



**Ngugi v Ngige; County Government of Olkejuado /Kajiado (Third party) (Environment & Land Case 859 of 2013) [2023] KEELC 20794 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20794 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 859 OF 2013  
LC KOMINGOI, J  
OCTOBER 12, 2023**

**BETWEEN**

**HANNAH WANJIKU NGUGI ..... PLAINTIFF**

**AND**

**LUCY NYAKINYUA NGIGE ..... DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF OLKEJUADO /KAJIADO ..... THIRD PARTY**

**JUDGMENT**

1. By a Plaint dated, 17<sup>th</sup> July, 2013 the plaintiff seeks Judgement against the Defendant as follows;
  1. A declaration that the Plaintiff is the lawful owner of plot No.118/Business Ongata Rongai Shopping Centre
  2. A permanent injunction restraining the Defendant by herself, her servants or agents from entering, remaining in, construction on or utilizing Plot. No.118 Business Ongata Rongai Shopping Centre
  3. Costs.
2. The Plaintiffs' claim is that she is the lawful owner of Plot No.118/ Business Ongata Rongai Trading Centre. She asserts that the Defendant has unlawfully entered and trespassed on it by erecting a perimeter fence and constructing temporary structures. In addition, she has also deposited construction material with a view of constructing permanent structures. This is notwithstanding that demand and notice of intention to sue had been issued against her.



### **The Defendant's case**

3. On 14<sup>th</sup> July, 2016, the Defendant filed a Statement of Defence dated 11<sup>th</sup> July, 2016 praying that the Plaintiff suit be dismissed with costs. She pleads that her late husband James Ngige, is the registered owner of Plot 636 "B" Residential which was allocated to him by the 3<sup>rd</sup> Party. She further alleges that she has always paid the land rates promptly. Given her occupation of the Plot has not been interrupted, she has guaranteed proprietary interest over the plot. She contends that during the hearing of this suit, she will raise a preliminary objection that the suit is bad in law for misjoinder of party.

### **Reply to defence and counterclaim**

4. On 26<sup>th</sup> July, 2016, the Plaintiff filed a reply to the Defendant defence dated 21<sup>st</sup> July, 2016 alleging that the Defendant invaded Plot 118 claiming it was plot 636 "B". Consequently, the unlawful and fraudulent payment of rents to the third party cannot confer any proprietary rights over the plot. She maintains that the Defendant has properly been enjoyed and therefore her defence must be dismissed with costs and judgement entered as prayer.
5. Even though the 3<sup>rd</sup> Party did not file any pleadings in response to the Plaintiff claims, it actively participated in the proceedings.

### **Evidence of the Plaintiff.**

6. PW1- Wesley Sankuyan Risancho, Kajiado County Government Assistant Surveyor produced a site visit report dated 5/12/2013 prepared after concluding a site visit on 4/12/2013. The site visit was conducted pursuant to directions issued by the court on 2/10/2013.
7. During cross examination, he acknowledged that he relied on the map and development plan to prepare the report. It was his evidence that the Plaintiff and James Njige were issued with allotment letters for plots 118 and 636 and that they even paid their respective rates. By his own admission, he swore that the county government issued allotment letters for non-existence land. New numbers were also allocated to the plots when the county government conducted validation exercise between 2016-2017. According to his testimony, the validation report prepared by the county planner was not filed in court because there was no letter demanding that it be filed. He explained that during the site visit, they found out that the 1<sup>st</sup> Defendant had constructed on his plot while the Plaintiff plot did not have any structures. He however stated that plot 636 did not exist on the ground neither was the Plaintiff present during the exercise.
8. When PW1 was re-examined, he stated that the county government informed all land owners through a newspaper that it would be conducting a validation exercise. It was also his evidence that even though the Plaintiff arrived late for the site visit, she found out that the Defendant had already stood on her plot.
9. PW2- Hannah Wanjiku Ngugi informed court that at the time she was issued with an allotment dated 20/05/2017, there was already a land dispute before court. Her evidence during cross examination was that at the time the property was transferred to her on 1992 upon purchase, the Defendant was not in occupation. It was not until 2012, when she found out that the Defendant was in plot 118. PW2 sustained the argument that she was shown her plot both physically and on the map. Through her own admission, she testified that she was not present nor represented when the validation exercise was being undertaken.
10. Upon being re-examined, she restated that she was shown her plot by PW1 and that prior to the year 2012, the Plot had not yet been encroached by the Defendant. PW2 also informed the court that she



sued Mr. Mugambi in 4646 of 1996 after he encroached on her plot. She was informed by the 3<sup>rd</sup> Party that she would only be issued with an allotment letter once the outcome of this suit was made.

### **Evidence of the Defendants.**

11. DW1, Lucy Nyakinyua Ngige testified that her late husband was allocated his plot forty two (42) years ago. Even though she would not recall when they constructed temporary structures on the dispute plot, she admitted that she was issued with a court order to stopping her from undertaking any activities after she erected a permanent house. She further explained that during the validation exercise, plot 636 “B”/ Res was validated as A122. It was also her testimony that even though she was also present during the site visit, the surveyor did not have a map during the process. According to her testimony, given the Plaintiff had never claimed ownership of the plot which she occupied nor even evicted her, her suit ought to be dismissed with costs.
12. When she was cross examined, she stated that they were physically allocated their plots by the County government by standing on their respective parcels. Nevertheless, the plaintiff was not present during the validation process and she did not disclose that there existed a dispute over the plot. According to her, her failure to disclose the existence of this land was because the plot belonged to her. Despite denying ever obtaining the allotment letter fraudulently, she acknowledged that she did not apply for change of user of the plot.
13. During re-examination, she reiterated that before she was issued with the allotment, she physically stood on her plot. During this time, the Plaintiff was absent. In addition, she stated that she did not know what happened to plots of persons who were absent during the validation exercise. DW1 stated that she was never asked by the surveyor whether there existed any dispute before court in respect of her plot. Bearing in mind she paid all the land rates to the county governments, she denied ever obtaining the allotment letter fraudulently.
14. At The close of the oral submissions parties tendered final written submissions.

### **The Plaintiff’s submissions**

15. They are dated 11<sup>th</sup> October 2022. They raise four (4) issues for determinations;
  - a. Whether the Plaintiff is the lawful owner of Plot. 118/Business Ongata Rongai?
  - b. Whether the Defendant herein has unlawfully encroached onto, entered and trespassed into Plot 118/Business Ongata Rongai?
  - c. Whether Plot No.118/Business Ongata Rongai and Plot 638 “B” Res refer to one and the same plot.
  - d. Whether the Plaintiff is entitled to the prayers sought in the Plaintiff?
16. Counsel reiterated the plaintiff’s evidence. Further that the county surveyor confirmed that the plot 118 business belonged to the plaintiff.

It is also submitted that the plaintiff produced a site plan which authenticated the plot as plot 118 business.
17. It is further submitted that the alleged validation exercise mentioned by the defendant was conducted without considering the plots with disputes and that the issue of double allocation does not arise.

He prays that the plaintiff be found to have proved her case on a to the required standard.



### **The Defendant's submissions**

18. The Defendant counsel filed submission dated 8<sup>th</sup> November, 2022 reiterating the parties' case and evidence presented during the hearing. Through the submission, the court is beseeched to disregard the site visit report because it was frustrated by PW1. This is because he admitted in his testimony that he did avail the county survey map, which sought to determine the physical location of the plot as was established in *Kihara Kiunjiri v Harrison Macharia Waitthaka & 2 Others* (2021) eKLR and *Frankline Ngira Osenoh v Elphas Barasa Okhonjo* (2022) eKLR.
19. Section 109 of the *Evidence Act* and court decision of *Evans Nyakwana v Cleophas Bwana Onyaro* (2015) eKLR are put forward to argue that the Plaintiff did not adduce any credible evidence to prove the 1<sup>st</sup> Defendant occupied and possessed Plot 188. Considering the Plaintiff has not proven her case to the required standard, the court is implored to dismiss her suit with costs.

### **Analysis and determination**

20. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are;
  - i. Whether the plaintiff is the lawful owner of Plot 118/Business Ongata Rongai?
  - ii. Whether the Defendant herein has unlawfully encroached onto, entered and trespassed into Plot 118/Business Ongata Rongai?
  - iii. Whether Plot No.118/Business Ongata Rongai and Plot 638 "B" Res refer to one and the same plot.
  - iv. Whether the Plaintiff is entitled to the prayers sought in the Plaintiff?
  - v. Who should bear costs of the suit?
21. The burden is on the plaintiff prove her case on a balance of probabilities as stipulated in Section 107 of the *Evidence Act* (CAP. 80 Laws of Kenya) which provides as follows;
  - " 107. Burden of proof.
    - (1) Whoever 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.
    - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
22. The Supreme Court in *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR, stated as follows with regards to discharge of evidentiary proof
  - " 132. Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout a trial<sup>52</sup> with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting<sup>53</sup> and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.



133. It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce factual ‘evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law. We shall revert to the issue of the shifting of the burden of proof later in this judgment.”
23. The Plaintiff claims she is the registered proprietor of Plot 118/B Ongata Rongai Shopping Centre which was allocated to her by the 3<sup>rd</sup> Party. To support her case, she produced various documents which trace the origin of plot 118/B allotment letter to her. According to the documents, plot 118/B was transferred to Paul Njoroge Wamithu and Johnson Kinuthia Ngugi on 19<sup>th</sup> April,1985. The Plot was sold to the Plaintiff on 24<sup>th</sup> August,1991 by Paul Njoroge Wamitho and Johnson Kinuthia Ngugi at Ksh.107,750/= through a duly executed agreement. Transfer was subsequently effected in her favor on 10<sup>th</sup> January,1992. This was after Paul Njoroge Wamitho and Johnson Kinuthia wrote a letter dated 10<sup>th</sup> January,1992 to the 3<sup>rd</sup> party requesting that transfer be effected. Through the letter, they also recognized and admitted that the Plaintiff was now the new owner of plot 118/Afterwards, the PS for Ministry of Local government was informed by the 3<sup>rd</sup> Party through its letter dated 27<sup>th</sup> September,2007 that they did no objection to the lease being issued to the Plaintiff. As a result, the 3<sup>rd</sup> Party granted approval that the Plaintiff be issued with a title for plot 118/B on 31<sup>st</sup> October,2006.
24. The Plaintiff faults the Defendant for encroaching on plot 118/B by claiming it belongs to her late husband. In her defence, the Defendant denies ever trespassing on Plot 118/B and maintains that she occupies Plot 636/B. It was her case that plot 636/B was allocated to James Ngige, her late husband on 19<sup>th</sup> September,1979. She also produced an allotment letter dated 20<sup>th</sup> May,2017 issued James Ngige after plot 636/B was validated A122. This according to the Defendant is a clear indication that plot 118/B and 636/B are different.
25. It is not in dispute that both the Plaintiff and James Ngige were each issued with allotment letters for their plots and even paid rates. PW1 admitted in his testament the 3<sup>rd</sup> Party issued them with allotment letters and that they also paid the requisite rates.
26. On 2<sup>nd</sup> October,2013, this court issued a consent order directing the 3<sup>rd</sup> Party county surveyor to conduct a site visit in order to ascertain the physical location of the plots and whether there was any encroachment. The order further stated that parties were at liberty to attend the site visit. The Surveyor was further ordered to file a report before this court. In compliance with the directive, a site visit report dated 5<sup>th</sup> December,2013 was filed. According to the report, plot 636/B would rather be traced in the county plans, map nor during the visit. It was also discovered that the Defendant dug and laid foundation for construction of iron sheet structures on plot 118/B.
27. On 9/12/2021, this court issued an order that site visit be conducted in presence of the parties and 3<sup>rd</sup> Party county planner and surveyor and prepare a report. The site visit would be undertaken by its Deputy Registrar. After conducting the site visit in presence of both parties’ counsel and Mr. Wesley Risancho, the 3<sup>rd</sup> Party Surveyor, the Deputy Registrar, filed a report which stated that its findings were in conformity with the site visit report dated 4<sup>th</sup> December,2013.



28. The court is of the view that based on the findings of the two site reports, it is clear that plot 636/B does not exist. It is also clear that the Defendant encroached on plot 118/B. In addition, even if the court were to further consider on the Defendant's claim over plot 636/B, the question that arises is in what capacity would the Defendant be asserting her claim. This is because she has not placed any documents before this court to show in what capacity she is asserting her rights on behalf of James Ngige whom she claims is her husband.
29. In conclusion if find that the plaintiff has proved her case as against the defendant on a balance of probabilities.
30. Accordingly judgement is entered for the plaintiff as against the defendant as follows:
- a. That a declaration is hereby issued that the Plaintiff is the lawful owner of plot No.118/ Business Ongata Rongai Shopping Centre
  - b. That a permanent injunction is hereby restraining the Defendant by herself, her servants or agents from entering, remaining in, construction on or utilizing Plot. No.118 Business Ongata Rongai Shopping Centre.
  - c. That Costs of the suit to be borne by the Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L.KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr.Ndumu Kimani for the Plaintiff.

N/A for the Defendant.

Court Assistant – Mutisya.

