



**Wanyonyi v Wamingwa (Environment & Land Case 106 of 2014)
[2024] KEELC 13297 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 106 OF 2014
EC CHERONO, J
NOVEMBER 21, 2024**

BETWEEN

METRINE NABISINO WANYONYI PLAINTIFF

AND

KEVIN KUNDU WAMINGWA DEFENDANT

JUDGMENT

a. Introduction And Pleadings

1. By an Amended plaint dated 30th June 2014, the Plaintiff seeks the following orders against the Defendant;
 - a. An order in terms of paragraph 6 &7 of the plaint above;
 6. The plaintiff's claim against the defendant is for an order that the transfer, registration and sub-division of land parcel no. E. Bukusu/S.Kanduyi/7207 was fraudulent and unlawful and therefore the defendant's title be cancelled for the attendant fraud and consequently the said parcel of land be returned to the plaintiff.
 7. This paragraph was amended by deletion.
 - b. Costs of the suit.
2. The plaintiff averred that, together with her husband one Geoffrey Keya, they were allocated land parcel no. E.Bukusu/S.Kanduyi/7207 (hereinafter referred to as 'the suit land') and that they were beneficiaries of the estate of Hilary Wamingwa. That the defendant fraudulently registered himself as the owner of the suit land and caused its subdivision into new numbers i.e E.Bukusu/S.Kanduyi/11758, 11759,11760,11761 and 11762. The plaintiff set out particulars of fraud against the defendant and averred that the registration was obtained when the defendant knew that land parcel NO.



E.BUKUSU/S.KANDUYI/ 7207 was allocated to his brother and the family of one Geoffrey Keya and that the defendant got registered as the sole owner after the death of his brother.

3. Upon service of the said Amended plaint, the defendant filed a statement of defence dated 16th July, 2014 denying the plaintiffs claim in its entirety. The defendant put the plaintiff to strict proof that she and her husband were allocated the suit land and that she was a beneficiary of the estate of Hilary Wamingwa. The defendant denied the particulars of fraud as leveled against him and averred that his registration as the owner of the suit land was to save it from being sold by public auction after one Bonface Wamalabe, the administrator of the estate of Hilary Wamingwa had transferred it to one Isacar Olago Obuogoh who in turn used the suit land as a collateral security to secure funds. It was averred that the suit land was indeed sub-divided for purposes of vesting part of it to the purchaser who had paid off the loan to Barclays Bank of Kenya Limited in order to salvage the land. It was further averred that this suit was res-judicata to Bungoma Chief Magistrate Land Case No. 19 of 2007 that has already been heard and determined.
4. When this case came up for pre-trial directions, the parties agreed to file and exchange compliance documents under Order 11 and to proceed with the hearing of the case by way of viva voce evidence.

Plaintiffs Evidence

5. PW1 Metrine Nabisino Wanyonyi adopted her witness statements dated 09/06/2014 and 25/05/2015 as her testimony- in-chief. She equally produced into evidence her list of documents dated 09/06/2014 which contained 5 items and that dated 22/4/2016 which contained 7 items as PExhibit 1 to 12. In cross examination, it was her testimony that the first registered owner of the suit land was Bonface Wamalabe Hilario, Iscar Olago Obuogoh, Kevin Kundu Wambigwa. That Bonface Wamalobe was the administrator of the estate of Geoffrey Keya Wambigwa who has since died. It was testimony that she heard that the defendant herein sued the said Iscar Olago Obuogoh and Barclays Bank in Bungoma HCCC No. 61 of 1998 who she sated paid off the loan with the bank.
6. PW1 declined having signed a memorandum of understanding despite being in the meeting leading to the said document and having so stated in her witness statement dated 25/05/2015. It was her evidence that she was allocated a plot measuring 50 by 100 feet which she avers she was later forced to sell to one Evans Bundi Maina and used the proceeds to buy another parcel of land. She testified that her co-wife one Juliet Mukwana took part in signing the memorandum of understanding.
7. In re-examination she testified that the green card shows the land was registered in the name of Hilary Wabingwa Mlali which was later succeeded and that the defendant acquired the title on 07/09/2005 although it is not shown how he acquired the title. It was her testimony that she was aware that a loan was taken and the title used as security.
8. PW2 Gilbert Wanyonyi adopted his witness statement dated 09/06/2014 as his testimony-in-chief where he stated that the suit land belonged to his grandfather Hilary Wamingwa who died intestate in the year 1981. In cross examination, he confirmed that his mother, the plaintiff herein signed the memorandum of agreement and that she later sold the land allocated to her. He testified that one Bonface Wamalabe sold the suit land to one Iscar Olago Obulogoh and that the said Iscar Olago took a loan using the suit land as security but defaulted in making payments resulting to a public auction. He testified that the said Iscar Olago later paid the owed sum to prevent the auction but not the defendant. In re-examination, the witness stated that his father Geoffrey Keya was entitled to the suit land after his grandfather's demise.



Defendant's case

9. DW1 Kevin Kundu Wamingwa adopted his witness statement dated 14/07/2014 as his testimony-in-chief and referred to his list of documents dated 15/07/2014 containing 7 items which he produced into evidence as DExhibit 1-7. He testified that the suit land belonged to his brother namely Bonface Wamalabe who the plaintiff confirmed was the administrator of her late husband's estate. He testified that he saw an auction advertisement after the person who had bought it (Iscar Olako Ombwogoh) defaulted in paying a loan he had taken up from Barclays Bank. He testified that he filed a case and stopped the public auction. Later with others including the plaintiff, they entered into a memorandum of agreement where the plaintiff was allocated a portion of the suit land and she sold immediately and bought another piece of land. In light of the above DW1 stated that the claim of fraud was therefore baseless.
10. In cross examination he testified that his fathers land was E.Bukusu/S.Kanduyi/120 which was shared amongst his beneficiaries. He denied that the suit land was given to the plaintiff's husband and that the plaintiffs husband had however instructed the administrator of their fathers estate to sell his portion of land. He testified that the suit land was transferred to him by his sickly father to hold in trust for his siblings. In re-examination he testified that the plaintiff and her co-wife were allocated land by the clan and se was given parcel no. E.Bukusu/S.Kanduyi/11758.
11. DW2 Juliet Nafula Samuel adopted her witness statement dated 14/07/2014 as her evidence in chief. She testified that she and the plaintiff were allocated land by the clan wherein the plaintiff sold her share. In cross-examination she testified that confirmed the evidence as stated by DW1 above.

Submissions

12. The plaintiff filed submissions dated 10/09/2024 where she submitted on two issues. The first issue is whether the defendants lawfully transmitted land parcel no. 7207 to his name. It was submitted that the suit land was allocated to Geoffrey Keya, the plaintiff's husband upon the succession of the estate of Hilary Wabingwa Mulati. She argued that the defendants title to the suit parcel of land is a subject of a fraudulent scheme as it was not clear how he became the registered owner and therefore any subsequent title thereto was incurably bad. Reliance was place in the case of ELC Case no. 887 of 2013 Munyu Maina vs. Hiram Gathithia Maina (2013) eKLR.
13. On the second issue whether the late Bonface Wamalambe held land in trust on behalf of the plaintiff and her children, it was submitted that the registration of an individual as a proprietor of land does not relieve him of his duties as a trustee. Reliance was placed in the case of Felista Muthoni Nyaga vs. Peter Kayo Mugo(2016)eKLR. It was argued that upon the demise of Hilaru Wabingwa, Boniface Wamalambe was appointed the administrator and held the title for the plaintiff's husband in trust pending transfer to him. However, both the said Bonface and Geoffrey Keya died before the said transfer was effected. It was argued that the actions of the defendant to cause for the transfer of the suit property in his name was marred with fraud.
14. The defendant filed submissions dated 23/09/2024. The defendant relied on the provisions of Section 24 of the [Land Registration Act](#), 2012 and argued that the defendant was the registered owner of the suit land having obtained the same from Bonface Wamalabe through a transfer with a portion of the said land having been sold to settle a loan. It was further argued that the plaintiff had not proved her case on a balance of probabilities and urged the court to dismiss the same.



Analysis And Determination.

15. I have carefully considered the pleadings by the parties, the evidence adduced and the written submission and find that the issues for determination are as follows;
- a. Whether the plaintiff is entitled to the orders sought.
 - b. Who bears the costs of the suit.

Whether the plaintiff is entitled to the orders sought.

16. The plaintiff contends that she is entitled to the suit land, initially bequeathed to her late husband, Geoffrey Keya, and later registered in the name of Bonface Wamalabe, the administrator of Hilario Wamabingwa Mulati's estate, in trust. She claims that Geoffrey Keya passed away before the land could be transferred to his name. She argues that Bonface Wamalabe fraudulently sold the land to Iscar Obuogoh, who then used it as collateral for a loan with Barclays Bank, eventually defaulting, which led to the land being advertised for auction. Although the loan was repaid by Iscar Obuogoh, the land was not transferred to Geoffrey Keya's estate but was instead fraudulently registered in the defendant's name. The defendant subsequently subdivided the land into five plots, one of which was allocated to her, but she was later forced to sell this portion.
17. The defendant claims that his registration as the owner of the suit land was intended to protect it from an impending auction, after the then registered owner Iscar Obuogoh had defaulted in repayments. He argued that after plot 120 was shared by Bonface Wamalabe, Geoffrey Keya's portion remained registered in the name of Bonface Wamalabe and that the next time he heard of the property was when he saw the advertised auction of 07/10/1998. He investigated the issue and discovered that the land had been sold by Bonface Wamalabe to the said Iscar Obuogoh who had then charged it. That he filed a case i.e. Bungoma HCC 91 OF 1998 where the court ordered that the loan balance be cleared and the land be registered in the name of Bonface Wamalabe in trust for Geoffrey Keya's estate. He argued that a portion of land was sold to settle the amount owed and after the title was retrieved, the suit land was sub-divided and the purchaser was allocated plot no. 11759 and 11761. He contended that the family met and the remaining plots were shared with the plaintiff being allocated a plot that she later sold to one Evans Bundi Maina. He argued that the plaintiff therefore cannot claim the suit land as it does not now exist.
18. From the record, it is not in contention that the suit land is a subdivision of plot no. 120 which was registered in the name of Hilario Wamabingwa Mulati-deceased and which was sub-divided and devolved to his beneficiaries as demonstrated in PExhibit 5. It is also clear that the plaintiff's husband Geoffrey Keya was allocated L.R.No.E.Bukusu/S.Kanduyi/7207 as confirmed by the family, Iscar Obuogoh and the area chief as shown in PExhibit 5,6,7,8 &9. It is also clear that the said Geoffrey Keya died before the administrator i.e. Bonface Wamalabe transferred the land to him as per the death certificate produced as PExhibit 4. It also emerges that the land was later sold to Iscar Obuogoh who took out a facility with Barclays bank as shown in DExhibit 3 and defaulted in payments prompting advertisement for sale by auction as shown in D-Exhibit 1.
19. The plaintiff contends that, contrary to the defendant's claim that part of the suit land was sold to cover the unpaid loan, Iscar Obuogoh actually settled the outstanding balance. Consequently, she argues that the entire land should have reverted to Geoffrey Keya's estate. She presented an agreement and an affidavit as evidence, marked as P-Exhibits 6 and 7. However, the defendant produced a memorandum of understanding dated 27/09/2008 as D-Exhibit 4 which was executed by the parties herein and one Juliet Nafula who was Geoffrey Keya's 1st wife where it was agreed that plot no. 11758



shall be shared amongst the three. It is however not in dispute that upon receiving her share of what was left of the suit land, the plaintiff took her portion and sold it as per D-Exhibit 6. The defendant also produced a witness statement, D-Exhibit 7 by the plaintiff recorded in Bungoma HCCA No. 99 of 2011 where she stated that her late husband sold a piece of his inheritance i.e. the suit land measuring approximately 0.15 ha to one John Ekirapia.

20. The first issue is on the burden of proof. Mativo J in *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR stated as follows:

“Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the.....test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in *Bristone PTE Ltd v Smith & Associates Far East Ltd* [2007] 4SLR (R) 855 at 59: ‘The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.’”

21. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding, lies on that person, who fail if no evidence at all were given on either side, see also (Section 107 of the *Evidence Act*). The burden of proof in this suit or proceedings therefore shift to either of the parties herein on each of the issues herein and each issue was determined by trial court on that basis.

22. The standard of proof in cases is the legal standard to which a party who holds the burden of proof is required to prove his/her case. Mativo J in the above case stated that the standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases such as the present one, the standard of proof is the balance of probabilities. Justice Mativo cited with approval Lord Denning in *Miller v Minister of Pensions* [1942] 2 ALL ER 372 as follows:

“The(standard of proof).....is well settled. It must carry a reasonable degree of probability..... If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.”

23. After examining the evidence presented and considering the plaintiff’s burden of proof, the court is of the view that at all times the plaintiff was aware that a portion of the suit land had been sold by her late husband in the 1990’s. She also acknowledged that her late husband had another wife, Juliet Nafula Mukhwana. Further, she confirmed receiving a portion of the suit land, which she claims was forced to sell and settle elsewhere. Additionally, her co-wife, who testified as a defense witness, confirmed that as a beneficiary of the estate of her late husband, she also received a share of the suit land for herself and her children. Therefore, it is unreasonable for the plaintiff to now assert entitlement to the entire suit land. Further, the suit land as originally described no- longer exists.

24. For the foregoing reasons, I find that the Plaintiff has not proved her claim on a balance of probabilities. Consequently, this suit commenced by an Amended plaint dated 30/06/2014 is hereby dismissed. Owing to the nature of the relationship between the parties herein, I order each party to bear their own costs.

25. Orders accordingly.

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 21ST DAY OF NOVEMBER, 2024.

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HON.E.C CHERONO



ELC JUDGE

In the presence of

Mr. Wanjala for the Defendants.

Plaintiff/Advocate-absent.

Bett C/A.

