



Wabwire v Kamuren (Sued in His Own Capacity and as the Legal Representative of the Estate of Agnes Jebet Kamuren -Deceased) (Environment & Land Case 477 of 2016) [2024] KEELC 1293 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 477 OF 2016**

**A OMBWAYO, J
MARCH 7, 2024**

BETWEEN

SCOLASTICA WABWIRE PLAINTIFF

AND

KENNETH KIPTALA KAMUREN (SUED IN HIS OWN CAPACITY AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF AGNES JEBET KAMUREN -DECEASED) DEFENDANT

JUDGMENT

1. Scholastica Wabwire (hereinafter referred to as the plaintiff) has come to this court with a further re-amended plaint dated 24th April 2023 against Kenneth Kiptala Kamuren (hereinafter referred to as the defendant) who has been sued in his own capacity and in his capacity as the legal representative of the estate of Agnes Jebet Kamuren. She prays for judgment in the terms that a declaration that the Plaintiff is the lawful owner or purchaser of all that parcel of land known as Unsurveyed Residential Plot No 19. She prays for damages for breach of contract and general damages for trespass. Moreover, she prays for an order of eviction of the Defendant. Lastly she prays for an order compelling the Defendant to transfer and cause a Certificate of Lease for all that parcel of land known as Unsurveyed Residential Plot No 19 to be issued in the Plaintiff's name.
2. In the alternative, an order compelling the Defendant to execute and hand to the plaintiff all the documents necessary to procure the certificate of lease over all that parcel of land known as Unsurveyed Residential Plot No 19 in the plaintiff's name. In the alternative, an order that the Defendant refunds the Plaintiff the purchase price together with interest thereon at prevailing commercial rates from 5th April 2002 until payment in full.
3. Lastly, she prays for a permanent injunction restraining the defendant and or his agents or otherwise whosoever from trespassing, erecting transferring to third parties and/or interfering with the Plaintiff's



quiet possession and enjoyment of all that parcel of land known as Unsurveyed Residential Plot No. 19 plus for costs of this suit

4. The facts of the case as pleaded by the plaintiff are that on or about 5th April 2002, the Plaintiff purchased all that parcel of land known as Unsurveyed Residential Plot No.19 pursuant to a letter of allotment Reference No. 308824/XLIV and dated 26th January 1996 from the Defendant vide a written agreement dated 5th April 2002 at a price of Kshs.220/-
5. On execution of the sale agreement the Plaintiff paid the Defendant a sum of 120,000/= with the balance of the purchase price of Ksh100,000/= being payable upon the Defendant procuring a Certificate of Lease of the property in the Plaintiffs name.
6. Upon purchasing the suit parcel of land, the Plaintiff took vacant possession of a parcel of land she was shown by the defendant believing it to be Unsurveyed Residential Plot No. 19 and started developing it by growing crops thereon.
7. Despite the Plaintiff being ready and willing to pay the balance of the purchase price, the Defendant without any justifiable cause failed, refused and or neglected to procure a Certificate of Lease in the Plaintiff's name.
8. On or about the 3rd November 2016, the Defendant without any colour of right whatsoever trespassed onto the parcel of land the plaintiff was occupying, prevented the Plaintiff from depositing construction materials and erected a barbed wire fence on part of the property intended to deny the Plaintiff access to her parcel of land.
9. Sometime in the year 2019, the Plaintiff discovered that the Defendant had granted her vacant possession of Unsurveyed Residential Plot No. 20 allocated to his spouse, Agnes Jebet Kamuren (Deceased), and that this is the property she had occupied throughout on the mistaken belief that it was the plaintiff's Unsurveyed Residential Plot No, 19 which she had purchased from the Defendant. The Defendant has engaged goons to harass intimidate and prevent the plaintiff from accessing her property.
10. The Plaintiff avers that the Defendant continues to interfere with her quiet and peaceful enjoyment of the suit property and by reason of the Defendant's illegal conduct she has suffered loss and damage. The Plaintiff's claim against the Defendant is for a declaration that the Plaintiff is the lawful owner of the suit property, a permanent injunction restraining the Defendant and or his agents from dealing in any manner whatsoever with all that parcel of land known as Unsurveyed Residential Plot No.19, an order compelling the Defendant to transfer the suit land to the Plaintiff and costs of this suit. Despite demand and notice of intention to sue having been given, the Defendant has refused to desist from his illegal conduct rendering the filing of this suit absolutely necessary.
11. The defendant filed a written statement of defence where he stated that sometimes in the year 2002 with intention to sell to the plaintiff LR No, Unsurveyed Residential Plot 19 Nakuru Municipality for an agreed purchase price of Ksh220,000/= he entered into an agreement with the plaintiff. The defendant avers further that pursuant to the said agreement the plaintiff paid him deposit in the sum of Ksh120,000/= and undertook to clear the in the sum of Ksh.100,000/= upon registration of a transfer and issuance of certificate of lease the plaintiffs name.

The defendant avers further that pursuant to the said agreement the plaintiff did not take possession of the land parcel and defendant initiated various processes to obtain title to the suit land and register a lease to himself or to the plaintiff but unfortunately the same was declined by the government and that he informed the plaintiff of the same and offered to refund her the deposit but the plaintiff refused insisting she wanted nothing but the parcel and later moved to court.



12. The defendant avers further that the plaintiff did not purchase the land parcel as she did not pay the full agreed purchase price. She did not take possession and he could not accept the balance of the purchase price even if the plaintiff was willing to pay the same on account of inability to procure title to the suit land. The defendant avers further that he is lawfully on the land parcel as allottee LR No. Unsurveyed Residential Plot No.19 Nakuru Municipality and as legal administrator of the estate of Agnes Jebet Kamuren on LR No.Unsuryved Residential plot No.20 Nakuru Municipality.
13. The defendant contends that he has not trespassed onto any plot, he has not prevented the plaintiff from depositing construction materials, he has not prevented the plaintiff from erecting a barbed wire fence and has not denied the plaintiff access to any land parcel.
14. The defendant avers further that the plaintiff is not the owner LR No. Unsurveyed Residential plot 19 Nakuru Municipality or IR No. Unsurveyed Residential Plot 20 NakL11"11 Municipality and has no right to deposit construction material, erect barbed wire fence and have access to any of the said plots. The defendant denies hiring goons to harass, intimidate and prevent the plaintiff from gaining access to the suit land and further denies interfering with the plaintiff in any manner on the suit land.
15. The defendant further contends that the, plaintiff has no right to an order for declaration as the lawful owner of LR No.Unsuryved Residential Plot 20 Nakuru Municipality and an order cannot be issued to compel the defendant to transfer the suit to the plaintiff. According to the defendant, the plaintiff's suit is incompetent, bad in law and has no merit and the plaintiff is guilty of laches and acquiescence and that the plaintiff has no cause of action against the defendant based on their joint agreement as the said agreement is time barred and invalid.
16. The defendant believes that the plaintiff is guilty of fraud as she attempts to use her agreement with the defendant on LR No. Unsurveyed Residential Plot 19 Nakuru Municipality which she has fraudulently altered and defaced and now purports to use the same to claim LR. No. (Unsurveyed Residential Plot 20, Nakuru Municipality. Lastly, that the plaintiff if claiming LR No. Unsurveyed Residential Plot 20 Nakuru Municipality should have claimed the same directly from the deceased and not himself and the plaintiff's claim has no colour of right and amounts to fishing.
17. When the matter came up for hearing the plaintiff testified that she purchased the unsurveyed land No.19 from the defendant. She paid Kshs120,000 and the balance was Kshs100,000. She settled on the land and when she wanted to pay the balance the defendant began dilly dallying and hence she has come to court. The defendant was given an opportunity to rebut this evidence but did not attend court despite knowledge of the hearing date.
18. This court finds that the evidence of the plaintiff is not controverted. The defence by the defendant is not evidence and therefore cannot be relied upon. Where a party fails to adduce evidence and has had opportunity to adduce the same the court will rely on the evidence adduced and on record.
19. In the case of In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.



20. The fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case.
21. The court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR 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 in unchallenged or not.

22. In this case, there is evidence that the plaintiff and the defendant entered into an agreement of sale of land and consideration of Ksh 120,000 was paid. However, it is not clear which plot the plaintiff is claiming as in the agreement, it shows that he bought Uns-residential Plot No 20 but in this case she is claiming UNs-residential Plot No 19 which belongs to the deceased Agnes Jebet Kamuren and yet she has not shown any agreement with the deceased. It is evident that the defendant is taking advantage of the confusion. It is very clear that that plot no 19 belonged to the late Jebet whereas plot no 20 belonged to the defendant and therefore the court cannot grant an order of specific performance or permanent injunction in respect of plot no 19 as prayed as the same is the property of the late Agness Jebet Kamuren. In this case I do apply the principle of equity that abhors parties to enrich themselves unjustly and do find that the plaintiff has satisfied the court that he is entitled to the following reliefs and I do grant:-
 - a. Damages for breach of contract of Kshs500,000/=
 - b. The defendant to refund the plaintiff the purchase price of Ksh 120,000 with interest at court rates from the time of filing the suit. The other prayers are disallowed.
 - c. Half costs of the suit to the plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF MARCH 2024.

A. O. OMBWAYO

JUDGE

