



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 723 OF 2017

GEOFFREY KOMU MUNGAI.....PLAINTIFF

VERSUS

PETER KIHOTO KIIRI.....1ST DEFENDANT

PAUL NG'ANG'A NDUNG'U.....2ND DEFENDANT

KARURA UMOJA INVESTMENT CO. LTD.....3RD DEFENDANT

JUDGMENT

By an **Amended Plaintiff** dated 25th October 2018, the Plaintiff herein filed this suit against the Defendants and sought for Judgment in the following terms:-

a) A declaration that the Plaintiff is the rightful owner and the sole proprietor of the plot No. 422 held at Karura Umoja Investment Co. Ltd and that the transfers of the said plot to Stanley Kinyanjui and the 2nd Defendant, Paul Ng'ang'a Ndung'u were illegal and void and therefore, the Court to issue an order restraining the 1st, 2nd and 3rd Defendants by themselves, agents, servants and or anybody claiming through them from selling, charging, disposing of, developing and subdividing, transferring, occupying and/or interfering in any other manner with all that plot Known as No. 422 held at Karura Umoja Investment Co. Ltd.

b) In the alternative of (a) this Honourable Court do order the Defendants to compensate the Plaintiff for the loss of the plot 422 at the current market value.

c) Costs of this suit.

The Plaintiff averred that in the year 1993, he bought shares and became a member of the 3rd Defendant Company, which issued him with a share certificate No.K/1182 to K/9280, also known as Plot No. 422 and he was thus allocated the said plot as a member of the 3rd Defendant. That the Plaintiff then took possession and sometimes allowed the 2nd Defendant to cultivate the land, which permission was based on trust. That the Plaintiff paid for the requisite charges necessary for transferring to his name, but that the 1st Defendant together with one Stanley Kinyanjui and Solomon Njuguna conspired with some officers of the 3rd Defendant and swindled the Plaintiff off his plot.

It was the Plaintiff's contention that the said Stanley was issued with a fake share certificate by the 3rd Defendant claiming ownership of the suit property, purportedly to have been transferred to him by one Solomon Kinyanjui. That the said Stanley Kinyanjui then transferred the suit property to the 2nd Defendant, who bought the suit property with the knowledge that the plot belonged to the Plaintiff, to which the 2nd Defendant took possession and purports to own it exclusively. That the 1st Defendant while working for the 3rd Defendant confiscated the Plaintiff's original documents pertaining to the suit property and gave the Plaintiff an acknowledgment. That despite having the said documents, the 1st and 3rd Defendants have made no effort to solve the Plaintiff's issues and have refused to return his documents despite numerous demands.

The suit is contested and the Defendants filed a statement of Defence dated 15th April 2019, and denied all the allegations made in the Plaintiff. It was the 3rd Defendant's contention that it has never issued the share certificate to the Plaintiff and that the same is **unauthentic and forged**. Further that as a Company, it has the requisite mandate and authority to transfer the suit plot to its bonafide owner, who was Stanley Kinyanjui, and that any transfer by him to the 2nd Defendant was legal and authentic and thus the 2nd Defendant is validly entitled to the suit property. It was further averred that the documents taken by the 3rd Defendant were falsified documents and that the 3rd Defendant had no right to inform the Plaintiff of the affairs of the Company. That the documents were not signed by the Directors of the 3rd Defendant Company and that the signatures thereon are forged and false signatures cannot give rise to legal ownership.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called one witness and the Defendants also called one witness and closed their case.

PLAINTIFF'S CASE

PW 1 Geoffrey Kungu Mungai adopted his witness statement and further testified that **Karura Umoja Investment Co. Ltd** was selling shares and on **3rd February 1993**, he visited their offices at Kilimambogo House where he was told each share was being sold at **Kshs.7000/=**. He produced the List of documents as exhibit 1-5.

It was his testimony that the **3rd** Defendant asked him for his original documents, but it failed to give them back to me to which he reported the matter to the CID. That the parties tried to solve the matter out of Court to no avail. Further that he paid **Kshs.7800/=** upon which he was issued with a receipt by one of the **3rd** Defendant's clerk, a **Mr. Muiru**, after which he was issued with the share certificate.

He told the Court that he was taken to the ground and was shown his plot and the Beacons. That he became a member on **2nd March 1993**, and that the receipt is for **28th August 1993**. Further that he was given the receipt by **Karura Umoja Investment Co. Ltd** for **Kshs.7800/=**. He acknowledged that the receipt has no stamp for **Karura Umoja Investment Co. Ltd**.

That the Share Certificate is dated **29th March 1984**, and was valued at **7,000/=**. Further that the Certificate and receipts were not given at the same time, and that **Mr. Kihoto** of **Karura Umoja Investment Company Limited**, took his documents. He denied that there was theft of documents at **Karura Umoja Investments**. He further testified that he took his documents to the Company on **3rd February 2010**, though it is not indicated that **Peter Kihoto** is the one who took the documents. He further testified that he did not ballot for the suit property and that the Company had certificates only. He told the Court that he entered into the plot and left a caretaker called **Paul Nganga Ndungu** and that the Defendants colluded to take away his land.

On re-examination, he testified that the share he bought was worth **Kshs.7000/=** and got the receipt from the Company and that the original is with **Mr. Kihoto**, who also gave him the acknowledgement.

DEFENCE CASE

DW 1 Peter Kihoto Kiiru the Director/Secretary of **Karura Umoja Investment Co. Ltd**, adopted his witness statement date **15th November 2019**. It was his testimony that according to their records, the suit property belonged to **Paul Nganga Ndungu**, who was issued with Certificate No. **0728**. That the Plaintiff went to the suit property, but the share certificate he held was not for the Plot Number as the document did not show any plot number. It was his testimony that their land was **LR. 10821/8**, and that the Plaintiff's share certificate has no parcel number. He denied that the **3rd** Defendant had an office at **Kilimambogo House** but at **Nyasabaini House** in **Juja**.

He testified that the receipts are dated **28th August 1993**, for **7800/=**, and were issued at **Kilimambogo House**. That the Contribution for the share was **200/=** and the receipt produced by the Plaintiff is for **7800/=** for the shares. Further that the share certificate is for **1984**, and the receipt is for **1993**. He denied that the documents produced by the Plaintiff were from them. He further denied that their Chairman signed the share certificate. That the Defendants were summoned by the DCIO and he confirmed that the documents were not genuine.

It was his testimony that in **1993**, he was working for **Lonro East Africa** and he started working for the **3rd** Defendant Company in **1994**, and their offices have been in **Nyasabaini** and that the Company did not have any office in **Kilimambogo House**. That **Ng'anga** bought the land from **Stanley Kinyanjui**, who bought it from his father and the transfer is dated **10th June 2009**. Further that **Solomon Njuguna** transferred the plot to his son **Stanley Kinyanjui**.

That **Stanley Kinyanjui's** share certificate is dated **1993**, and he denied even confiscating the Plaintiff's documents but stated that the documents were confiscated by the CID. That whatever the Plaintiff paid, he did not pay in their offices. That he only came to know the Plaintiff in **2009**, but the title for the land was obtained in **2008**. That the **3rd** Defendant gave certificates of ownership, which have land parcel number and that they have been issuing certificates of ownership since **2004**, but share Certificates used to be given before **2004**. Further that for the land to be transferred, one has to pay **25000/=** and that there was no receipt to show that the Plaintiff paid the same.

He further testified that he came to the office in the year **2004**, and that before **2004**, many members used to come with fake documents. That the office had a file that was used to verify documents and the fake ones would be rejected. That the **2nd** Defendant has built a school on the suit property.

After close of viva voce evidence, the parties filed written submissions which the Court has carefully read and considered. The Court has also considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and renders itself as follows:-

It is not in doubt that both the Plaintiff and the **2nd** Defendant are laying claim to the suit property. It is the Plaintiff's contention that he bought the suit property from the **3rd** Defendant, who were by then housed at **Kilimambogo House**. The Plaintiff has further alleged that upon purchasing the said shares in respect of the suit property, he was issued with a receipt and taken to the ground to which he was shown the suit property herein as his land. The Plaintiff further testified that the **3rd** Defendant through one of its officers DW1, confiscated his documents when he learnt that the Defendants had colluded to have his plot taken away.

However, it is the Defendants contention that the documents held by the Plaintiff are a forgery and that the **3rd** Defendant was never housed at **Kilimambogo House**. DW1 who gave evidence on behalf of the Defendants and stated that he started working for the Company in **1994**.

That the suit property belonged to the 2nd Defendant, who had bought it from the original owner. Though DW1 testified that the documents held by the Plaintiff were a forgery as those were not the type of documents that were normally given to their members, DW1 who was testifying on behalf of the Company never produced any evidence to show the type of documentations that the Company either gave to its members before or now.

Those being the facts of the case, the issues for determination are;

1. Which party has proved the root of its title
2. Whether the Plaintiff is entitled to the orders sought
3. Who should bear the cost of this case

1. Which Party has proved the Root of its Title

It is not in doubt that the Plaintiff and the 2nd Defendant's root of titles has been called into question. What the Court must then determine is which of the two has proved the root of his title consistently and to the required standard. The Plaintiff claims to have a share certificate that entitles him to ownership of the suit property, while the 3rd Defendant's contends that according to its records, it is the 2nd Defendant that is the legal owner of the suit property. See the case of Munyu Maina..Vs..Hiram Gathiga Maina, Civil Appeal No.239 of 2009, where the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

The Court would like to point out that indeed, it is strange that though the 2nd Defendant who is the alleged owner of the suit property's and whose title was called into question, never appeared in Court to establish how he acquired the suit property or the process that led to his acquisition of the suit property.

In support of his claim, the Plaintiff has produced a receipt to show that he bought the suit property from the 3rd Defendant by buying of shares from the said Company. The receipt is dated **28th August 1993**. Further the Plaintiff has also produced a share certificate which is dated **30th March 1983**. In his submissions, the Plaintiff has submitted that the said date that is indicated in the share certificate is a flaw and that the same was done by the Company. To buttress this submission, the Plaintiff also submitted that the share certificate that was given to one **Stanley Kinyanjui** also had a flaw and therefore it would seem that it was a Company flaw.

However, it is the 3rd Defendant's contention that the documents that the Plaintiff held in its possession were fraudulent documents that had not been issued by the 3rd Defendant. DW1 who is an official of the 3rd Defendant testified on behalf of the Defendants and stated that the Company has a procedure that it follows, It was his further evidence that the 3rd Defendant Company had given its share to **Solomon Kinyanjui**, who in turn transferred the same to **Stanley Kinyanjui**, who then transferred the same to the 2nd Defendant. This being the sequence through which ownership was passed, it is the Court's considered view that this does not mean that the Court will automatically believe the evidence tendered by DW1, just because he represents the Company.

It is trite that he who alleges must prove and the Defendants having alleged that the Plaintiff's documents were a forgery, then they had the onus of proving the same. More so because the 3rd Defendant was the custodian of the said documents. In their submissions, the Defendants have relied on the case of James Njoroge Gitau ...Vs...Lucy Chepkurui Kimutai [2018] eKLR where the Court held that;-

“What is before me is a straight contest over who between the plaintiff and the defendant ought to own the land. For either litigant to succeed, they need to demonstrate to me, the root of their title, and the root of their title must originate from the shares held at Kalenjin Enterprises. I have already outlined that the plaintiff purchased shares from Mr. Chumo who had in turn purchased shares from Mr. Morogochi. This is affirmed by the company through its director, Mr. Chelaite who testified as PW-2. Mr. Chelaite produced a register of the company, and I have absolutely no reason to doubt that register. The register shows the name of the plaintiff and assigns him the plot No. 7. This evidence is coming from the company itself, and cannot be taken lightly. It is the company which knows its members and which knows what land it has assigned to the members. If the company refutes that one is a member, then that person needs to rebut this, through cogent evidence. I am afraid that the defendant had not delivered any evidence to me that Kimutai held any shares at Kalenjin Enterprises. She has not delivered any share certificate, nor any receipt for payment for survey so as to be assigned the suit land. All that the plaintiff had was a document, titled “Rift Valley Enterprises (Koelel Farm) List of Allottees” as proof that the suit land was assigned to the deceased.

Now, I do not know the origin of this list for it does not bear a stamp of authenticity from Kalenjin Enterprises. It does appear to me to have been prepared by the Land Registrar, but I have no idea and from what verifying documents, the Land Registrar, made this list. PW-2 categorically denounced this list as a fraudulent one, and I cannot take that lightly. Having been so demonized, it behoved upon the defendant to give a semblance of authenticity to that list, which I am afraid the defendant did not do. Other than merely producing it, the defendant did not try to show that this list is genuine and authentic. I am afraid that given the fact that a director of the company has denounced this list, and there being no evidence to back up its authenticity, I am unable to give that list priority over the register that PW-2 produced. I am thus not persuaded that Kimutai Rotich was ever assigned to own the suit land by Kalenjin Enterprises. He ought never to have been registered as proprietor of the suit property at all. My finding therefore is that his registration as proprietor must have been procured by way of fraud, misrepresentation or

mistake.

The Court could not agree more with the sentiments of the Honourable Judge. It is indeed true that the evidence coming from the Company cannot be taken lightly as it, is the Company which knows its members. However it is also not in doubt that the said evidence must be substantiated. It was not enough for DW1 to come to Court and testify. The Company being the custodian of the said documentations that would have established the root of title by the 2nd Defendant and showed the difference between the documentations provided by the Plaintiff and those in the custody of the Company and those that are issued by the Company, it need to substantiate further.

It is the Company that has alleged that the documentations by the Plaintiff were fraud and further averred that the 2nd Defendant is the legal owner of the suit property. It was then incumbent upon the 3rd Defendant to prove the allegations made by itself against the Plaintiff. It had the onus of proving its allegations, but failed to do so to the satisfaction of this Court.

Further it is trite that if a party fails to produce any evidence that is in its possession, the presumption is that such evidence would be detrimental to its case, See the case of **Abdnego Mutunga Muinde...Vs...Republic (2018) Eklr in which the Court cired the case Nguku ...Vs...Republic (1985) KLR 412** where the Court of Appeal held that;-

“Where a party fails to produce certain evidence, a presumption arises that the evidence produced would be unfavourable to that party.”

Unlike the above case in which the Defendants sought to rely on, in this instant case, no evidence has been produced by the Company (3rd Defendant) to rebut the Plaintiff’s evidence. It is not enough for the Company to only state that the said documents are a forgery and that they did not conform to the ones issued by them. The Company would have proved the same by producing in Court evidence that rebuts the evidence produced by the Plaintiff. The Plaintiff had no contrary documents to compare to the ones he had with nor does the Court have any opportunity to compare the Plaintiff’s documents against others. Further though DW1 sought to deny that he confiscated the Plaintiff’s documents, in the statement of Defence, the Defendants acknowledged confiscating the said documents. Further the acknowledgment by the Plaintiff has not been rebutted. The Court then wonders why the Company would seek to confiscate documents that did not belong to it. For the above reasons, the Court finds and holds that the Defendants have failed to prove the roof of title held by the 2nd Defendant.

Though the 3rd Defendant has alleged fraud on the part of the Plaintiff herein, it failed to discharge its duty through its witnesses. There was no evidence led by the Defendants herein to prove the allegations of fraud especially on the part of the Plaintiff. The 3rd Defendant has failed to discharge its duty as provided by **Section 107 of the Evidence Act**, which provides:-

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.

Allegations of fraud being extremely serious and which must be strictly proved, the Court finds that the Defendants herein failed to discharge that duty as provided by **Section 109 of the Evidence Act**, which states as follows:-

“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”.

Whether the Plaintiff has proved his root of title? It is the Court’s considered view that what must first be determined is whether the discrepancy in the share certificate vis a viz the date given by the Plaintiff is fatal to the root of his title. The Plaintiff has submitted that the said flaw in his share certificate is the same one that has been found in the share certificate by the said **Stanley Kinyanjui**. The Court finds that the evidence by the Plaintiff has not been controverted and thus the Court is satisfied that the said error was a **flaw** in the 3rd defendant’s Company documentations. Therefore, the Court finds and holds that the Plaintiff has proved his root of title.

2. Whether the Plaintiff is entitled to the orders sought.

The Plaintiff sought for a declaration that he is the rightful owner of the suit property and that the transfer to **Stanley Kinyanjui** and the 2nd Defendant are illegal. He urged the Court to issue an order restraining them from interfering with the suit plot. The Court has already held and found that the Plaintiff has been able to prove the root of his title and therefore the Plaintiff is the rightful owner of the suit property and hence entitled to all right and privileges appertaining to it as provided by **Section 24 and 25 of the Land Registration Act**.

The Court notes that the Plaintiff had also sought for compensation for the loss of the suit property. However, the court finds that the said prayer would have been an alternative in the event the 2nd Defendant would have been found to be an innocent purchaser for value. The 2nd Defendant failed to prove the root of his title in any way. Further the Court notes that the Plaintiff had also made various allegation to the effect that he had let the 2nd Defendant use the suit property as a caretaker, which allegations have not been rebutted by the Defendants. Taking into account the available evidence, the Court finds that the Plaintiff is entitled to the prayers sought.

3. Who should bear the costs of the suit

Section 27 of the Civil Procedure Act gives the Court discretion to grant costs of the suit. However, it is trite that costs usually follow the events, unless there are special circumstances to warrant the denial of costs. In this instant case the Plaintiff is the successful party, and the Court finds and holds entitled to the costs of the suit.

Having carefully considered the available evidence, the exhibits produced in court, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has proved his case against the Defendants herein on the required Standard of balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiff against the Defendants herein jointly and severally as sought in the Plaint dated **25th October 2018** in terms of prayers **no (a) and (c)**.

It is so ordered

Dated, signed and Delivered at Thika this 29th day of October 2020.

L. GACHERU

JUDGE

29/10/2020

Court Assistant – Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgement** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

L. GACHERU

JUDGE

29/10/2020