



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 140 OF 2017

(FORMERLY NAIROBI ELC 603 OF 2016)

ZACHAUS NYOIKE NDIRANGU.....PLAINTIFF

VERSUS

NORTH GATANGA WELFARE ORGANIZATION.....1ST DEFENDANT

JOSEPH KIRUKA.....2ND DEFENDANT

DANIEL KWERI.....3RD DEFENDANT

HUMPHREY WANGI.....4TH DEFENDANT

JULIUS MUGO.....5TH DEFENDANT

JUDGMENT

By a **Plaint** dated **7th June 2016**, the Plaintiff herein filed this suit against the Defendants seeking for orders that;

- (a) The Court issues a mandatory order compelling the Defendants to effect the transfer to the name of Rosemary Njoki Mwaura*
- (b) The Defendants be issued with a permanent injunction of not interfering with the Plaintiff's or the new owner on the said plot N.589.*
- (c) The Defendants to bear the costs of this suit*
- (d) Any other relief the Court deems fit and just to grant in the circumstances.*

In his statement of claim, the Plaintiff averred that he is a member and shareholder of the 1st Defendant which was formed as a Welfare Society by the staff and former staffs of **Delmonte Kenya Limited**. That when the 1st Defendant invite its members to contribute toward purchase of land in **Nanga Kihoto Farmers Cooperative Society Limited**, he contributed for one plot being **N.589**. When he finished payment, on **11th April 2016**, he sold the suit land to one **Rosemary Njoki Mwaura** and submitted the transfer forms as per the association's regulations. That however the official refused to sign and verbally informed him that the area chief had informed them not to effect the transfer and despite visiting the welfare's offices, he has not been given a reason why he was barred from selling the land.

However he has already sold the suit land and what was remaining was the transfer as the said **Rosemary Njoki Mwaura** has already taken possession and started developing the suit land and is demanding either the transfer or a refund of the purchase price plus interest and the costs incurred.

Despite being duly served, the Defendants did not enter appearance or participate in the proceedings .The matter proceeded for formal proof wherein the Plaintiff herein testified and closed his case.

PLAINTIFF'S CASE

PW1 Zachaus Nyoike Ndirangu adopted his witness statement dated 7th June 2016, and produced his list of documents as exhibit 1 in Court. He further testified that he is a member of **North Gatanga Welfare Organization**. It was his testimony that after he purchased the suit property, he obtained his portion which was subdivided from the main property and he sold his portion to one **Rosemary** and entered into a sale agreement to that effect. That he received **Kshs.165,000/=** from the purchaser but when he went to the welfare's offices to have the suit land transferred to her, the officials refused to have the land transferred and they did not give him any reason and despite demands they have refused to do so. He urged the Court to allow his claim.

After close of viva voce evidence, the Court directed the Plaintiff to file brief written submissions and in compliance with the said directive the Plaintiff through the **Law Firm of Mary Ngechi & Company Advocates** filed the submissions on 17th June 2019, and submitted that the Plaintiff is the beneficial owner of the suit property and thus had capacity to dispose off the suit land to the third party. Further that the said **Rosemary** is a *bonafide* purchaser for value and the fact that the Defendants role was limited to the coming together of land investors, it did not have a role in limiting the transfer and their actions are therefore ultra vires.

The Court has now carefully read and considered the pleadings, evidence adduced and the written submissions and the Court's finds that the issue for determination is whether the Plaintiff is entitled to the orders sought.

The Defendant failed to enter appearance and therefore the suit is undefended. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted and there would be no reason as to why the Court should not believe it. 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 the Court 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”

Even with the above, 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 logical conclusion as an exparte evidence is not automatic proof since 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* 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... Carooline Nduku (2018)eKLR*, 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.”

The Plaintiff has alleged that he is a member of the 1st Defendant which is North Gatanga Welfare Organization and to this effect he has produced in evidence a membership card No.15 which proves that he is indeed a member of the 1st defendant. The Plaintiff further testified that he bought the suit land after contributing his share and was given the suit land after subdivision. To this effect the Court has also seen the ballot card which is prove that the Plaintiff is the owner of the suit property.

The Court takes notice that the first name of the Plaintiff appears to be misspelt in the two cards. However the Identity card number of the Plaintiff is the same in both cards and the 2nd name too is the same. Further this Court has already found that the evidence of the Plaintiff is uncontroverted. The Defendants have not challenged his membership or that he indeed was the beneficial owner of the suit property. As such this Court holds and finds that the Plaintiff indeed is the beneficial owner of the suit property.

Having held that he is the owner of the suit property, it therefore means that he held all the rights and interests that were appertained to the suit property herein. He could therefore enter into a sale agreement with whoever he wanted to. This Court has seen the sale agreement between the Plaintiff and the said Rosemary Mwaura. The Plaintiff having sold the suit land, was therefore entitled to get any necessary assistance from the Defendants to unable him transfer the suit property to the purchaser. The Plaintiff has claimed that the Defendant have declined to offer him the said assistance. No explanation has been offered. Therefore the Plaintiff is entitled to the orders sought.

Section 27 of the Civil Procedure Act gives the Court the discretion to grant costs of the suit. Costs are usually awarded to the successful litigant. In this instance the Plaintiff is the successful litigant is therefore he is entitled to the costs of the suit.

Having now carefully considered the available evidence and the exhibits thereto, together with the written submissions, the Court finds that the Plaintiff has discharged his duty of proof of the case on the required standard of balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiff against the Defendants as prayed in the Plaint in terms of prayer No.(a), (b) & (c). The Defendants to effect the said transfer forthwith.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of December 2019.

L. GACHERU

JUDGE

6/12/2019

In the presence of

Mr. Juma holding brief for M/S Ngechi for Plaintiff

No appearance for Defendants

Jackline - Court Assistant.

L. GACHERU

JUDGE