



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC SUIT NO.596 OF 2017**

**MUCHI GCHUKIA.....PLAINTIFF**

**VERSUS**

**FRANCIS NDIRANGU NJOROGE.....1<sup>ST</sup> DEFENDANT**

**PETER WANAINAN NJOROGE.....2<sup>ND</sup> DEFENDANT**

**PAUL MBATIA KABUHO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a Plaintiff dated **12<sup>th</sup> June 2017**, the Plaintiff herein brought this suit against the Defendants for orders that;

- a) An order directing each of the Defendants to execute the necessary legal instruments to partition the suit land so that the Plaintiff gets his fair share free of the rights of the Defendant.*
- b) An order authorizing and directing the Court Executive officer to execute the necessary legal instruments on behalf of any or all Defendants who may fail or default in executing the same.*
- c) General Damages.*
- d) Costs of the suit and interest thereon.*
- e) Any other relief that the Court may deem just to grant.*

In his statement of Claim, the Plaintiff averred that on the **15<sup>th</sup> of April 2016**, the three Defendants were registered as proprietors in common of all that parcel of land known as **Kiganjo/ Gachika/ 3886**, and despite being registered as proprietors in common in undivided shares in the suit property, they held diverse shares in the land with the Plaintiff holding 0.651 hectares and the Defendants holding 0.502 hectares.

He further averred that it was a common understanding between the proprietors of the undivided shares that should one wish to have rights of others, they would cooperate and obtain the requisite **Land Control Board Consent** and execute all legal instruments to effect of partitioning and transfer of the shares. He alleged that he approached each of the three Defendants and requested them to join him in seeking the necessary Land Control Board **Consent** to partition and transfer his free share but they have unreasonably and without justification refused to do so. It was his contention that the Defendants actions have occasioned him great hardship and violation of his rights to own property privately and his ability to deal with his share of the property as he wishes and he has therefore suffered damages.

Though the Defendants were served with Summons to Enter Appearance and file Defence as per the **Affidavit of Service of David Njoroge Mburu**, sworn on **16<sup>th</sup> August 2017**, they failed to do so. Matter proceeded for Formal Proof on **29<sup>th</sup> November 2018**, wherein the Plaintiff gave evidence for himself and called no witness.

**PLAINTIFFS CASE**

**PW1 Muchi Gichuki**, adopted his witness statement in Court as evidence. He further produced his list of documents as exhibits in Court and produced the demand letters. He testified that despite sending demand letters to the Defendants they have failed to respond or comply with them. Further that the Defendants have sold the suit land to other people and that his title is **1.61 acres and** that he has come to Court seeking for his title deed.

After the Close of his case, the Plaintiff through the **Law Firm of Kiarie Joshua & Company Advocates** filed his written submissions which the Court has carefully read and considered.

The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted. However the Plaintiff is still required to prove his case on the required standard of balance of probability. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru Munyoro.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988**, where it was held that:-

***“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”***

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR**, where the Court stated:-

***“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”***

Further in the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR**, where the Court held that:-

***“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”***

It is this Court's opinion then that the issue for determination is **whether the Plaintiff is entitled to the orders sought.**

The Plaintiff has alleged that he holds the suit land in common with the Defendants and that each one of them holds undivided shares in the said Suit land. To this effect he has produced a Copy of the title deed that evidenced that he is the registered own of the suit property together with the Defendants .He also produced a letter of consent dated **24<sup>TH</sup> October 1999**, and a transfer of undivided shares that evidences that he holds **1.00 acres** of the suit land. This Court therefore holds and finds that indeed the Plaintiff is the registered owner of the suit land holding 1.00 acre and as such he is entitled to the same.

The Plaintiff has further alleged that the parties agreed that when the time came and a party would like to have his share divided, then the other parties would cooperate and enable the party to have his share. As already held by this Court, the testimony of the plaintiff remains uncontroverted and unchallenged. The Plaintiff is not a relative to the Defendants and only bought the suit land from the Defendants. It is therefore obvious that at some point the parties must have been aware that each party would want to have their own share and therefore have the same subdivided. It is also clear that the plaintiff's evidence having not been challenged the Court is inclined to accept his version of events and therefore need to have the said land partitioned and each party to have his share.

The Plaintiff has also claimed for General damages. However no evidence was availed to show the damages that the Plaintiff suffered nor was any proved and in the absence of proof of any damages suffered, this Court is of the opinion that the Plaintiff is not entitled to the same and therefore the said prayer must fail as it is trite that whoever alleges must prove.

This Court therefore finds that the Plaintiff has proved his case on a balance of probability and is entitled to the orders as sought. The Plaintiff has however alleged that he is entitled to **1.61 acres** and has sought for **0.651 hectares**, However the Court having perused through the documents availed as exhibits, finds that the Plaintiff was to be allocated **1.00 acres** of the suit land translating to **0.405 hectares**, upon conversion and therefore that is the share that he is entitled to.

The upshot of the foregoing is that the Plaintiff has partially proved this case on a balance of probability and the Court finds that he is entitled to the orders sought. The Plaintiff suit is therefore allowed in terms of prayers **(a), (b) and )(d)**with the Plaintiff getting only **1 acre** to be excised from the suit land. In prayer No.(b), the Order is directing the Deputy Registrar of this Court and not Executive Officer.

It is so ordered.

**Dated, Signed and Delivered at Thika this **8<sup>th</sup>** day of **November, 2019**.**

**L. GACHERU**

**JUDGE**

**8/11/2019**

In the presence of

M/S Muhia holding brief for Kiarie Joshua for Plaintiff

No appearance for Defendants

Jackline - Court Assistant.

**L. GACHERU**

**JUDGE**

**8/11/2019**