



**Ogutu & another (Suing as Legal Representative of the Estate of Edward Kwanya Julu - Deceased) v Rollo (Environment & Land Case E012 of 2021) [2023] KEELC 20527 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20527 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E012 OF 2021**

**EK WABWOTO, J  
OCTOBER 5, 2023**

**BETWEEN**

**MARY ATIENO OGUTU ..... 1<sup>ST</sup> PLAINTIFF  
ERASTUS WERE JULU ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF EDWARD  
KWANYA JULU - DECEASED**

**AND**

**ARTURO GIOVANNI ROLLO ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs brought this suit through a plaint dated December 11, 2020. They sought the following orders against the defendant.
  - a. An order directing the Defendant to complete the sale of L.R. Number Nairobi Block/110/936 to the 1<sup>st</sup> plaintiff Mary Atieno Ogutu in place of the Late Edward Okwanya Julu.
  - b. In the alternative and without prejudice to (a), an order that the Deputy Registrar of the High Court be directed to execute the transfer of L.R. No. Nairobi Block/110/936 to the 1<sup>st</sup> plaintiff Mary Atieno Ogutu in place of the Late Edward Okwanya Julu on behalf of the defendant.
  - c. Costs of this suit.
2. The Plaintiffs' case was that on the January 12, 1995, the late Mr. Edward Okwanya Julu and the defendant entered into a Sale Agreement for a parcel of land known as land reference number Nairobi



- Block/110/936, with a purchase price of KShs. 550,000/= . Mr. Julu paid the full amount, and the Defendant received it as payment.
3. It was averred that upon payment, Mr. Julu and his family took possession of the property, intending to build a home for their family once the sale was finalized. However, before the property transfer could be executed in Mr. Julu's name, the defendant went missing, and all efforts to trace him have been in vain. Tragically, during the search for the defendant, Mr. Julu passed away before the matter could be resolved.
  4. Following Mr. Julu's passing, the plaintiffs filed Succession Case 1280 of 1997, and the court granted them Letters of Administration over his estate. The court's directive required the plaintiffs, as administrators, to dispose of the estate based on the Certificate of Confirmation of Grant dated March 17, 2003.
  5. Despite the court's orders, the Administrators have faced challenges in fully effecting the property's transfer into the name of the Administrator. The 1<sup>st</sup> plaintiff and her children have managed to build a family home on half of the property and have peacefully resided there for more than twenty-four (24) years without any claim from the defendant or his representatives.
  6. Every effort to trace the defendant by the plaintiffs, including engaging a tracking agency, has yielded no results, leaving the matter unresolved.
  7. At the hearing, Mary Atieno Ogutu testified as P.W.1 and the sole plaintiffs witness in the suit. She adopted her witness statement dated December 11, 2020 and a bundle of documents equally dated December 11, 2020 as her evidence in chief.
  8. The Plaintiffs also filed written submissions dated July 31, 2023 through the law firm of Meru & Njagi Advocates which reiterated the Plaintiff's case and urged the court to grant the prayers sought in the plaint.
  9. I have considered the pleadings, the evidence adduced and submissions before the court. This suit is undefended. The main issue for consideration is whether the Plaintiffs have proved their case to the required standard to warrant the grant of the prayers sought.
  10. Although the suit was undefended, the Plaintiffs have a duty to formally prove their case on a balance of probabilities as is required by law.
  11. In the case of *Kirugi and another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;  

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
  12. Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the court held that;  

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
  13. The court has considered the evidence tendered in this case, the plaintiffs have presented evidence to this court affirming the existence of a valid sale agreement (P.Exhibit 4), payment receipt (Exhibit 5) and diligent effort to locate the defendant through a reputable agency (P. Exhibit 6) which regrettable



yielded no results. The advocate representing Thome Farmers No.1 Ltd, Dorcas Nanjero during the transaction, has issued a statement confirming the authenticity of the documents held by the Plaintiffs.

14. In the absence of the defence and or controverting evidence, the court is satisfied that the plaintiffs have proved their case on a balance of probabilities in so far as the beneficial ownership of the property is concerned and they are entitled to the reliefs sought.
15. In light of the foregoing, the court makes the following disposal orders in the suit:
  - a. An Order is hereby issued directing the Defendant to complete the sale of L.R. Number Nairobi Block/110/936 to the 1<sup>st</sup> plaintiff Mary Atieno Ogutu in place of the Late Edward Okwanya Julo.
  - b. Failure to complete the above within 45 days, the Deputy Registrar of this Court is hereby directed to execute the transfer of L.R. Number Nairobi Block/110/936 to the 1<sup>st</sup> plaintiff Mary Atieno Ogutu in place of the Late Edward Okwanya Julo on behalf of the defendant.
  - c. Each party to bear own costs of the suit.

Judgment accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.**

**E. K. WABWOTO**

**JUDGE**

**In the virtual presence of:**

Mr. Karanja for the Plaintiffs.

No appearance for the Defendant.

Court Assistant: Caroline Nafuna.

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