



**Ndiema v Rugara (Environment & Land Case 466 of 2016)
[2022] KEELC 2432 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 466 OF 2016**

EK WABWOTO, J

MAY 5, 2022

BETWEEN

PHIEDDIPPIEDS CHIMSEN NDIEMA PLAINTIFF

AND

PATRICK WAHOME RUGARA DEFENDANT

JUDGMENT

1. The suit was commenced vide a Plaint dated May 3, 2016 where the Plaintiff sought the following orders:
 - a) That a permanent injunction be issued against the defendant from trespassing into the Plaintiff's property Title No. Ruiru Kiu Block 2/4886;
 - b) The defendant be evicted from property Title No. Ruiru Kiu Block 2/4886 and by such eviction the structures in it be demolished;
 - c) Any other relief the court may deem fit to issue against the defendant;
 - d) Costs of this suit
2. The suit was contested by the defendant. The defendant filed a Defence and counterclaim dated July 22, 2016 where it was prayed for the plaintiff's suit to be dismissed with costs and judgement entered in his favour. Consequently, he sought for the following orders in his counterclaim:
 - a. A declaration that the defendant is the bona fide owner of the parcel of land described and Plot No N 204 on the sub-division scheme by Githunguri Constituency Ranching Company Limited and otherwise known as land title Number Ruiru/ Kiu Block 2 (Githunguri)/4886.



- b. An order that the registrar Thika Land registry do cancel title number Ruiru/ Kiu Block 2 (Githunguri)/4886 issued on March 24, 2006 in the name of Phieddppieds Chimsen Ndiema and re-issue the same in the name of the defendant.
 - c. A permanent restraining injunction to restrain the plaintiff whether by himself, his agents or servants or employees or any other person by whom he may claim in any way whatsoever, from interfering with the defendant's quiet possession, ownership and use of parcel of land described and plot No. N 204 on the subdivision scheme by Githunguri Constituency Ranching Company Limited and otherwise known as land title Number Ruiru/ Kiu Block 2 (Githunguri)/4886.
 - d. Any other order that the court may deem fit to grant and/or issue to serve the interests of justice.
 - e. Costs of the suit.
3. The matter proceeded for hearing on 14th and 29th October 2021. Two witnesses testified on behalf of the Plaintiff while the Defendant called five witness. After the close of the respective parties' cases, parties also filed their respective written submissions which the court has duly considered.

Plaintiffs' case

4. The Plaintiff, Phieddippieds Chimsen Ndiema (PW1) testified that he was a retired military service officer who had served for over 10 years in the Kenyan military prior to his retirement. He relied on his witness statements dated May 3, 2016 and April 12, 2019 which were adopted by the Court as part of his evidence in chief.
5. It was his testimony that during his time in service around the year 2005, his colleague George Muthee Matu approached him requesting for assistance in paying school fees in exchange for a parcel of land located in Ruiru. He further stated that according to him the parcel of land had been held by virtue of shareholding at Githunguri Constituency Ranching Company. He paid out Ksh 150,000 which was considered as purchase price of the said property. Later changes were effected in the company registry and he acquired the title deed of the property.
6. In an elaborate and lengthy cross-examination, he conceded that he was not member of Githunguri Ranching Company neither did he have a sale agreement nor held a clearance certificate or any other transfer documents. He however confirmed having managed to obtain a title in respect to the suit property.
7. In re-examination, he stated that together with the Defendant, they had been summoned by the area chief on July 22, 2014 with a view of resolving the dispute. He reiterated that he had known George Matu for many years to the extent that he could not doubt him nor consider him as a con.
8. Mr. George Muthee Matu (PW2) testified to being a retired military officer. He relied on his statement dated 12th April 2019 which was consequently adopted by the court as part of his evidence in chief.
9. In an equally lengthy cross-examination, he reiterated that he was a member of Githunguri Ranching and had bought the suit property for Kshs 50,000 on 7th March 1998. It was after the payment of the purchase price that he was issued with a Share Certificate No. 7999 signed by the Chairman/Director and also a Ballot Card No P233.
10. In further cross examination, he also conceded that he did not have a sale agreement but that did not mean that there was no sale. He also stated that he was not aware how the Plaintiff was given the title since he was not present when the same was issued.



11. In re-examination by the Plaintiff's counsel, he stated that he only transferred the shares to the Plaintiff and pursuant to the transfer of shares he did not retain any other shares with the company.

Defendant's case

12. The Defendant, Patrick Wahome Rugara (DW1) testified to being in the ICT business and stated that he was a resident of Ruiru. During his testimony, he relied on his witness statement, bundle and list of documents dated 22nd July 2016 which were produced as part of his evidence in chief. He also produced a supplementary bundle dated July 2019 and 18th June 2021 which were also adopted by the court.
13. He stated that he had been staying with his family at the suit property since 2015 having bought the same from Daniel Mundia Kamau. He also stated that he had a sale agreement dated 4th July 2014 with Daniel Mundia Kamau and had paid Kshs 800,000/- as purchase price and was given ballot paper N204 and share certificate 832 and later being issued with a clearance certificate dated 26th November 2014 to process the title deed.
14. He also added that he was the genuine owner of the plot since he had followed all the due process towards acquisition of the same.
15. In cross-examination, he confirmed that he did not pay the land rates to Thika Municipality because he did not think he was supposed to pay.
16. Daniel Mundia Kamau testified as DW2. During his testimony, he adopted his witness statement dated 3rd March 2018 confirming that he was the one who had sold the suit property to the Defendant having acquired it from his mother Susan Kamau.
17. He further clarified that he had initially lost his National ID No 1020020 and the replacement was issued on 22nd December 2016. The Certificate had the No. 4923112 which was merely an error by the Company and was not in any way an indication of fraud.
18. Francis Waweru testified as DW3. He equally relied on his witness statement dated 3rd March 2017. He confirmed that he resides 300 meters from the suit property and to his knowledge all parcels of land belonged to Githunguri Ranching Company. He further stated that he is the one who introduced the Defendant to the idea of buying the suit property and that all those parcels of land including his property initially belonged to Githunguri Ranching Company Limited.
19. He testified to linking up Daniel Mundia (DW2) ad Patrick Wahome (DW1) in respect to the transaction on account of willing buyer and willing seller basis for which he was paid a commission of Ksh 50,000 to assist in the transfer of the land. In cross-examination, he clarified that he had been a freelance broker since 2007 although not registered. He claimed to have done an investigation to confirm seller's documents were genuine but did not have the investigation report in court.
20. John Maina Mburu testified as (DW4). He similarly adopted his witness statement dated 8th June 2017. He stated that he was a businessman and the Chairman/director of Githunguri Constituency Ranching Company. He confirmed that the Defendant was the genuine owner of the suit property and as per their records there was no indication of any details of PW2 who had claimed to have sold the same to the Plaintiff.
21. Edwin Gichege Mwangi testified as DW5, He stated that he was a registered valuer and director of Landmark Realtor Limited. He produced a valuation report dated 6th April 2017 which was adopted by the court.



The Plaintiff's submissions

22. The Plaintiff filed his written submissions dated 29th November 2021 through the firm of J.M. Onyancha & Associates. In the said submissions, counsel for the Plaintiff outlined the testimony tendered by both the parties and further concluded his submissions by stating that the Plaintiff had demonstrated how he bought the land from PW2 upon which he had applied and obtained title deed for the same.
23. Citing the case of *Gitway Investment Limited vs Tajmal Limited and Others [2006]* eKLR counsel submitted that the case was similar to the circumstances herein having demonstrated that the Plaintiff was the registered owner of the suit property. Counsel also referred to the case of *Giella v Casman Brown & Co. Ltd* (1973 EA 358) and stated that the Plaintiff's case had been proven on a balance of probability and as such he should be granted the prayers sought.

The Defendant's submissions

24. The Defendant filed written submissions dated 13th January 2022 through the firm of M/S Kibanya & Kamau Advocates. Counsel for the Defendant outlined four issues for determination by the Court. These included;
 - i. Whether the Plaintiff's title deed issued on 24/03/2006 over land title Ruiru/ Kiu block 2 (Githunguri)/4886 was obtained fraudulently,
 - ii. Whether the suit property belongs to the Defendant,
 - iii. Whether the counterclaim is merited,
 - iv. Which party should bear the costs of the suit and the counterclaim.
25. On Whether the Plaintiff's title deed issued on 24/03/2006 over land title Ruiru/Kiu Block 2 (Githunguri)/4886 was obtained fraudulently, counsel submitted that the Plaintiff did not produce any sale agreement to prove that he indeed bought the said property and without prove of purchase, the Plaintiff's claim could not hold. Counsel also relied on the case of *Propwa Company Limited vs Justus Nyamo Gatondo[2020]* eKLR and Section 26 of the *Land Registration Act* to challenge the Plaintiff's title on grounds of fraud, illegality and corrupt scheme. It was further submitted that on this ground the Plaintiff's title should be cancelled as provided for under Section 80(1) of the *Land Registration Act*.
26. On Whether the suit property belongs to the Defendant, counsel submitted that the testimony of the Defendant's witnesses had aptly demonstrated how the suit property rightly belonged to the Defendant. It was submitted that DW4, who testified as the Chairman of Githunguri Constituency Ranching Company Limited had confirmed that as per their records, the Defendant was the rightful owner of the suit property and that the Company had not been able to obtain his title deed due to the existence of the Plaintiff's title which had been obtained fraudulently.
27. On Whether the counterclaim was merited, Counsel argued that the Defendant had demonstrated and proven how the Plaintiff's title was fraudulently registered and as such the Defendant was entitled to the prayers sought in the counterclaim.
28. Finally, on costs, counsel argued that costs follow the event and the Plaintiff should be condemned to pay for the same.



Analysis and Determination

29. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence. Taking into account the parties' pleadings, evidence and submissions, in my view, the following are the key issues falling for determination in this suit:-
- i. Who among the Plaintiff and the Defendant is the bonafide owner of land title Ruiru/Ruiru Kiu Block 2/4886 (the suit property herein)?
 - ii. What would be the appropriate orders for the court to issue in the matter?
 - iii. What orders should issue as to costs?

Issue No. 1

Who among the Plaintiff and the Defendant is the bonafide owner of land title RUIRU/RUIRU KIU BLOCK 2/4886 (the suit property herein)?

30. As a starting point, it is important to recall what the Court of Appeal stated in *Samuel Kamere v Lands Registrar, Kajiado [2015]* eKLR:

“It is evident that there are two competing claims over the suit property, and we have said that the plaintiff's proprietary interest is already established. Since the appellant's title is under challenge, in order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

Section 26 (1) (b) of the Land Registration Act which states;

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

On the issue of the burden of the proof, the Court in *Evans Nyakwana vs. Cleophas Bwana Ongaro (2015)* eKLR held that:

“As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”



The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the Court of Appeal held that:

“*Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372* discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

31. Based on the above, the onus is squarely on the Plaintiff to prove that he indeed purchased the suit. Section 109 of the *Evidence Act*, provides 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.
32. The Plaintiff herein never presented a sale agreement. From the evaluation of the evidence that was adduced before this court, the Plaintiff failed to provide any of the documents he used to process the transfer. In his evidence, the Defendant alleged that prior to purchasing the suit land, he did due diligence. It is curious that the Plaintiff lacks in his possession all the documents that would essentially show the root of his title. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gatbiba Maina (2013)* eKLR pronounced itself as thus;

“we state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

Further in the case of *Kassim Ahmed Omar & Another vs. Anwar Ahmed Abed & Others* , Malindi ELC No. 18 of 2015 the Court held that;

“A certificate of title is an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”



33. The Defendants argue that there was no agreement reached as recognized in law and more particularly provided for in the Law of contract Act (cap 23) which provides as follows under section 3 (3):-

“No suit shall be brought upon a contract for the disposition of an interest in land unless

- a) The contract upon which the suit is founded.
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
- b) The signature of each party, signing has been attested by a witness who is present when the contract was signed by such party”.

35. The case of Patrick Tarzan Matu & another Vs Nassim Sharrif Nassir Abdulla & 2 others (2009) eKLR where Justice Azangalala (as he then was) stated as follows:-

“The plaintiffs’ claim arises from a failed agreement of sale of the suit property. It is therefore founded upon a contract for the disposition of an interest in land. The plaintiffs admit that the agreement was not executed by the applicant. The agreement did not therefore meet the requirements of sub-section 3 (a) (ii) of section 3 of the Law of Contract Act. The plaintiffs contend that correspondence exchanged between their advocates and the applicant’s advocates constitute a memorandum upon which they base their action. I have perused the correspondence exhibited by the plaintiffs. The same does not support the plaintiff’s stand-point. In any event such correspondence is contra sub-section 3 (b) of section 3 of the said Act. The plaintiffs’ suit therefore contravenes the express provisions of the Law of Contract Act aforesaid”.

the case of Silverbird kenya Limited Vs Junction Limited and 3 others (2013) eKLR where Justice Mutungi held as follows;

“In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the law of Contract Act to be the foundation of the Plaintiff’s claim against the defendants. Section 3(3) of the Law of contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff’s suit must fail for being in contravention of Section 3(3) of the Law of Contract Cap 23 Laws of Kenya”.

36. In the instant suit there was no evidence that the Plaintiff had a sale agreement in respect to the purchase of the suit property. The Plaintiff even conceded in cross examination that he had none. The Plaintiff has not properly demonstrated how he acquired his title.

37. On the aspects of fraud, it is trite law that fraud must be pleaded particularized and proved. The standard of prove in fraud is above the balance of probability but lower than beyond reasonable doubt. At paragraph 13 of the Defence which was part of the counterclaim dated 22nd July 2022, the Defendant made averments and particulars of fraud against the Plaintiff as follows:

- a) Claiming and holding himself as a member and/or shareholder of the company which he is not.



- b) Using forged documents purporting that they were issued by the company to register himself as the owner of the suit property.
 - c) Misleading the land registrar at Thika that the company had cleared him to be registered as the owner of the suit property.
 - d) Purporting to be registered owner of the suit property when the process of transferring the same from the company to the defendant is underway.
38. The Defendant from his averments contained in his Defence stated that the purported fraudulent acts leading to the registration of the title in the name of the Plaintiff. In the evidence that was adduced before court, the Defendant was able to prove the particulars of fraud that was pleaded. The testimony of DW4 was crucial in the instant case. He laid down a chronology of its dealings with the Defendant and even how the property was transferred from the company through other parties up to the Defendant. Through his testimony it was established that the company had no records of the Plaintiff neither had they any records of PW2 who purportedly sold the suit land to the Plaintiff. This can only lead to one conclusion that the Plaintiff's registration to the suit property was done fraudulent and as such it is the finding of this court that the Defendant is the bonafide owner of the suit property.

Issue No. 2

Who would be the appropriate orders for the court to issue in the matter?

39. Having held that the Defendant is the bonafide owner of suit land. I find that the Defendant is entitled to all the rights, interest and privileges that pertain to the land. The Defendant is therefore entitled to the prayers sought in his counterclaim.
40. On the prayer for permanent injunction which was sought in the Defendant's counterclaim, from the Defendant's evidence that was tendered, it is my finding that he has met the threshold for the grant of the same. As such this prayer is meritorious and the same is for granting.
41. The Defendant has proved his counterclaim against the Plaintiff to the required standards and has laid down a basis for the grant of the prayers sought.

Issue No. 3

What orders should issue as to costs

42. On costs, the same is a matter of courts discretion, the discretion given to courts is very wide though underpinned under Section 27 of the [Civil Procedure Act](#) in which the provisions states that;-
- “ the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full powers to determine by whom and out of what property and to what extent such sots are to be paid.”
43. Looking at the circumstances of this case while exercising my discretion, I direct that each party to bear their own costs of the suit.

Final orders

44. In sum, the Plaintiff has not proved his claim against the Defendant on a balance of probability. I find the counter claim by the Defendant against the Plaintiff proved on a balance of probability.



45. I accordingly make the following orders:

- i) I hereby dismiss the Plaintiff's claim against the Defendant.
- ii) I enter judgment for the Defendant against the Plaintiff in the counter claim dated July 22, 2016 in terms of prayers (a), (b) and (c) sought therein.
- iii) Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY 2022

E. K. WABWOTO

JUDGE

In the presence of:

N/A for the Plaintiff

Mr. Thuku for the Defendant

Court Assistant; Caroline Nafuna

E. K. WABWOTO

JUDGE

