



REPUBLIC OF KENYA



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**Kibui v Mwangi & 2 others (Environment & Land Case 90 of 2008)
[2022] KEELC 13732 (KLR) (3 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 90 OF 2008**

JO MBOYA, J

OCTOBER 3, 2022

BETWEEN

BERNARD WACHIRA KIBUI PLAINTIFF

AND

DAVID MACHARIA MWANGI 1ST DEFENDANT

JANE MUGUTHI KAREGI 2ND DEFENDANT

KASARANI SETTLEMENT LTD 3RD DEFENDANT

JUDGMENT

Introduction And Background:

1. *Vide* the Plaint dated the February 28, 2008, the Plaintiff herein has approached the Honourable Court seeking for the following Reliefs;
 - i. A Declaration that the Plaintiff is the Lawful Owner of a Parcel of Land known as Plot No 87 being part of L.R No. 1XXX5-Kasarani Nairobi.
 - ii. A Permanent Injunction restraining the 1st and 2nd Defendants, their agents or servants from dealing, alienating, subdividing, trespassing and or continuing to trespass and/or in any manner interfering with the Plaintiff's quiet enjoyment of the Plaintiff's parcel of land known as plot number 87 being part of L.R No. 1XXX5-Kasarani Nairobi.
 - iii. A Permanent Injunction restraining the 3rd Defendant, their agents or servants from dealing, alienating, selling, subdividing and processing Title and/or land transfer documents in favor of the 1st and 2nd Defendants and in any manner interfering with the Plaintiff's quiet enjoyment of the Plaintiff's Parcel of land known as Plot Number 87 being part of L.R No. 1XXX5-Kasarani Nairobi.



- iv. Costs of the suit.
2. Upon being served with the Plaint and the Summons to enter appearance, the Defendants herein duly entered appearance and filed Statement of Defense on the April 15, 2008, whereby the Defendants jointly and/or severally denied the claims by the Plaintiff.
3. Thereafter the pleadings in respect of the subject matter closed and same was ready for hearing. Nevertheless, the first formal hearing took place on the October 26, 2021.

Evidence By The Parties:

A.Plaintiff's case:

4. The Plaintiff herein testified as PW1. The the witness stated that at all material times relevant to this suit, L.R No. 1XXX5-Kasarani Nairobi (hereinafter referred to as the suit property) was Government Land and that same was given and/or allocated to Landless People who were Members of Kasarani Re-settlement project duly managed by a committee headed by Bishop Gaitho, who was the chairman thereof.
5. The witness further testified that other than Bishop Gaitho, now deceased, the Kasarani Resettlement Project Committee also comprised of the District Officer, Kasarani, who was a Member of the Resettlement Committee.
6. Besides, the witness stated that having been a resident of Kasarani on or around the year 2002, same qualified as a Member of Kasarani Resettlement Project and in this regard, same duly participated in balloting, whereupon same was successful and obtained ballot number 87.
7. On the other hand, the witness added that after the successful balloting, same was issued with a designated card, confirming that same had successful balloted and was thereby entitled to ownership of Plot number 87.
8. In any event, the witness further testified that after being issued with the designated card/original ballot, same was called upon to surrender the original ballot in exchange for Ownership Certificate, attesting to and confirming his rights to and in respect of Plot number 87.
9. Be that as it may, the witness added that after surrendering the ballot, same was duly issued with a Certificate dated the September 15, 2002 and which certificate was duly signed by Bishop Gaitho, now deceased and Mr. George Ayonga, who were the Chairman and Member, respectively, of Kasarani Resettlement Project Committee.
10. Other than the foregoing, the witness testified that upon obtaining the certificate of ownership, same was shown the Plot in question, namely, Plot number 87 by a designated surveyor engaged by Kasarani Resettlement Project. For clarity, the witness stated that the surveyor who showed him the Plot in question was Mr. Francis M Kariuki.
11. Nevertheless, the witness herein added that on or about the year 2007, the Members of Kasarani Resettlement Project formed a Company called Kasarani Settlement Ltd, whose obligation was to redeem the suit property, which was to be sold and or disposed of courtesy of a Court Decree issued *vide* Milimani HCC No 148 of 2007.
12. It was the further testimony of the witness that premised on the intended desire to salvage the suit property, the resultant Company requested the Members to contribute various sums, towards and for purposes of redeeming the suit property.



13. In the premises, the witness added that same proceeded to and indeed paid the sum of Kshs.175, 000/= only vide Bankers cheque, which money was paid to the firm of M/s J. K Gachie & Associates Advocates.
14. On the other hand, the witness added that on or about the January 9, 2008 same discovered and or established that the 1st and 2nd Defendants had entered upon and trespassed onto the suit Plot and laid a claim in respect thereto.
15. Besides, the witness added that the 1st and 2nd Defendant also commenced construction of structures on the suit plot, which construction was being undertaken without the consent, permission and/or authority of the witness.
16. Other than the foregoing, the witness reiterated and adopted the contents of the witness statement dated the March 18, 2013. For clarity, the witness statement under reference was adopted as further Evidence in chief of the witness.
17. Further, the witness herein referred to and sought to rely on the List and Bundle of Documents dated the April 30, 2008. In this regard, the Documents at the foot of the List dated the April 30, 2008 were admitted as Plaintiff's exhibits P1 to P8, respectively.
18. On cross examination, by counsel for the Defendants the witness herein stated that same did not know of one called Irene Wangari Irungu, who is purported to have sold the suit Plot to the 1st and 2nd Defendants.
19. Further, the witness also added that same was also not aware of Esther Wanjiru Irungu. For clarity, the witness maintained that Esther Wanjiru Irungu was never recorded in the Register of Members of Kasarani Resettlement Project.
20. Whilst under further cross examination, the witness maintained that same got the suit plot by virtue of being a resident at Kasarani, where same was staying with one, namely, Dennis.
21. On the other hand, the witness added that after acquiring the suit Plot, same left Kasarani and went Mukurwe-eni where he stayed for some time.
22. Be that as it may, the Witness stated that same is a duly registered Member of Kasarani Resettlement Project and that his membership thereto is vindicated by the Certificate which was duly signed by the chairman , namely, Bishop Gaitho, now deceased.
23. Other than the foregoing, the witness further stated that after being allocated the suit Plot, same was duly identified and shown unto him by a Surveyor, namely, Francis Kariuki.
24. While under further Cross examination, the witness added that same paid the sum of Kshs.175, 000/= only, which payment was meant to facilitate the redemption of the suit property ,which was being sold and or disposed of by way of Public auction.
25. Finally, the witness herein reiterated that Plot number 87 was duly allocated unto him. In this regard, the witness emphasized that the impugned actions or activities by the 1st and 2nd Defendants constitutes trespass.
26. On re-examination, the witness stated that immediately same procured and obtained the bankers cheque for kes.175, 000/= only, same was taken to the 3rd Defendant herein. For clarity, the Witness added that the payment was meant to help redeem the Suit Property, which was on the verge of being sold on account of a Court Decree.



27. Further, the witness also added that up to and including the time of his testimony before the Honourable court, same has neither been interrogated over allegation of fraud and forgery, concerning the Certificate of ownership of Land, nor has same been charged before any Court of law.
28. With the foregoing testimony, the Plaintiff's case was closed.

B. Defendants' case:

29. The Defendants' case revolves around the Evidence of two witnesses. For clarity, the 1st witness was David Macharia Mwangi, who testified as DW1, whereas Francis M Kariuki, testified as DW2.
30. According to DW1, the 2nd Defendant and himself, entered into a Land Sale Agreement with one Irene Wangari Irungu relating to the sale/purchase of Plot number 87 – Kasarani Resettlement Project.
31. Further, the witness testified that the Sale Agreement was reduced into writing and same was duly signed and executed by the respective Parties.
32. DW1 added that after entry into and execution of the Sale Agreement, Irene Wangari Irungu, took the 2nd Defendant and the witness to the offices of Kasarani Resettlement Project, whereat the committee presided by the chairman, certified that indeed the vendor was the legitimate owner of the Plot in question.
33. Besides, the witness also added that the chairman of the committee, namely, the Bishop Gaitho thereafter signed and issued unto the 2nd Defendant and himself a Certificate confirming ownership of the suit Plot.
34. At any rate, the witness added that sometime in the year 2007, same received information that the suit Plot along other Plots, comprising the suit Property, were being sold in execution of a Court Decree, issued vide Milimani High Court.
35. Upon receipt of the foregoing information, the witness added that the Membership of Kasarani Resettlement Project, including himself and the 2nd Defendant agreed to incorporate a Company to deal with the redemption of the suit property and in particular, to save the suit Property from being sold and/or disposed of.
36. Pursuant to the resolution by the Members of Kasarani Resettlement Project, the witness stated that indeed the Company was duly formed and same made good effort and salvaged the suit property from being sold and or alienated. In this regard, the witness added that each Member was called upon to pay certain amounts of monies.
37. It was the further testimony of the witness that same paid the sum of Kshs.225, 000/= only which monies were remitted to an Advocate who had been retained by the Company to engage with M/s J K Gachie & Associates Advocates, the latter, who was the advocates for the organization pursuing the sale of the suit property vide public auction.
38. The Witness further testified that on or about January 2008, same commenced and or started construction on the Suit Plots and that during the commencement of the construction, same received information that the Plaintiff herein was laying a claim to ownership of the suit plot.
39. As a result of the foregoing, the witness stated that same proceeded to and obtained the Cell-phone number of the Plaintiff and he thereafter called the Plaintiff and requested that the Plaintiff and himself do meet at the Offices of Kasarani Resettlement Projects.



40. For the avoidance of doubt, the witness added that indeed the Plaintiff and himself eventually met at the Offices of Kasarani Resettlement Project, whereupon the dispute over and in respect of the suit plot was addressed and resolved by the chairman of the project, namely, Bishop Gaitho, now deceased.
41. Indeed, the witness added that during the meeting at the offices of Kasarni Resettlement Project, Bishop Gaitho clearly informed the Plaintiff that same was not a Member of Kasarani Resettlement Project. In any event, the witness added that the ownership Certificate which the Plaintiff had was disowned by Bishop Gaitho.
42. Other than the foregoing, the witness referred to his Statement dated the 18th September 2017 and thereafter same adopted the witness statement. For clarity, the witness Statement was admitted as further Evidence in chief.
43. Other than the foregoing, the Witness also referred to a List and Bundle of Documents dated the September 18, 2017 containing a total of Seven Documents. For clarity, the Documents herein were admitted as exhibits D1 to D7 respectively.
44. On cross examination, the Witness reiterated that the 2nd Defendant and himself purchased and acquired the suit plot, that is Plot number 87 from Irene Wangari Irungu.
45. On the other hand, the witness added that the sale of the suit plot by Irene Wangari Irungu was duly approved and ratified by the officials of Kasarani Resettlement Project, under the Leadership of one, Bishop Gaitho, now Deceased.
46. Besides, the witness added that same was also able to confirm that the name of one Esther Wanjiru Irungu, who was represented by the vendor was duly contained in the Register of Members of Kasarani Resettlement Project.
47. While under further cross examination, the witness stated that despite having bought the suit Plot from Irene Wangari Irungu, her name was not appearing in the register. However, the witness added that Irene Wangari Irungu was representing Esther Wanjiru Irungu whose name was lawfully in the register.
48. Concerning whether the Plot bought/purchased was Plot Number 087 or 87, the witness stated that the two numbers relate to one and the same Plot. For clarity, the Witness stated that the addition of Figure Zero prior to or before 87 does not change the fact that the Plot in Question is Plot 87.
49. As to whether the witness procured and obtained a witness statement from Irene Wangari Irungu, the witness clarified that same could not procure and or obtain a witness statement from the said vendor because she passed on in the year 2013.
50. Finally, the witness herein stated that same has constructed on the suit Plot and that the construction is complete and currently under occupation of various Tenants. In any event, the Witness stated that the Building on the Suit Plot is a Six Storey Building.
51. On re-examination the witness stated that the Plot which he (Witness's) bought was Plot 087, but clarified that there is no difference between 087 and 87.
52. As concerns the relationship between Irene Wangari Irung and Esther Wanjiru Irungu, the Witness stated that Irene Wangari Irungu was the Mother of Esther Wanjiru Irungu.
53. The Second witness was Francis Murigi Kariuki, who testified as DW2. According to the witness herein, same is a Licensed Surveyor and thus knowledgeable about survey works.



54. Further, the witness added that in the year 2002, same was working under Savannah Land Surveyors, which was hired by Kasarani Resettlement Projects for purposes of undertaking Professional Survey works. In this regard, the witness added that same was hired by the officials of Kasarani Resettlement Project.
55. On the other hand, the witness added that during his retention, same was tasked with the mandate of pointing out various Plots to Members of Kasarani Resettlement Project and showing the beacons thereof.
56. As a result of the foregoing, the witness added that same was able to show various Members of Kasarani Resettlement Project their allocated Plots. For clarity, the witness testified that one of the Members whom he showed her plot was a Lady by the name Esther Wanjiru Irungu, who was acting as a proxy of her Father, namely, John Irungu Chege.
57. In any event, the Witness further testified that the Plots which same identified and showed to Esther Wanjiru Irungu was Plot Number 87, situated within L.R No. 1XXX5-Kasarani Nairobi.
58. To the contrary, the witness testified that same did not show any plot to the Plaintiff herein. In this regard, the witness clarified that the Plaintiff was never a Member of Kasarani Resettlement Project.
59. Be that as it may, the witness herein added that latter on, same was constituted and became the Secretary of the 3rd Defendant. In this regard, the witness testified that he was charged with the obligation of keeping the Records of the 3rd Defendant.
60. It was the witness' evidence that in the course of keeping the records of the 3rd Defendant, same was therefore the custodian of the Register of Members of the 3rd Defendant. In this regard, the witness clarified that a copy of the Register of the Members of the 3rd Defendant has been produced and availed to the court and entry number 87, which also speaks to the Plot number, shows/ confirms that the said plot was allocated to Esther Wanjiru Irungu.
61. On the other hand, the witness clarified that the name of the Plaintiff was neither reflected nor contained in the Register of Members of Kasarani Resettlement Project.
62. On cross examination, the witness stated that same was testifying before the Court as a Representative of the 3rd Defendant by virtue of being the Secretary of the 3rd Defendant.
63. Further, the witness also added that initially same was the surveyor who was retained and engaged by Kasarani Resettlement Projects to identify and show the Members their respective Plots.
64. Nevertheless, the witness stated that same was thereafter constituted and appointed as the Secretary of the 3rd Defendant and that by virtue of being the Secretary, same is the custodian of the Records of Kasarani Resettlement Project, which is now a Limited Liability Company.
65. It was the further testimony of the witness that even though the copy/extract of the Register presented to the court was not certified, same was however the true copy of the Register of the Members.
66. As pertains to whether Esther Wanjiru Irungu indeed balloted, the witness confirmed that indeed she balloted and that is why her name is contained and reflected in the Register of Members, as opposed to the Plaintiff.
67. Finally, the witness herein testified that even though the ownership certificate presented by the Plaintiff was a forgery and the chairman disowned signing same, he (witness) had not recorded any statement with the Police relating to the forgery perpetrated by the Plaintiff.



68. On re-examination, the witness herein reiterated that the Suit Plot was duly sold by Irene Wangari Irungu, who was a Representative of Esther Wanjiru Irungu.
69. On the other hand, the witness added that the suit Plot is currently developed and there is a completed six Storey Building standing thereon and belonging to the 1st and 2nd Defendants.

Submissions By The Parties:

A. The plaintiff's submissions:

70. The Plaintiff filed written submissions dated the July 8, 2022 and in respect of which same has raised and ventilated three pertinent issues:
71. First, counsel for the Plaintiff submitted that the Plaintiff herein was a lawful Member of Kasarani Resettlement Project and that by virtue of such membership, same balloted and became the owner of Plot Number 87, Kasarani Resettlement Project.
72. Further, counsel for the Plaintiff added that after successful balloting, the Plaintiff was issued with a designated card, which was duly signed by the chairman of the project and a Member of the Project Committee, namely, Mr. Ayonga.
73. Subsequently, counsel has added that the Plaintiff was issued with an ownership certificate confirming and authenticating that indeed the Plaintiff was the owner of Plot number 87.
74. For the avoidance of doubt, counsel for the Plaintiff has added that despite the allegation that the Plaintiff's Documents and essentially the ownership certificate was a forgery, the Plaintiff has never been summoned by the police nor charged before any court of law.
75. Secondly, counsel for the Plaintiff has submitted that though the 1st and 2nd Defendants contend to have bought and purchased the suit plot from one Irene Wangari Irungu, the said Irene Wangari Irungu was never a Member of Kasarani Resettlement Project.
76. In this regard, counsel has submitted that not having been a Member of Kasarani Resettlement Project, Irene Wangari Irungu could not have sold the Suit Plot to the 1st and 2nd Defendants as alleged or at all.
77. Thirdly, counsel for the Plaintiff has submitted that DW2 was obligated to produce and or avail to court all the Documents pertaining to and/or concerning the membership of the 3rd Defendant.
78. However, same failed to do so and merely availed to court a copy of a Register of Members, which was neither Complete nor certified.
79. Premised on the foregoing, counsel for the Plaintiff therefore implored the court to find and hold that the Plaintiff has proved and established his case on a balance of probabilities. Consequently, counsel for the Plaintiff urged the court to find and hold that the suit Plot lawfully belongs to the Plaintiff.

B. Defendants' submissions:

80. The Defendants herein relied on (sic) amended submissions dated the July 27, 2022 and same similarly, raised three pertinent issues for consideration..
81. First and foremost, counsel for the Defendants submitted that even though the Plaintiff had claimed to be a Member of Kasarani Resettlement Project, same did not adduce and or avail to court a copy of the Register containing/reflecting his name as a Member.



82. Secondly, counsel for the Defendants also submitted that the card and the certificate of ownership which was produced and relied upon by the Plaintiff, were disowned by the chairman of Kasarani Resettlement Project, namely, Bishop Gaitho, now deceased.
83. In this regard, counsel for the Defendants added that the documents having been disowned by the chairman of Kasarani Resettlement Project and who went further to contend that the signature thereon was a forgery, same therefore cannot be deemed as credible.
84. Finally, counsel for the Defendants submitted that the Plaintiff herein had contended that same was shown Plot number 87 by a surveyor known as Francis Kariuki. However, the said surveyor, who was alluded to by the Plaintiff is the one who testified as DW2.
85. Counsel for the Defendants further submitted that during his testimony, DW2, denied and or disputed having identified, pointed out or shown any Plot to the Plaintiff herein.
86. At any rate, counsel for the Defendants further added that DW2, who was hitherto the surveyor, was subsequently made the Secretary of the 3rd Defendant and therefore the custodian of the 3rd Defendants' records.
87. Despite the foregoing, counsel pointed out that the witness clarified that the Plaintiff was not known to the 3rd Defendant, who was the successor of Kasarani Resettlement Project.
88. Suffice it to point out, that neither counsel cited nor relied on any case law.

Issues For Determination:

89. Having reviewed the Plaintiff, the witness statements and the Bundle of Documents filed by the Plaintiff and having reviewed the Statement of Defense and the attendant Documents on behalf of the Defendants; and similarly, having considered the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for determination;
 - i. Whether the Plaintiff was indeed a Member of Kasarani Resettlement Project and thereafter Kasarani Settlement Limited.
 - ii. Whether the Plaintiff was the owner of Plot number 87 located within LR. No. 14235-Kasarani Nairobi.
 - iii. Whether the Plaintiff is entitled to the Reliefs sought.

Analysis And Determination:

Issue Number 1 - Whether the Plaintiff was indeed a Member of Kasarani Resettlement Project and thereafter Kasarani Settlement Limited.

90. Before venturing to address and or deal with the issue herein, it is appropriate to state that being a Civil dispute, the burden of proof lies on the shoulders of the Plaintiff, who is obligated to tender credible and sufficient evidence to prove his claim to and in respect of the suit property.
91. On the other hand, it is also appropriate to reiterate that the standard of proof is on a balance of probabilities and that once the Plaintiff has discharged the Evidential burden, then the Defendant must be called upon to tender evidence in rebuttal.
92. As pertains to the burden and standard of proof, it is imperative to refer to two decisions, which have explained and underscored the import, tenor and meaning of balance of probabilities.



93. The first decision in this regard is the case of *Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard)* [2018] eKLR, where the Court expounded on section 107 and 109 of the *Evidence Act* as;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller vs Minister of Pensions* (1947) explained as follows:-“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 probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

94. The second decision that is also worthy of note is the case of *Kiambu County Tenants Welfare Association versus Attorney General & another* [2017] eKLR, where the court observed as hereunder;

“Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[16] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,[17]Lord Denning said the following about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

95. Informed by the established case law, it is now appropriate to interrogate the evidence that was placed before the Honourable court by and/or on behalf of the Plaintiff, to ascertain and authenticate whether indeed the Plaintiff was a Member of Kasarani Resettlement Project.
96. It is worthy to recall that the Plaintiff herein stated that same was hitherto residing at Kasarani area and that by virtue of such residency, same qualified to be a Member of Kasarani Resettlement Project.
97. On the other hand, the Plaintiff further added that in the year 2002 same participated in a ballot exercise and he emerged as the owner of Plot Number 87, Kasarani Nairobi.



98. To vindicate his claim, to being a Member of Kasarani Resettlement Project, the Plaintiff adduced before the court copy of a card speaking to Plot number 87 and ownership certificate, which was stated to have been issued by the same Kasarani Resettlement Project.
99. However, the Defendants herein testified and placed before the court evidence that when a dispute arose pertaining to ownership of Plot number 87, a meeting was called, convened and held at the offices of Kasarani Resettlement project and that during the said meeting Bishop Gaitho, now deceased, who was the chairman disowned the signature that were appearing on the Plaintiff's Documents.
100. Secondly, even though the Plaintiff claimed to have qualified to be a Member and was therefore a member of Kasarani Resettlement project, same did not adduce and or tender before the court a copy of the Register of Members containing his Membership number and name.
101. Surely, if the Plaintiff herein was a Member of Kasarani Resettlement Project, his name would be reflected and contained in the Register of members. In this regard, where there is a dispute as to Membership of Kasarani Resettlement Project, the Register of Members would be a critical, albeit primary, Document to determine such membership.
102. Thirdly, the Kasarani Resettlement Project, which metamorphosized into a Limited liability Company, had/has officials, who keep Records of the members.
103. Consequently, where a dispute arises pertaining to Membership of such an organization, it behooves the person claiming to be a Member to summon any of the officials of the said organization to attend court and testify on his or her behalf.
104. At any rate, where such officials are reluctant to attend court and testify, the claimant (in this case the Plaintiff), would be at liberty to take out Witness Summons in line with Order 16 Rule of the Civil Procedure Rules 2010.
105. Notwithstanding the foregoing, it is imperative to note that the Plaintiff herein was the sole witness who testified herein and maintained that he was a Member of Kasarani Resettlement Project.
106. To my mind, it was incumbent upon the Plaintiff to summon and or call even one single official of the said organization to come to court and corroborate the Plaintiff's claim to be a Member of the same.
107. Other than the foregoing, assuming that efforts to procure an official from the organization had failed (for which no evidence was tendered), the Plaintiff would even have called a Co-member of the said Kasarani Resettlement project to come and confirm the Plaintiff's Membership.
108. Contrarily, the Defendants herein summoned and called DW2, who testified that same was the Secretary of the 3rd Defendant. Besides, DW2 also testified that the Members of Kasarani Resettlement Project are the ones who incorporated the 3rd Defendant.
109. Premised on the foregoing, DW2 pointed out that Membership of the 3rd Defendant was therefore derived from her predecessor, namely, Kasarani Resettlement Project.
110. Further, DW2 testified and remained emphatic that the Plaintiff herein was never a Member of Kasarani Resettlement project and by extension is not a member of the 3rd Defendant.
111. To my mind, the failure by the Plaintiff to summon and or call any official of Kasarani Resettlement Project, must be taken to mean that the Plaintiff was apprehensive that the Evidence of such official, if any called, would be adverse.



112. In view of the foregoing, I come to the inescapable conclusion that the Plaintiff herein has neither proved nor established that same was truly and indeed a Member of Kasarani Resettlement project.
113. Consequently, my answer to issue number one is in the Negative. Simply put, the Plaintiff was not a Member of Kasarani Resettlement Project and that explains the absence of his name in the Register of Members, a copy of which was tendered and produced before the court.

Issue Number 2 - Whether the Plaintiff was the owner of Plot Number 87 located within LR. No. 14235-Kasarani Nairobi.

114. The Plaintiff herein contended and claimed that same participated in the ballot and was duly allocated Plot number 87, Kasarani Nairobi.
115. Besides, it was also the Plaintiff's testimony that after the successful balloting and upon being allocated Plot number 87, the physical position and the boundaries of the Plot were shown/pointed out to him by a surveyor, namely Francis Murigi Kariuki.
116. Thereafter, the Plaintiff further stated that upon the identification of the physical position of the duly allocated plot, same took possession of the plot, before he relocated to reside at Makurwe-ini.
117. Other than the foregoing, the Plaintiff also pointed out that after the suit plot was allocated unto him, same was issued with a designated card and ultimately ownership certificate, both of which are said to have been signed by the chairman of Kasarani resettlement project.
118. Be that as it may, three things stand out. First, the signatures contained in the designated card and the ownership certificate, which were alleged to belong to Bishop Gaitho, now deceased, were disputed and disowned by the said bishop Gaitho during his life time.
119. Secondly, the names of the persons who were successful during the ballot and who were ultimately allocated Plots Numbers within Kasarani Resettlement project were recorded and contained in a Register of Members.
120. Surprisingly, the name of the Plaintiff herein is neither reflected nor contained in the Register. In this regard, the question that arises is; if the Plaintiff was indeed a Member of the Project, then why was his name omitted, excluded and not contained in the Register.
121. In my considered view, the exclusion of the name of the Plaintiff from the Register of Members, denotes that indeed the Plaintiff was never a Member of Kasarani Resettlement Project.
122. In any event, if the Plaintiff was ever a Member of Kasarani Resettlement Project, then it was incumbent upon the Plaintiff to avail and produce before the court a copy of the Register containing his name/membership.
123. Thirdly, there is the issue pertaining to the Surveyor who pointed out or identified the physical/ Ground location of the suit Plot to the Plaintiff.
124. According to the Plaintiff, his Plot Number 87 was pointed out unto him by one Francis Murigi Kariuki. In this regard, one would have expected the Plaintiff to summon and or call the said witness, unless the said Witness, was Deceased or otherwise, not capable of attending Court for obvious reasons.
125. However, the Plaintiff herein did not call the said surveyor, for purposes of corroborating the testimony of the Plaintiff.



126. Nevertheless, it is not lost on the Honourable court that the surveyor who was alluded to by the Plaintiff, to have been the one who pointed out or showed the physical ground to the Plaintiff, was indeed called and testified on behalf of the Defendants.
127. For coherence, the surveyor was DW2. According to DW2, same identified and pointed out Plot Number 87 to the known owner, namely, Esther Wanjiru Irungu, who was representing Chege Irungu.
128. Further, Dw2 added that at no point in time did he point out or identify Plot Number 87 to the Plaintiff herein. In short, DW2 stated that the Plaintiff was unknown to him.
129. Better still, DW2 added that later on, same was constituted as the Secretary of the 3rd Defendant and by virtue of being the Secretary, same is the custodian of the Records of the 3rd Defendant.
130. To this end, DW2 produced and tendered in Evidence a copy of the Register of the Members and their respective Plot numbers. For clarity, Plot Number 87 was recorded against the name Esther Wanjiru Irungu, who was stated to be the Daughter of Irene Wangari Irungu, the vendor.
131. From the totality of the Evidence tendered, it is difficult to discern and/ or appreciate the basis and/or foundation upon which the Plaintiff herein lays a claim to the suit plot.
132. To my mind, the burden was on the Plaintiff to place before the Honourable Court credible evidence. Indeed, the burden remains on the Plaintiff, even where the Defendants would not have tendered nor adduced any Evidence.
133. In this respect, case law abound. However, the decision in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, stands out and is worthy of citation on the basis of its richness in Jurisprudence. The Court of Appeal stated as hereunder;

“In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the *Evidence Act*, as follows;

- “107 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.
- (1) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- (2) The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.
108. 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 be on any particular person.”

In these proceedings and particularly the claim that the appellant sold off properties of three companies to the detriment of the 1st respondent, the three provisions reproduced above require that the 1st respondent who laid the claim that certain facts existed had the burden to prove existence of those facts. It is no matter that the appellant did not refute the claim by way of a replying affidavit. The 1st respondent was still bound to lay evidence on a balance of probability of the alleged facts before the learned judge. The 1st respondent claimed that there were three companies in which he, the appellant and others held shares. Each of those companies owned the properties stated in the petition. That



the appellant sold off those properties and had them accordingly transferred and as a result the 1st respondent suffered loss and damage.

In our view we think that the facts to be proved required documentary evidence. The 1st respondent ought to have produced the certificates of incorporation of the three companies together with their respective Articles and Memoranda of Association, the names and addresses of the shareholders, the shareholding of each, and documents of title to show that each of those companies owned parcels of land as pleaded. Evidence that the properties were sold, to who, at what consideration and when the sales took place, ought to have been adduced. By that or such evidence as the learned judge should have required, the 1st respondent would have been on his way to prove existence of facts to satisfy the court that indeed those facts existed. That was his burden. He did not discharge it.

Issue Number 3 - Whether the Plaintiff is entitled to the Reliefs sought.

134. Having dealt with and or addressed the preceding issues, it must have become apparent that the Plaintiff herein has neither proved nor established his Membership to Kasarani Resettlement project nor ownership of Plot number 87.
135. Certainly, the obligation to tender evidence to warrant positive findings, was on the Plaintiff. For clarity, both the Evidential and legal burden lay at the doorstep of the Plaintiff.
136. However, despite the incidence and burden of proof laying on the Plaintiff, same was unable to discharge the burden, either to the requisite Standard or at all.
137. Effectively, the bottom line as pertains to the subject matter is that without discharging the burden placed on same, the Plaintiff cannot partake of or benefit from ownership rights attendant to the suit Plot.
138. In the premises, the Plaintiff is not entitled to any of the Reliefs which were enumerated at the foot of the Plaint dated the February 28, 2008.

Final Disposition:

139. To my mind, the Plaintiff herein has failed to discharge the burden of proof that was placed on his shoulders by dint of Section 107, 108 and 109 of The Evidence Act Chapter 80 Laws of Kenya.
140. Consequently, and having failed to meet the requisite threshold, the Plaintiff's case fails. In this regard, the Plaintiff's suit be and is hereby Dismissed with costs to the Defendants.
141. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3rd DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Wamwayi for the Plaintiff

Mr. Gachichio for the Defendants

