Defendant who trespassed thereon and dug trenches in readiness for construction.
 10. PW1 also states that his efforts to recover the suit property through the Housing Scheme's Office, the Police, and the Local Administration did not bear any fruit.
 11. In cross – examination, PW1 stated that the subject property was being allocated by Ruai Chokaa Housing Scheme which had the mandate to sell the plots and issue certificates. He further stated that after purchasing the suit plot from Agnes Karumba, her allotment letter was destroyed by the 1st Defendant in his presence, he was then issued with a certificate of ownership. He is not aware of any payments made by the said Agnes to the housing scheme towards the plot.
 12. PW1 also stated that he paid Agnes Ksh.140,000/= in cash and was not issued with a receipt. He revealed that the transaction was conducted in a Hotel ostensibly because the chairman wanted to 'eat' the money alone without the officials of the housing scheme.
 13. He also stated that he was in possession of the suit plot for about one or one and a half years, then the plot was taken away. He added that when he was filing this suit, the plot was empty but a building has now been erected.



14. The case for the 1st, 3rd and 4th Defendants was advanced by DW1, the 4th Defendant. He adopted his witness statement dated 15.12.2021 and 8 documents in his list of documents of even date as his evidence. He contends that he purchased the suit plot at a cost of Ksh.430,000/= in line with the conditions of allotment offer, and was issued with a receipt as well as a certificate dated 17.7.2009. That immediately after purchase, he developed the plot with a one story commercial building containing 3 shops fetching about Ksh.70,000/- per month.
15. DW1 was not cross-examined since the Plaintiff failed to appear on the date fixed for defence hearing.
16. The Plaintiff did not file submissions.
17. The 1st, 3rd and 4th Defendants filed submissions dated 18.12.2023 where they contend that the Plaintiff failed to dispense the burden of prove as provided under Section 107, 109 and 112 of the *Evidence Act*. To this end, it was argued that the plaintiff failed to prove that Agnes Kagure whom he claims under was the proprietor of the suit plot in light of Defendants' evidence that the said plot had been allocated to the 4th Defendant after the said Kagure who was the 1st allottee failed to meet the conditions set for allocation.
18. It is also argued that to the extent that the suit property did not vest in the name of Agnes Kagure, she could not sell what she did not have. The case of *Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others* [2015] eKLR was relied upon.
19. It is also submitted that the Plaintiff did not produce evidence of purchase and that by the time he alleges to have purchased the suit property, the 4th Defendant had already paid the full purchase price to Ruai Chokaa Housing Scheme, he had been issued with a certificate of ownership and he had taken up possession of the said plot.
20. The case of *Gitwany Investment Limited v Tajmall Limited & 2 others* [2006] eKLR is relied upon to submit that where there are equals of equities, the 1st in time prevails and since the 4th Defendant paid for the suit plot 1st, and his certificate of ownership was issued on 17.7.2009 while the Plaintiffs was issued on 1.2.2010, his ownership prevails.

Determination

21. I have carefully considered the pleadings, the evidence and submissions proffered herein. The issue falling for determination is whether the plaintiff has proved his claim of ownership over the suit plot and whether he is entitled to the prayers sought in the plaint.
22. As rightly submitted by the 1st, 3rd and 4th defendants, he who alleges bears the burden of proving his claim as set out under Section 107, 109 and 112 of the *Evidence Act*. Also see - *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR. In *Samson S. Maitai & another v. African Safari Club Limited & Another* [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”
23. To prove his claim of ownership to the suit plot, the plaintiff produced a sale agreement between him and the said Agnes Kagure Karumba dated 3.10.2009 and a certificate of ownership of the plot issued by the housing scheme on 1.2.2010. Since his ownership is pegged on Agnes Karumba's alleged ownership of the said plot, then it was incumbent upon him to demonstrate that indeed Agnes possessed rights and or interests in the suit plot capable of transferring the same to him.



24. The plaintiff however failed to establish that Agnes owned the suit plot. He did not have a certificate of ownership, letter of allotment or any other document issued to Agnes by the housing scheme. Further, he could not prove that the said Agnes paid any consideration to the housing scheme. To this end, the doctrine invoked by the 1st, 3rd and 4th defendants of “*Nemo dat Quod non halet*” which stipulates that no one can give that which one does not have is applicable herein.
25. On the other hand, the 1st, 3rd and 4th Defendants proffered a plausible defence that the suit plot was hived from a larger parcel known as LR No. 11531/8, owned by one Rabir Krishan Kechahard. That Ruai Chokaa Housing Scheme was responsible for subdividing the plots in that land. That the 4th defendant paid Ksh.450,000/= for the land and that is how he came to occupy the suit land.
26. What I discern is that PW1 was a purchaser who had no care for due diligence. He did not visit the Housing Scheme’s offices before purchase to establish the ownership status of the plot and as a consequence, he purchased a plot that was not available for allocation/sale. In his own words, he was making payments to the alleged chairman in a hotel, yet he knew that choka housing scheme had an office. Further, there is no indication as to whether the suit plot was clearly demarcated on the ground.
27. Of great concern is the fact that the plaintiff did not demonstrate the capacity in which Ruai Chokaa Housing scheme was allocating and subdividing the land. Did they own the land?. In paragraph 3, 4 and 5 of their defence, the 1st, 3rd and 4th defendants have stated that the larger parcel of land is registered in the name of one RanbirKrishen Kecharhand Kent. Though no evidence was adduced to support this averment, the defendants have given a sneak preview to the murky nature of the ownership claims in Choka area.
28. For now, it is sufficient to state that even entity known as Choka Housing Scheme had no ownership rights to transmit to Agnes Kagure and then to the plaintiff. The Plaintiff failed to conduct due diligence to establish the root of the suit plot and he is therefore not an innocent purchaser, See- [Chemey Investment Limited v Attorney General & 2 others](#) [2018] eKLR.
29. The defendants did not lodge a counterclaim, hence the court is unable to analyze their rights and interests in the suit plot.
30. In light of the foregoing findings, the claim of the plaintiff is hereby dismissed, but each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Court Assistant: Cheronno

