



**Nyingi v Thuita (Environment & Land Case 214 of 2013)
[2023] KEELC 21186 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 214 OF 2013**

JO OLOLA, J

NOVEMBER 2, 2023

BETWEEN

JAMES GATIBA NYINGI PLAINTIFF

AND

HELLEN WARUKIRA THUITA DEFENDANT

JUDGMENT

Background

1. By his Complaint dated and filed herein on 30th October 2013, as amended on 2nd December 2013, James Gatiba Nyingi (the Plaintiff) prays for Judgment against the Defendant for:
 - (a) A declaration that the suit land is the lawful property of the Plaintiff;
 - (b) An order that the Defendant do give vacant possession of the suit premises (and) in default the Plaintiff be at liberty to evict her with the supervision of the OCS of the area Police Station; and
 - (c) Costs of this suit.
2. Those prayers arise from the Plaintiff's contention that at all times material, he was the registered owner of Plot No. 35, Nyaribo having purchased the same from Nanga Central Marketing Services Limited. The Plaintiff accuses the Defendant of trespassing upon the said plot and proceeding to put up structures thereon without any colour of right and/or the Plaintiff's permission or authority.
3. But in her Statement of Defence dated 20th November 2013, Hellen Warukira Thuita (the Defendant) denies that she has trespassed onto the Plaintiff's parcel of land as alleged or at all. It is the Defendant's case that she did purchase the suit property on 3rd October, 2011 and that she was immediately granted vacant possession of the same.



4. The Defendant asserts that she followed all the necessary and requisite procedures to effectuate the transfer of the property into her name and that she has since substantively developed the same.

The Plaintiff's Case

5. The Plaintiff (PW1) testified as the sole witness at the trial which proceeded before my predecessor the Honourable Justice L. N. Waithaka. PW1 told the Court that he bought Plot No. 35 from Nanga Central Marketing Limited on 16th April, 1999. He was thereafter issued with a clearance certificate by the company after paying the requisite fees. He was also issued with a map showing the location of the plot he had purchased.
6. PW1 further told the Court that immediately after the purchase, he took possession of the land and cultivated beans thereon for about 2 years. Having not used the land for some time, he returned in the year 2013 only to find that the Defendant had constructed houses thereon. PW1 told the Court he reported the incident to the area Chief who in turn referred him to Kiganjo Police Station.
7. PW1 further told the Court that when he approached the Director of the said Nanga Central Marketing Limited who had sold him the land, he was advised that the company was no longer in existence and it was then he decided to sue the person who had constructed on the land.

The Defence Case

8. Despite her filing a Statement of Defence herein dated 20th November 2013, the Defendant did not testify at the trial.

Analysis and Determination

9. I have carefully perused and considered the pleadings filed herein, the testimony of the Plaintiff as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocate representing the Defendant. The Plaintiff who was acting in person did not file any submissions.
10. By his Plaint dated and filed on 30th October 2018, the Plaintiff has urged this Court to declare that Plot No. 35 Nyaribo is his lawful property. In addition, the Plaintiff urges the Court to direct the Defendant to grant him vacant possession and that in default the Plaintiff be at liberty to evict the Defendant from the suit land with the supervision of the Police.
11. It was the Plaintiff's case that he had purchased the said Plot No. 35 Nyaribo from the previous owners known as Nanga Central Marketing Limited. In support of that position, the Plaintiff produced a Sale Agreement dated 16th April, 1999 indicating that he paid a sum of Kshs.35,000/-.
12. It was further the Plaintiff's case that the Company issued him with a Plot Clearance Certificate for the land on 30th January, 2001 as well as a Map showing the exact location of the plot of land. He told the Court that he immediately took possession of the land and used the same to plant beans for about two (2) years.
13. The Plaintiff told the Court that he did not utilize the land for quite some time. In 2013 when he went to check on the same, he found the Defendant had built some houses thereon. The Plaintiff accuses the Defendant of trespassing onto the property and constructing buildings thereon without his authority or permission.
14. In her Written Statement of Defence, the Defendant did not deny that she had constructed buildings on the said Plot No. 35, Nyaribo. It was her case that she had purchased the same property on 3rd



October, 2011 and that she had been immediately granted possession and hence the developments she has carried on on the land.

15. From the material placed before the Court, it was apparent that the suit property was an unregistered parcel of land. While the Defendant did not state in her pleadings the vendor from whom she had purchased the property, her submissions before the Court appear to suggest that she had a better title to the land on the basis that she bought the same from the same vendor as the Plaintiff and that while the Plaintiff was not put in possession, she had been put in exclusive possession thereof and had subsequently developed the same.
16. As the Court stated in *Danson Kimani & Another -vs- Embakasi Ranching Company Limited* (2014) eKLR:

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the former is found in documentary evidence which leads to the root of the 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 he is the one entitled to the property.”

17. Addressing a similar issue in *Caroline Awinja Ochieng & Another -vs- Jane Anne Mbithe Gitau & 2 Others* (2015 eKLR, the Court observed as follows:

“... tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wadding through documentary history ...”

It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good deed compilation of the documents or relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically “the essential indicia of title to unregistered land” [per (1991) Nourse L J in *Sen -vs- Headley* (1991) Ch. 425 at 437].

18. In the matter herein, while the Defendant contended that she had a better title than the Plaintiff she neither filed any Statement on oath nor did she testify at the trial herein. As regards proof of claims, Sections 109 and 112 of the [Evidence Act](#) provides as follows:

“109. 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.

112. In any civil proceedings, when any fact is especially within the knowledge of any Party to those proceedings, the burden of proving or disproving that fact is upon him.”



19. Considering a situation where a party filed pleadings but fails to testify in a matter such as in this case in CMC Aviation Limited -vs- Crusair Limited (No. 1) (1987 KLR 103, the Court held as follows:

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments depend upon evidence for proof of their contents.”

20. As it were, where a Party fails to call evidence in support of its case, that Party’s pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce evidence means that the evidence adduced by the Plaintiff against her is uncontroverted and therefore unchallenged (See Daniel Kenga Katana & 4 Others -vs- Dzitu Toto Bokole & 3 Others (2022) eKLR].

21. In the matter herein, the Plaintiff testified and produced a Sale Agreement among other documents to demonstrate how he came to acquire Plot No. 35, Nyaribo on 16th April, 1999. While the Defendant contended that she had bought the same Plot some 12 years later, she did not place anything before this Court to support that contention.

22. It follows that in the circumstances herein, I was persuaded that the Plaintiff had established on a balance of probabilities that he is the rightful owner of the suit property.

23. Accordingly, Judgment is hereby entered for the Plaintiff against the Defendant as follows:

- (a) A declaration is hereby made that the suit land is the lawful property of the Plaintiff.
- (b) The Defendant is hereby directed to grant vacant possession of the suit land to the Plaintiff within 45 days from today. In default, the Plaintiff shall be at liberty to evict the Defendant therefrom.
- (c) The costs of this suit shall be borne by the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 2ND DAY OF NOVEMBER, 2023.

In the presence of:

Mr. James Gatiba Nyingi present in person

No appearance for the Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE

