



REPUBLIC OF KENYA



**Gatumbi v City Council of Nairobi & 2 others (Environment & Land Case
178 of 2011) [2024] KEELC 1813 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1813 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 178 OF 2011**

OA ANGOTE, J

APRIL 11, 2024

BETWEEN

JAMES KIARIE GATUMBI PLAINTIFF

AND

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

JULIUS PETER MIGWI GICHIMU 2ND DEFENDANT

JOSEPH MUCHIRI 3RD DEFENDANT

JUDGMENT

1. Vide a Complaint dated 19th April, 2011, the Plaintiff seeks the following reliefs against the Defendants jointly and severally;
 - a. A Declaration that the suit property known as L.R No 36/111/1214 belongs to the Plaintiff and that the Registrar do cancel the Memorandum of Conveyance dated 30th March, 2009 in favour of Julius Peter Migwi Gichimu and Joseph Muchiri from the register of titles.
 - b. The Vesting Order dated the 25th February, 2008 issued by the Senior Resident Magistrate in CMCC No 30 of 2007 be set aside and the registration thereof in the register of titles be cancelled.
 - c. Permanent injunction restraining the Defendants, either by themselves and/or their nominees, assigns and/or agents from selling, alienating, disposing off, constructing structures on or in any other way whatsoever and howsoever dealing with the suit property known as L.R No 36/111/1214.
 - d. General damages.
 - e. Costs of the suit.



2. It is the Plaintiff's case that at all material times and before the 17th April, 2009, he was the registered owner of all that parcel of land known as L.R No 36/111/1214 situate in Eastleigh in Nairobi (hereinafter the suit property) having been registered as such on 7th September, 1990 and that at all material times relevant to the suit and before the year 2009, he dutifully paid rates to the 1st Defendant and as at 25th July, 2008, no arrears were due to the 1st Defendant.
3. According to the Plaintiff, sometime in 2008, the 1st Defendant sent him a rates demand note of Kshs 8,882 for the year 2009; that when he turned up at the 1st Defendant's offices to make payments, he was issued with a rates demand note showing there were no arrears and that he was further informed that the same had been waived.
4. The Plaintiff states that sometime in June, 2008, he lost the title document to the suit property and pursuant thereto commenced proceedings for procuring a duplicate title as required by law and that on 30th September, 2009, upon a visit to the lands office to follow up on the issue of the duplicate title, he was shown documents indicating that the property had been sold and vested in the names of the 2nd and 3rd Defendants.
5. The Plaintiff averred in the Plaint that pursuant thereto, he filed an application dated 4th November, 2009 before the 1st Class Magistrate being Civil Suit No 30 of 2007 in which he asked the Court to set aside and vacate the ex-parte Judgement that gave rise to the vesting of the suit property in the names of the 2nd and 3rd Defendants and that the Court set aside the Judgement as requested but declined to cancel the registration of the 2nd and 3rd Defendants to the suit property for lack of jurisdiction.
6. The Plaintiff asserts that the sale and transfer of the suit property to the 2nd and 3rd Defendants was illegal, irregular and fraudulent, the particulars of which include failing to serve him with a rates demand note for the alleged arrears; failing to serve him with summons to enter appearance as required by the law in CMCC No 30 of 2007 and selling the suit property without valuation and at a price far below its value of Kshs 30,000,000.
7. The 1st Defendant filed a Defence in which it denied the assertions set out in the Plaint stating that in the year 2008, it sent to the Plaintiff a rates demand note; that despite receipt thereof, the Plaintiff neglected and/or otherwise refused to pay the accrued rates and that as a result thereof, the 1st Defendant sold the property in realization of the outstanding rates.
8. The 1st Defendant maintains that the sale was lawful and regular and the Plaintiff has no cause of action against the 1st Defendant; that in any event, if the decision of the Magistrate in Civil Suit No 30 of 2007, which gave rise to the sale of the suit property was set aside as alleged, the Plaintiff's recourse lies in setting the same down for hearing afresh and the Plaintiff cannot seek for cancellation of the lawfully registered title; that Civil Suit No 30 of 2007 has not been heard and determined in favour of the Plaintiff and that the prayers he seeks herein are unavailable to him in the circumstances.

Hearing and Evidence

9. The matter proceeded for hearing on 30th September, 2022. The Plaintiff, PW1, adopted his witness statement dated 19th April, 2011 and produced the documents of an even date as PEXB1.
10. PW1 informed the court that he was the registered and rateable owner of the suit property; that in the month of June, 2008, he lost his title documents and sought to obtain a duplicate title from the Registrar of Lands at Ardhi House and that upon contacting Ardhi House, he was informed that one of the required documents to secure another title was a rates clearance certificate.



11. According to the Plaintiff, he applied for the rates clearance certificate which application was received and duly acknowledged by the Chief Accountant in charge of rates and that the Chief Accountant aforesaid undertook verification of the records and gave him approval for the issuance of the rates clearance certificate.
12. It was his evidence that upon payment of the requisite fees, he was issued with a rates clearance certificate on 26th June, 2008; that on 30th September, 2009, he headed to the lands office with all the requisite documents ready to obtain a duplicate title; that he was shocked when he discovered that the suit property had been sold to the 2nd and 3rd Defendants pursuant to a vesting order dated 25th February, 2008 issued by the Magistrate at the City Court in CMCC No 30 of 2007 and that upon perusing the Court documents, he discovered that Judgement had been entered against him for allegedly failing to enter appearance and file a Defence.
13. PW1 urged that he has never been in default of rates and has never been informed of any such default by the 1st Defendant; that he has always visited the suit property and has never found any summons or Court papers fixed thereon; that in any event, there were persons' resident on the suit property who would have either accepted the suit papers on his behalf or informed him of the same and that the 1st Defendant acted illegally in selling the suit property to the 2nd and 3rd Defendants.
14. It was his evidence that the suit property was allegedly sold due to rates arrears; that he has never had any arrears; that he is paying rates to date and that the property was sold to the 2nd and 3rd Defendants who have not entered appearance or filed a Defence. The Defendants did not testify.

Submissions

15. The Plaintiff, through Counsel, submitted that both the vesting order and the memorandum of conveyance emanated from the ex-parte Judgment of the Court in CMCC No. 30 of 2007; that they derived their validity and legitimacy from the said judgment and that when the ex-parte judgement was set aside, they both lost their validity and legitimacy.
16. It was submitted that although the lower court set aside the ex parte Judgment, it could not cancel the title because it lacked the jurisdiction to do so and that the setting aside of the ex-parte judgment rendered the vesting order herein and the memorandum of conveyance a nullity due to the maxim ex nihilo nihil fit. Reliance in this respect was placed on the cases of Kaniki Karisa Kaniki vs Commercial Bank Ltd & 2 Others [2016] eKLR and Maalim vs Kenya National Qualifications Authority (Petition E124 of 2022) [2023] KEHC 2002 (KLR) (Constitutional and Human Rights) (17 February 2023) (Judgment) Petition E124 of 2022.
17. It was submitted that further, the purported public auction of 8th December, 2007 having emanated from the impugned ex-parte proceedings ought to be set aside; that the same was in any event marred with further irregularities and/or non-compliance with mandatory provisions of the law and that not only was the Plaintiff unaware of the proceedings in Court in CMCC 30 of 2007, the auctioneers did not give him a redemption notice as per rule 15(d) of the Auctioneers Rules 1997.
18. According to the Plaintiff's counsel, there is no evidence of an advertisement in the daily newspaper before sale by public auction contrary to Order 22 rule 57 of the Civil Procedure Rules and that further, no valuation report was conducted, nor a reserve price set based on the valuation report. Counsel cited the case of Electrical Marketing (Wholesale) ltd vs Nairobi City County and 2 Others Environment & Land Appeal 22 of 2017.



19. Counsel submitted that the Auctioneers sold the property at a gross undervalue; that the monies from the sale were not accounted for nor paid into Court as required by law; that the Auctioneer did not fulfill his duty of care towards the Plaintiff, as the owner of the suit property and that the Plaintiff has demonstrated that he is entitled to the orders sought. The Defendants did not file submissions.

Analysis and Determination

20. Having carefully considered the pleadings, testimonies and submissions herein, the sole issue that arises for determination is;
- i. Whether the Vesting Order dated 25th February, 2008 and the Memorandum of Conveyance dated 30th March, 2009 should be cancelled and set aside?
21. The Plaintiff has sought for a declaration that he is the lawful proprietor of the suit property; cancellation of the Memorandum of Conveyance dated 30th March, 2009 in favour of the 2nd and 3rd Defendants; cancellation of the Vesting Order dated 25th February, 2008; and permanent injunctive orders restraining the Defendants from any dealings with the suit property.
22. It is the Plaintiff's case that he was the duly registered proprietor of the suit property and that sometime in 2008, he lost his documents and when he followed up on getting a duplicate title, he was informed that the 1st Defendant had sold the property to the 2nd and 3rd Defendants pursuant to a Vesting Order obtained on 25th February, 2008.
23. According to the Plaintiff, the sale and transfer of the suit property to the 2nd and 3rd Defendants was illegal, irregular and void; that further, the Court in CMCC 30 of 2007 set aside the ex-parte Judgement vesting the suit property in the 2nd and 3rd Defendant's name but declined to cancel the registration of the 2nd and 3rd Defendants to the suit property. The Plaintiff adduced into evidence a copy of the certificate of postal search in respect of the suit property dated 21st January, 2010, and a copy of pleadings in CMCC No 37 of 2007.
24. He also adduced into evidence a letter from the City Council to Court seeking a copy of the decree dated 25th October, 2007, a letter from himself to the City Council of Nairobi dated 26th June, 2008 requesting for a clearance certificate, receipt dated 26th June, 2008 for Kshs 2, 500 being payment for clearance certificate, letter to the executive officer dated 30th September, 2009, and a copy of the demand note for land rates issued by the 1st Defendant dated 20th January, 2009.
25. He also adduced into evidence the rates demand note dated 25th June, 2008, a letter to the Chief Lands Registrar dated 25th September, 2009, the Memorandum of Conveyance dated 30th March, 2009 and the valuation report dated 28th February, 2011.
26. Despite having duly entered appearance and filed a Statement of Defence, the 1st Defendant did not participate in the trial. As a result, thereof, it failed to substantiate the allegations made in its Defence and produce any evidence to counter the Plaintiff's testimony. The Plaintiff's evidence therefore remains uncontroverted and unchallenged. The Defence on record remains mere allegations.
27. It is now settled that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove his case is in no way lessened because the Defendant did not adduce any evidence. This



was succinctly expressed by the Court of Appeal in the case of Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR where the Court held as follows:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct...”

While the defendant’s failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.

The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

28. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. The same is set out under Section 107(1) (2) of the *Evidence Act*, which provides as follows:

- (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.”

29. And Sections 109 and 112 of the same Act which state as follows:

109. 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.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

30. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in Mumbi M’Nabea vs David M. Wachira [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

31. It is not disputed that the 2nd and 3rd Defendants purchased the suit property at a Public Auction which was held on 8th December, 2007 pursuant to instructions issued by the Subordinate Court in 1st Class Magistrates Court Case No 30 of 2007 in execution of the decree therein.



32. It is also not in dispute that in the Magistrate's Court aforesaid, a Vesting Order was issued on 25th February, 2008. Vide a Conveyance dated 30th March, 2009, the suit property was transferred to the 2nd and 3rd Defendants. The Memorandum of Conveyance was registered on 17th April, 2009.
33. The Plaintiff seeks to impugn this transfer on the basis that the same was actuated by fraud, illegality and/or irregularity. The Black's Law Dictionary defines fraud thus:
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”
34. It is trite law that fraud must not only be pleaded and particularized but strictly proven. The Plaintiff has particularized the elements of fraud against the Defendants as failing to serve him with a rates demand note for the alleged arrears; failing to serve him with summons to enter appearance as required by the law in CMCC No 30 of 2007 and selling the suit property without valuation and at a price far below its value of Kshs 30,000,000.
35. It is the Plaintiff's case that the Defendants colluded to defraud him of the suit property by initiating proceedings to sell the suit property in a clandestine manner when they were no outstanding rates.
36. Considering the elements of fraud particularized by the Plaintiff, it is clear that the Plaintiff is contesting the question of whether any rates were due to him, the legitimacy of the judgment by the Magistrates Court, not having been served with summons and the execution process undertaken by the Magistrates Courts.
37. The Court opines that these are issues that would have been best suited for determination in the Magistrates Court in which the question of rates was a live issue and under whose hand judgement was issued and execution was carried out. Indeed, from the pleadings adduced by the Plaintiff, it is clear that some of these issues were canvassed therein.
38. In particular, vide the Motion of 4th November, 2009 seeking to set aside the ex-parte judgement, the Plaintiff asserted that it did not owe any rates and had not been served with summons.
39. It is unclear what happened to the Motion of 4th November, 2009. While the Plaintiff asserts that it resulted in the setting aside of the ex-parte judgement, the aforesaid orders have not been produced in evidence. In any event, even if the ex-parte Judgement had been set aside, the next logical step would have been for the Plaintiff to enter appearance, defend the suit and have the Vesting Order and the title in favour of the 3rd Defendant cancelled.
40. Not being privy to what happened in the matter, it is clear that any consideration of the issues as brought before this Court put it in danger of infringing the principles of res judicata or sub-judice. In the same vein, the question with respect to the validity of execution proceedings cannot be determined by this Court, not being an appellate Court.
41. Section 34 of the *Civil Procedure Act* is clear that questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or



satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. Indeed, if the lower court did not have jurisdiction to grant the orders it did, that would be a good ground for cancelling all the transactions, including the execution proceedings.

42. In any event, the Plaintiff did not produce in evidence the order setting aside the ex-parte orders. This Court cannot make a positive finding on the same. Further, the setting aside of an ex-parte judgement does not constitute a determination and would not in itself warrant the cancellation of title.
43. In the end, the Court finds that the Plaintiff's suit is unmerited and proceeds to dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF APRIL, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Plaintiff

No appearance for Defendants

Court Assistant: Tracy

