



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO 827 OF 2017

KIRATHIE NDIRITU THUKU.....PLAINTIFF

VS

VERONICAH WANJIKU GATHOGO.....1ST DEFENDANT

ANTIQUA AUCTIONS AGENCY.....2ND DEFENDANT

LETSHEGO MICROFINANCE KENYA.....3RD DEFENDANT

NEW GATUNDU MIXED FARMERS CO LTD.....4TH DEFENDANT

LAND REGISTRAR, THIKA5TH DEFENDANT

JUDGMENT

1. By a Plaint dated 14/11/2017 and filed on 15/11/2017, the Plaintiff prayed for Judgment against the Defendants for Orders THAT;
 - a. A declaration that the Plaintiff is the lawful owner of land parcel No. JUJA/KOMO BLOCK 2/534.
 - b. An order that the title deed over title number JUJA/KOMO BLOCK 2/534 issued in the names of VERONICA WANJIKU GATHOGO be cancelled forthwith by the Land Registrar at Thika.
 - c. An order for cancellation of the charge over land parcel no. 534.
 - d. An order for the removal of the entries in favour of VERONICA WANJIKU GATHOGO and the charge in favour of Letshego Microfinance Kenya.
 - e. Costs of the suit.
 - f. Any other order the Court may deem fit to grant.
2. The Plaintiff's case is that at all material times he was a member and shareholder of New Gatundu Farmers Co. Ltd wherein he was allocated parcel no. 534 (*hereinafter referred to as the suit land*). That sometime in 2017, he engaged a surveyor to re-establish the boundaries and place beacons on the suit land. That however, he was surprised to learn that notices had been put up for auction of the suit land. That the said notices identified the 1st Defendant as the owner of Juja/Komo/Block 2/534. He denied such ownership and maintained that he was the genuine allottee of the suit land from the 4th Defendant. He acknowledged that he was yet to process the title deed thereof but only holds a share certificate and ballot card for the suit land.
3. The 1st Defendant was served through substituted service via the Daily Nation of the 22/2/2018. Despite service the 1st Defendant failed to enter appearance nor file a defence leading to Judgement being entered against her.
4. The suit is opposed by the 2nd, 3rd and 4th Defendants. The 4th Defendant despite service failed to defend the suit.
5. The 2nd and 3rd Defendants filed a joint statement of defence dated 20/4/2018. The 2nd Defendant admitted putting up auction notices on

the suit land registered under the 1st Defendant's name. This was pursuant to the exercise of statutory power of sale to recover outstanding loan arrears. However, they were incessant that the land claimed by the Plaintiff is distinct from the one they sought to sell. That it conducted due diligence in ascertaining ownership of the land before charging it. They denied any allegation of fraud, mistake or illegality on the 3rd Defendant's part. They denied service of any demand or notice to sue upon them.

6. In support of the Plaintiffs case, the 4th Defendant via its statement of defence dated the 22/3/2018 and filed on the 23/3/18 admitted that the Plaintiff is indeed the allottee of the suit land having been issued with a share certificate followed by a ballot. Conversely the 4th Defendant stated that the 1st Defendant too is their member having been allotted ballot No 1466 which she acquired by purchase from the original allottee namely James Wainaina. The 4th Defendant pointed out that the 1st Defendant ought to have obtained title in respect to her ballot No 1466 and not ballot No 283 belonging to the Plaintiff. The 4th Defendant sought to absolve itself of blame in the mishap and denied all allegations of fraud, misrepresentation, mistake and or illegality levelled against it by the Plaintiff and undertook to subject the Plaintiff to strict proof at the hearing of the suit. On that ground the 4th Defendant sought the dismissal of the suit and in the alternative and without prejudice to the prayer for dismissal proposed that the ballot No 1466 belonging to the 1st Defendant should be registered in the name of the Plaintiff.

7. At the hearing the Plaintiff testified as the sole witness on 7/10/2021. He adopted his witness statement dated 21/5/2018. He relied on his List of Documents and supplementary List of Documents dated 14/11/2017 and 20/11/2017 respectively. The said documents were adduced as evidence and Marked **P.Exh 1-7**; share certificate no. 142, ballot no. 283, bundle of receipts, application for caution, public auction notice, undertaking as to damages and copy of green card.

8. Additionally, the 4th Defendant's documents listed in the List of Documents dated 4/5/2018 were produced in support of the Plaintiff's case as **P.exh 8 -14** i.e. various copies of receipts and ballot card no. 1466 dated 8/9/98.

9. In his testimony PW1 – Kirathe Ndiritu Thuku, stated he became a member of the 4th Defendant in 1973 where he held 4000 shares having accumulated the same by the year 1986. He held a share certificate No 42 and was allocated the suit land via ballot card No. 283. He produced various receipts for an assortment of payments ranging from survey fees, shares clearance etc. Like many allottees are yet to take titles for their parcels, the witness stated that he had not been issued with a title.

10. That in July 2017 he engaged a surveyor to reestablish the boundaries and to fix beacons and it is when his son who had accompanied the surveyor informed him that the land had been claimed by a third party. That in November of the same year the area chief informed him that notices had been issued for the sale of the suit land by auction.

11. Alarmed by the news he informed the Court that he then rushed to the plot and found the notices indicating that the land belongs to the 1st Defendant whom he had never met. It was his evidence that he never sold the suit land to the 1st Defendant. That he then proceeded to the 4th Defendant's offices who confirmed that he is the owner of the ballot for the suit land and denied circumstances of the 1st Defendant's registration as the owner of the suit land. Next he obtained copy of a green card from the 5th Defendant which showed that the 1st Defendant acquired the suit land in 2015. It was his evidence that the 1st Defendant fraudulently acquired title to his property and later charged it to the 3rd Defendant hence the auction.

12. In cross-examination, PW1 conceded that he had never taken possession of the suit land. Further he admitted not having reported any fraud to the police.

13. On the other hand, the 2nd and 3rd Defendants called the 3rd Defendant's branch manager, **Johnson Kiarie** as DW1. He relied on his witness statement dated 12/2/2019 as his evidence in chief. He also produced the list of documents dated 20/4/2018 as D. Eexh. 1-12. It was his evidence that the 1st Defendant applied for a loan of Kshs. 800,000/- sometime in 2015 and offered the suit land as security thereon. That they conducted due diligence including valuation of the land, official search at the Thika lands registry which revealed the title was duly registered on 24/2/2015. That the 3rd Defendant proceeded to perfect the securities leading to the registration of a charge on the 17/6/2015 and a further search was conducted to confirm the said registration on the suit land following which the loan was duly disbursed to the 1st Defendant. That upon the 1st Defendant default on repaying the loan, the 3rd Defendant instructed its lawyers to issue statutory notices to realize the security. That despite the issuance of the statutory notices the 1st Defendant failed to pay the loan and a 45-day redemption notice and a notification of sale ensued. That it is in the process of realizing the security that they were served with the suit papers by Plaintiff.

14. On cross-examination, DW1 by Ms Wamboi for the 4th Defendant, the witness admitted that they did not make any enquiries or investigation of the title with the 4th Defendant. He was ardent that they conducted due diligence by inspecting the documents at the lands registry which accordingly, they were satisfied that the suit land belonged to the 1st Defendant.

15. In further cross examination by Ms Igecha for the Plaintiff the witness stated that once the case was in Court they were informed by the 4th Defendant that the suit land does not belong to the 1st Defendant but to the Plaintiff. That the 4th Defendant. That according to their due diligence which was premised on the record at the Lands office and that there was not necessary to carry out any searches at the 4th Defendants offices.

16. The evidence by the sole rival parties marked the end of the hearing. Directions were taken to file final submissions ahead of delivery of Judgement.

17. The firm of **Igecha & Co. Advocates** filed submissions dated 21/10/2021 on behalf of the Plaintiff. It was submitted that the Plaintiff has proven that he was the allottee of the suit land vide ballot card no. 283 as confirmed by the 4th Defendant. That the Plaintiff's payments for

the suit land have not been denied. Furthermore, that the 4th Defendant admitted that the 1st Defendant obtained title deed for the wrong property as opposed to what she was allocated vide ballot No. 1466. That the 1st Defendant despite service, elected not to enter appearance to defend the root of her impugned title.

18. The Plaintiff added that the 1st Defendant's title was acquired by fraud or mistake as confirmed by the 4th Defendant calling for cancellation of title in line with Section 26 of the LRA. Reliance was placed to the cases of **Munyu Maina V Hiram Gathiha Maina [2013] eKLR**, and **Joseph Gitari v Muthui Chomba & 7 others [2018] eKLR**.

19. The 4th Defendant's brief submissions are dated 3/11/2021 by the firm of **Wambui Ngugi & Co. Advocates**. It supported the Plaintiff's claim and stated that the 1st Defendant's title ought to be in relation to ballot card no. 1466. That the said ballot card initially belonged to James Wainaina who is said to have sold land to the 1st Defendant. It shifted the burden of proving the authenticity of the land title to the 1st Defendant and urged the Court to allow the Plaintiff's suit with costs. Reliance was placed on the CoA decision in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**.

20. On the other hand, the firm of **Tobiko Njoroge & Co. Advocates** filed submissions dated 27/10/2021 on behalf of the 2nd and 3rd Defendants. They reiterated the background of facts leading to the present suit and asserted carrying due diligence as evidenced by their exhibits. That the Plaintiff had not proven he is the beneficial owner of the suit land in line with Section 107 of the Evidence Act.

21. On the claim of fraudulent acquisition of title by the 1st Defendant, they maintained that the Plaintiff had not discharged the burden of proving fraud which is higher than a balance of probabilities but lower than beyond reasonable doubt. That fraudulent acts must be strictly pleaded and proven. Lastly, the 3rd Defendant submitted that it created a valid and legal charge over the suit land. That as a result of the 1st Defendant's default on repayment of the loan, it is right in exercising the statutory power of sale as provided for under Section 9 (3)(e) of the Land Act. A plethora of decisions were cited in support of the submissions including **Serah Mwehu Muhu v Commissioner of Lands & 2 others [2014] eKLR**, **Arthi Highway Developers Limited v West End Butchery Ltd & 6 others [2015] eKLR** and **Kitur vs. Standard Chartered Bank & 2 others (2002) 1KLR**.

Analysis & Determination

22. In my view, the main issue for determination is whether the Plaintiff has proven his claim to warrant the orders sought.

23. The Plaintiff's case is that he is the rightful owner of land parcel No. 534 having purchased the same from the 4th Defendant. The 1st Defendant's title deed is in respect to a land parcel no. Juja/Komo Block 2/354. At paragraph 4 of the 2nd and 3rd Defendants' statement of defence, the Defendants alluded to different parcels of land claimed by the Plaintiff against the one they have charged. Indeed the 4th Defendant submitted that the 1st Defendant's land ought to spring from ballot card No. 1466.

24. It is trite that he who alleges must prove. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the "onus" is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant "**on a balance of probabilities**". This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.

25. **Sections 107, 108 and 109 of the Evidence Act** state;

"107. Burden of proof

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

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.

109. Proof of particular fact

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."

26. The import of the above provisions places the duty of proving the instant case on the Plaintiff. Section 108 in particular is stringent that even where no defence is filed, the Plaintiff must discharge the threshold placed on him. The Court of Appeal Judgment in **Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR** explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of the leading Text Book;- **The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14:**

"13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the

facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

27. The said burden of proof is enhanced by the Plaintiff's allegation of fraud and misrepresentation on the part of the Defendants. It is not in doubt that the standard of proving fraud is higher than a mere balance of probabilities but lower than beyond reasonable doubt. This position was buttressed by the Court of Appeal in **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** as follows:

"The appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."

28. In addition, the Court of Appeal at Nyeri in **Jennifer Nyambura Kamau v Humphrey Nandi Civil Appeal No. 342 of 2010 [2013] eKLR** emphasized that it is not enough to plead fraud but the same must be proved as a fact by evidence.

29. **Article 40** of Constitution of Kenya affords every person the protection of the right to own property. The exception is found in sub article 6 that such right would not extend to any property that has been found to have been unlawfully acquired. The rights of a proprietor are further protected under Section 25 of the Land Registration Act.

30. The **Land Registration Act** at Section 26 also provides on the criteria for impeaching a title of land. It provides;

"26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

31. The Plaintiff led evidence and presented documents in support of his claim which included the share certificate, the ballot and the receipts issued by the 4th Defendant for various services that he paid for. The 1st Defendant having failed to rebut the Plaintiffs claim does not mean that the Court will take the evidence of the Plaintiff at face value. The more reason the Plaintiff must discharge the burden of proof that indeed his claim to the suit land is beyond reproach.

32. Although it is on record that the 4th Defendant supported the case of the Plaintiff, the 4th Defendant failed to call any witness. Effectively the pleadings and the statements and evidence on record remain as such pleadings. Untested statements cannot be taken as evidence because its probative value is unknown. The submissions of the 4th Defendant cannot be equated with evidence and as I have always held, submissions are the summation of a party's case. It can never take the place of evidence.

33. The second reason why the Plaintiffs case is facing headwinds is because the Plaintiff has failed to show the link or the nexus between the Share Certificate No 142 and the ballot No 283 and the suit land registered as No JUJA/KOMO BLOCK 2/354. The production of the members register together with the area map denoting the suit land on the ground by the Plaintiff or the 4th Defendant would have provided the much needed nexus or link to the Plaintiffs claim. The membership register ties the member to the plot No allotted or balloted. In my view these two documents in addition to the share certificate and the ballot are critical documents that a claimant must have to proof ownership of land from a land buying company or a cooperative society. Their absence creates doubt in the mind of the Court.

34. There is no evidence on record to shed light on the whether the description of the suit land, as per the Plaintiff, refer to the same suit land. Indeed the 4th Defendant while supporting the Plaintiff's case, failed to testify and elucidate on the position of the suit land. It only stated in its submissions that the 1st Defendant's parcel of land is ballot 1466 and is therefore distinct from the Plaintiff's. The Plaintiff may as well have had a good case had he paid attention and discharged his the burden of proof on the standard of preponderance.

35. The 4th Defendant attempted to shift the burden of proof to the 1st Defendant to explain the authenticity of her title. While it is true that evidential burden may shift to a rival party, the initial obligation lies on he who asserts. Be that as it may, the 3rd Defendant led evidence on their due diligence before granting the 1st Defendant a loan facility. D. Exh 1 is a copy of title in the 1st Defendant's name and an official search (D. Exh.2) dated 27/4/2015 confirming the same. D. Exh.3 is further official search dated 30/6/2015 confirming the 3rd Defendant's charge on the suit land. According to D. Exh.7 – copy of the Charge instrument, the charge as duly registered on 17/6/2015.

36. Moreover the 4th Defendant as the custodian of the mother title on such allotted land, it behooved it to testify and explain the nature of the suit land vis-à-vis the 3rd Defendant's claim that there are two distinct parcels of land.

37. In the end, I am satisfied that the Plaintiff has not discharged the standard of proof in substantiating his claim. The suit fails for want of proof.

38. Although costs are at the discretion of the Court the general rule is that costs follow the event. However, seeing that the Plaintiff's case was supported by the 4th Defendant I direct that each party to pay their costs.

39. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Ms Igecha for the Plaintiff

1st, 2nd, 3rd, 4th and 5th Defendants – absent

Ms. Phyllis Mwangi – Court Assistant