



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 305 OF 2016**

**REHEMA WANJIRU.....PLAINTIFF**

**VERSUS**

**GEORGE FONDO (Sued as the Administrator of the Estate of**

**SAFARI KAZUNGU KALAMA.....1<sup>ST</sup> DEFENDANT**

**REHEMA KAZANI WANZA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 14<sup>th</sup> November 2016 and amended on 11<sup>th</sup> October 2019, the plaintiff herein sued the defendant's jointly and severally seeking for the following orders:

- a) A permanent injunction restraining the defendant, his agents, servants, employees or any person under his authority from interfering with the land parcel No. Kilifi/Vipingo/188 in any manner.***
- b) Declaration that the plaintiff is entitled to 2 acres of plot No. Kilifi/Vipingo/188 now registered as Kilifi/Vipingo/547.***
- c) Costs of the suit***
- d) Any other relief this court deems fit to grant.***

The plaintiff contemporaneously filed the plaint together with an application for injunction against the defendants which was allowed vide a ruling dated 20<sup>th</sup> December 2017.

This matter came up for hearing on 27<sup>th</sup> September 2021 when counsel for the plaintiff was present and the defendant and his counsel were absent though served with evidence of service having been filed in court via email. The case therefore proceeded undefended.

**PLAINTIFF'S CASE**

PW1 the plaintiff herein adopted her witness statement dated 14<sup>th</sup> November 2016 as her evidence in chief and stated that she bought one acre of the suit plot known as KILIFI/VIPINGO/188 from one Safari Kazungu Kalama vide an agreement dated 5<sup>th</sup> September 1995 and a further one acre from Kingi Kazungu Kalama a brother to Safari Kazungu.

It was PW1's evidence that she took immediate possession but she could not get a transfer of the title as Safari Kazungu had secured a loan with the suit land at Kenya Commercial Bank Kilifi.

PW1 also stated that she has had a quiet possession of the suit land until 2015 when the defendant started interfering with the land. She stated further that the defendant has fenced part of the land and has threatened to sell to other parties of which if the same happens, she will suffer irreparably as she has developed the suit land.

PW1 stated that she sued the defendants after they indicated to her that she should give them additional money for the plot otherwise they would evict her.

It was further PW1's testimony that on 11<sup>th</sup> June 2019, she conducted a search on the suit land when she discovered that a new title had been fraudulently issued in favour of the 2<sup>nd</sup> Defendant and the land registered as KILIFI/VIPINGO/547.

PW1 therefore urged the court to grant the orders as prayed in the plaint.

### **ANALYSIS AND DETERMINATION**

I have considered the plaintiff's evidence and the sale agreements in respect of the suit land. The issues for determination are whether the defendant was duly served with a hearing notice, whether the sale agreements were valid and enforceable; whether there was breach and finally whether the plaintiff is entitled to the orders sought.

On the issue of service, the Electronic Case management practice directions 2020 section 6 provides as follows;

***6 (1) where under any law a document is required to be lodged or filed in court, the filing shall be effected by electronic means in accordance with these practice directions***

***(2) in every judicial proceeding, the court and the parties to the case shall employ the use of technology to expedite proceedings and make them more efficient***

***(3) the technology referred to in subparagraph (2) shall include-***

***(a) e-filing;***

***(b) e-service of documents***

***(c) digital display devices;***

***(d) real time transcript devices***

***(e) video and audio conferencing***

***(f) digital import devices***

***(g) computers in the court***

Further, section 13 provides;

***13 (1) where under any law a document is required to be served on a person, service may be effected by electronic means in accordance with these practice directions.***

***(2) every person who files a document in court shall electronically serve the document to everyone who by law is entitled to be served through the address contained in the electronic system.***

***(3) where the person or the advocate of the person on whom service is to be effected is not registered in the system, the initial service may be effected through any other means authorized by law and an affidavit of return of service shall be filed in court.***

From the record, the defendant's advocate on record was served with a hearing notice via email and an affidavit of service filed whereby the email was attached as proof of service. The court scheduled the matter for 11 am and asked the advocate on record to reach out to counsel for the defendant and when he came back he indicated to the court that he had tried to reach him to no avail. I therefore find that there was proper service.

On the issue whether the agreements were valid, the same were entered into by the parties to the sale, the consideration, the acreage, the description of the plot, the terms of the agreement and the parties appended their signatures to the agreement. The agreements also indicated their identity card numbers. There is no evidence that the same suffered from any illegality or frustration.

The plaintiff's evidence was uncontroverted, but that does not mean that if a suit is not defended the claim must be allowed without proving the case on a balance of probabilities. The plaintiff's burden to prove her case still remains.

The plaintiff gave a chronology of how she entered into an agreement for sale of two acres on the respective dates and took possession thereof todate. The defendants did not give evidence to controvert the plaintiff's claim.

In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002**, Lesiit, J. citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No.548 of 1998** appreciated that:

***"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the***

*claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."*

Further in the case of **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997**, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence. They remain unsubstantiated as it has not been subjected to cross examination.

In the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR** the court held that:

*"It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence."*

Having said that, I find that the plaintiff has proved her case against the defendants and judgment is entered as prayed in the following terms.

*a) A permanent injunction is hereby issued restraining the defendant, his agents, servants, employees or any person under his authority from interfering with the land parcel No. Kilifi/Vipingo/188 in any manner.*

*b) A Declaration is hereby issued that the plaintiff is entitled to 2 acres of plot No. Kilifi/Vipingo/188 now registered as Kilifi/Vipingo/547.*

*c) Defendant to pay costs of the suit*

**DATED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

**M. A. ODENY**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.