Gitau v Chief Land Registrar, Muranga & 4 others (Environment & Land Case E032 of 2021) [2024] KEELC 3906 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3906 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE E032 OF 2021

LN GACHERU, J

APRIL 25, 2024

BETWEEN

JAMES MBURU GITAU ..... PLAINTIFF

AND

CHIEF LAND REGISTRAR, MURANGA ..... 1ST DEFENDANT

LAND REGISTRAR, MURANGA ..... 2ND DEFENDANT

DIRECTOR OF SURVEYS ..... 3RD DEFENDANT

KIHIU MWIRI FARMERS CO LTD ..... 4TH DEFENDANT

ROSE WANGARI MWANGI ..... 5TH DEFENDANT

JUDGMENT

1. By an amended Plaint dated 15th October 2021, the Plaintiff herein James Mburu Gitau, sought for judgement against the Defendants herein jointly and severally for the following prayers:

   a. An order directing the Defendants to register to the Plaintiff plots No Mitubiri/ Nanga/ Block A 9214/ 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1154, 1153 1168, 1152, 1151, 1150, 1149, 1113, 1112 & 1159,

   aa. An order of injunction restraining the 5th Defendant from entering, trespassing or in any way interfering with the Plaintiff occupation of plot No. Mitubiri/ Nanga/ Block A/ 9214/ 1168;

   b. A permanent injunction restraining the 1st, 2nd, 3rd, & 4th Defendants their servants, agents or any other person claiming under them from entering, trespassing, transferring, selling, or in any other way dealing with plots No. Mitubiri/ Nanga/ Block A 9214/ 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1154, 1153, 1168, 1152, 1151, 1150, 1149, 1113, 1112 & 1159;

   c. Costs of the suit;

d. Any other relief that the Court may deem fit to grant.

2. In his claim, the Plaintiff averred that at all material times to this suit, he was the holder of Share Certificates No 6048, 3538, 2715, 5910, 6025, 5647, 2475, 3364, 4540. 1555& 6045, and out of the said shares, he was allocated ¼ acre plot out of LR No. 9214 and 7 non-members Certificates of plot ownership which are Mitubiri/ Nanga/ Block A/ 9214/ 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1154, 1153, 1168, 1152, 1151, 1150, 1149, 1113, 1112, & 1159, which constitutes of 18 plots.

3. The Plaintiff further averred that he is a member and shareholder of Kihiu Mwiri Farmers Co. Ltd, who owned the above plots and had been in occupation of the same plots since the year 2006, which is approx. 15 years.

4. Further, the Plaintiff averred that the 1st, 2nd & 3rd Defendants started an ongoing process of registration and surveying of the land. However, they excluded the Plaintiff from the list of people being allocated the title deeds despite him having all the requisite documents to prove ownership and despite demand, the Defendants have failed to give any reasons for excluding him.

5. It was his further claim that he has not been issued with a title deed despite him having all the relevant documents to prove ownership and has also not been allocated any parcel of land or included in the list of those to be allocated or to be issued with the title deeds.

6. The Plaintiff alleged that some people are claiming to have been issued with title deeds to the plots that the Plaintiff rightfully owns. That the 5th Defendant has delivered building materials and had dug trenches on the suit plot No Mitubiri/ Nanga/ Block A 9214/ 1168.

7. It was his further allegations that he has continued to own and to occupy the said plot, which the Defendants without any legal right and while acting illegally allocated the plots to third parties.

8. The Plaintiff also alleged that despite service of demand of Notices of intention to sue, the Defendants have refused to transfer his property to him, thus rendering this suit necessary. He urged the court to allow his claim.

9. All the Defendants were served with copies of Amended Plaint and Summons to Enter Appearance as is evident from the Affidavit of service sworn by Kariuki Stephen Richu, a Process Server. However, only the 5th Defendant Entered Appearance and filed Defence through Ashreen Mathew Associates Advocates.

10. In her Statement of Defence filed on 19th June 2023, the 5th Defendant denied all the allegations made in the Plaint. She alleged that she is a member of the 4th Defendant and became the registered owner of Mitubiri/Wempa Block 5(Kenyatta Farm)/503, formerly Mitubiri/ Nanga/Block A/9214 Plot No. B212.

11. The 5th Defendant denied that the Plaintiff is the registered owner of the land parcel No Mitubiri/ Wempa/Block 5(Kenyatta Farm) 503, and did put the Plaintiff to strict proof thereof.

12. Further, it was her allegations that since the institution of this suit, the Plaintiff has leased out Mitubiri/ Wempa/ Block 5/ Kenyatta Farm)503, devoid of any right to property, to the detriment of the 5th Defendant, who is the registered owner of this parcel of land.

13. Consequently, the 5th Defendant prayed for dismissal of the Plaintiff's suit with costs; an order of injunction to restrain the Plaintiff from entering, trespassing, transferring, selling and /or in any other way from dealing with Mitubiri/Wempa/Kenyatta Farm/503; damages and mesne profits from the lease of Mitubiri/ Wempa/ Block 5/ Kenyatta Farm/503, since the institution of this suit.

14. After several mentions for pre trial directions, the matter was set down for hearing on 2nd October 2023, wherein the 5th Defendant failed to attend court, despite service of hearing Notice as is evident from Affidavit of Service sworn by Kariuki Stephen Richu on 28th September 2023. The matter proceeded for hearing in the absence of the 5th Defendant.

15. When the matter came up for hearing, the Plaintiff gave evidence for himself and called three more witness to support his claim.

Plaintiff's Case

16. PW1, James Mburu Gitau, the Plaintiff adopted his witness statement as part of his evidence. It was his further evidence that he bought the suit land from different persons, who owned shares at Kihiu Mwiri Farmers Co. Ltd, and in total he bought 18 plots. Further that the surveyor went to register the owners of the different plots, but they declined to register him, and pulled him aside.

17. He produced documents as exhibits to show that the plots in question were transferred to him. It was his further evidence that he now wishes to obtain title deeds for his parcels of land. In his witness statement, he enumerated the plots that he acquired from 7 non- members and that the total were 18 plots.

18. He also stated that various people have emerged claiming to have been issued with the title deeds to his plots. He alleged that he has tried to reach the 3rd Defendant and the people surveying, but he was informed that his name was not among the persons allocated title deeds.

19. It was his prayers that the court should compel all the Defendants to register all the plots in his possession to him as the rightful owner.

20. PW2, Ken Stephen Muchoki, adopted his witness statement dated 1st November 2022, as his evidence in chief. It was his evidence that he was the secretary of Kihiu Mwiri Farmers Co. Ltd, from 2005- 2011, and he is also a member of the Society and a shareholder of the Company and he owns some plots.

21. It was his evidence that during his tenure as the Secretary of the company, he would handle all office documents including the Company Register of members and the properties owned by them.

22. Further, he testified that he was aware that the Plaintiff is the rightful owner of ¼ acre plot out of LR No 9214, and 7 non- members Certificates of plot ownership in Mitubiri/ Nanga/ Block A/ 9214, which comprises of 18 plots.

23. It was his further evidence that in 2016, the 1st to 3rd Defendants started the process of registration and surveying of land parcels within Mitubiri area. However, the exercise of issuance of title deeds was not conducted well, and the Plaintiff was excluded from the list of people being issued with title deeds.

24. He also testified that when the Defendants started the process of issuance of title deeds, they failed to issue all members with title deeds including the Plaintiffs, and they also did not allocate title deeds in accordance with what the members owned on the ground. Further, that the Defendants allocated the plots owned by the Plaintiff illegally to various people, who are now claiming ownership.

25. Further, that the Plaintiff has tried to reach the 1st to 3rd Defendants offices and the people surveying the ground, but has been unsuccessful, as they were told that their names were not among the people allocated title deeds. It was his further evidence that the Plaintiff is the rightful owner of the stated plots.

26. PW3, Jane Wambui Kamau also adopted her witness statement 1st November 2022, as her evidence in chief. It was her evidence that her husband was a member and shareholder of Kihiu Mwiri Farmers Co. Ltd, and owns several plots.

27. She testified that their plot is adjacent to the Plaintiff's properties, and they are caretakers of the Plaintiff's properties at Kihiu Mwiri, where the Plaintiff has developed some plots and built a permanent house thereon, cowshed, dug boreholes and has planted various cash crops and trees.

28. It was her further evidence that they have lived on their parcel of land from 2006, and the Plaintiff has been their neighbour. Further, that the 1st and 3rd Defendants began the process of registration and surveying of the land in 2016, which exercise was not conducted well, and the Plaintiff was excluded from the list of persons who were to be issued title deeds. Further that not all members were issued with title deeds.

29. She also testified that the Plaintiff tried to reach the Defendants to resolve the issue to no avail. It was her evidence that the Plaintiff is the rightful owner of the stated plots, although his name is not among those who are to be issued with the title deed.

30. PW4, Paul Kamande Mwangi, adopted his witness statement as his evidence in chief, and averred that he knows the Plaintiff as his land is next to his. He also testified that there was a person who tried to invade the Plaintiff's parcels of land by depositing building materials thereon, and that PW3, takes care of the Plaintiff's land.

31. After the close of the Plaintiff's case, he filed written submissions

    on 21st December 2023, and relied on the available evidence. It was submitted that the Plaintiff is the rightful owner of the suit plots and therefore, he ought to be recognized as such and issued with the title deeds for his respective plots.

32. He relied on Article 40 of *the Constitution* on the right to property which is protected under Article 40(3) of the said Constitution, wherein it is provided that the State shall not deprive any person of property of any description. It was his further submissions that the 1st to 3rd Defendants have not given any reasons why only the Plaintiff was denied his right to own his land at Kihiu Mwiri Farmers Company Limited, yet members with Certificates of allotment like him, were allowed to claim their land

33. Further, he submitted that since the 1st to 4th Defendants did both file any Defence, then they have not controverted his evidence and he urged the court to allow his claim.

34. The above is the available evidence which this court has carefully read and considered. The court too has considered the exhibits produced in court and the Defence filed by the 5th Defendant, who did not attend court to give her evidence and controvert the Plaintiff's case. This court finds the single issue for determination is whether the Plaintiff has proved his case on the required standard of balance of probabilities.

35. The Plaintiff's claim is for the court to declare him as the rightful owner of plots No Mitubiri/ Nanga/ Block A/ 9214/ 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1154, 1153, 1168, 1152,

    1151, 1150, 1149, 1113, 1112 & 1159, for injunction to restrain the 5th Defendant from entering into the suit land and for permanent injunction to restrain the 1st to 4th Defendants from entering into the suit land.

36. For the Plaintiff to succeed in his claim, then he needed to avail sufficient evidence to prove that he deserves the prayers sought. In an attempt to discharge this burden, the Plaintiff gave evidence for himself and called three witnesses. Further, he produced various exhibits to support his claim.

37. The Plaintiff is the one who has alleged, and therefore the burden of proof lies upon him as provided by Section 107 of the *Evidence Act*. Further, it is trite that he who alleges must prove. See the case of Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR, the Court held as follows:

> " It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed."

38. In opposing the Plaintiff's claim, the 5th Defendant filed a Defence dated 28th February 2023, and denied all the allegations made by the Plaintiff. Though she did not file a Counter- claim, she urged the court to dismiss the Plaintiff's case and grant an order of permanent injunction to restrain the Plaintiff's from entering or trespassing on land parcel No. Mitubiri/ Wempa Block 5(Kenyatta Farm)503. However, this is not one of the suit properties being claimed by the Plaintiff.

39. Though the 5th Defendant filed her defence, she failed to attend court to give evidence. Therefore, her Defence is a mere allegation. See the case of CMC Aviation Ltd v Crusair Ltd (No1) [1987] KLR

103, where the court held;

> " the pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. averments are not made on oaths. Averments depend upon evidence for proof of their contents.

40. Further, in the case of Edward Muriga Through Stanley Muriga vs Nathaniel D. Schulter, Civil Appeal No. 23 of 1997, the court held;

> " in this matter apart from filing its statement of defence, the defendant did not adduce any evidence in support of the 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"

41. Being guided as above, this court finds and holds that the 5th Defendant's Defence is mere allegations and thus the Plaintiff case is not opposed.

42. Even with uncontroverted evidence, the Plaintiff still has the onerous task of calling sufficient evidence to prove his case on the usual standard of balance of probabilities. See the case of Eastern Produce (K) Ltd – Chemomi Tea Estate v Bonface Shoya [2018] eKLR, where the Court held;-

> " In civil cases, a Plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of Kirugi & Ano v Kabiya & 3 Others[1987] KLR 347 where the Court of Appeal stated that the burden was always on the Plaintiff to prove his case on the balance of

probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

Moreover, Section 109 of the *Evidence Act* states that the burden of proof is to any particular fact lies on the person who wishes the Court to believe in its existence....."

See also the case of Gichinga Kibutha Caroline Nduku [2018] eKLR where the Court held as follows;

"The hearing referred to above is the one commonly known as "Formal proof". The Civil Procedure Rules do not define "Formal Proof". Black's Law Dictionary defines "Formal" as including "rules established by an institution according to certain processes". This particular hearing is for the claimant to proof his claim. It is not automatic that in instances where the evidence is not controverted, the claimant's claim 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."

43. The Court has seen various certificates of ownership of shares at Kihiu Mwiri Farmers Co. Ltd, which were issued to various individuals on various dates, but a number of them were issued on 27th December 1978. Later the said shares were transferred to the Plaintiff herein.

44. In particular, the court has seen Share Certificates Nos 6048, 3538, 2715, 5910, 6025, 5647, 2475, which are all in the name of the Plaintiff after transfer by the original allottees. There was no evidence called by the defendants to controvert the Plaintiffs evidence.

45. The court too has seen Certificates of Allotment issued by Kihiu Mwiri Farmers Co. Ltd, to the Plaintiff herein. These certificates of allotment are in respect to land parcel No Mitubiri/Nanga Block A /9214, which were issued to the Plaintiff herein. Various receipts of payment made by the Plaintiff are also exhibits. All these exhibits were not controverted by the Defendants.

46. Pw2, Stephen Mucoki gave evidence to the effect that he was a former secretary of Kihiu Mwiri Farmers Co. Ltd, and he knew that the Plaintiff herein was the rightful owner of the 18 parcels of land enumerated in the Plaint. He also supported the Plaintiff claim that when the Defendants started the process of registration and issuance of title deeds, they failed to issue the Plaintiff who was the rightful owner of the enumerated plots with the title deeds. This evidence was also not controverted by the Defendants, and this court finds no reasons not to believe.

47. As stated earlier, though the 5th Defendant had alleged that she was the rightful owner of land parcel No Mitubiri/ Wempa/ Kenyatta Farm/ 503, there was no evidence adduced to link the said parcel of land with the plots that are being claimed by the Plaintiff. This court finds that the Plaintiff is the rightful owner of the said plots.

48. Having found that the Plaintiff is the rightful owner, then he is entitled to having the said plots registered in his name, and to also enjoy quiet possession of the said plots. The Plaintiff can only enjoy quiet possession when he has a vacant possession. He can only have vacant possession if strangers to the land or intruders are kept away through an order of injunction.

49. The Plaintiff has sought for permanent injunction. A permanent injunction is a remedy granted by the court after evidence has been called and it determines the rights of the parties. See the case of Kenya Power & Lightning Company Ltd v Sheriff Molan Habib where the court held that; -

> " Permanent Injunction determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merit of the
>
> case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected."

50. The Plaintiff has claimed that as the rightful owner of the enumerated plots, he has been denied registration of the said plots by the Defendants herein. The said claim has not been denied and/or Controverted by the Defendants. The witnesses were categorical that the Plaintiff owns the said suit plots and has put up a permanent house and dug borehole.

51. The Plaintiff being the owner of the suit plots needs to be registered as the owner and to enjoy quiet possession. Consequently, this court finds and holds that the Plaintiff has proved his case on the required standard of balance of probabilities.

52. For the above reasons, judgement is entered for the Plaintiff against the Defendants herein jointly and severally as prayed in the Amended Plaint dated 15th October 2021, in terms of prayers No. a, aa, b, plus costs of the suit and interests thereon, to be borne by the Defendants herein Jointly and Severally.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF APRIL, 2024.

L. GACHERU

JUDGE

25/4/2024.

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Charagu for Plaintiff

for 1st Defendant

Absent for 2nd Defendant

for 3rd Defendant

for 4th Defendant

Mr Nderitu for 5th Defendant

L. Gacheru

Judge

25/4/2024