



**Njeru v Olendo (Environment & Land Case 1154 of 2015)
[2023] KEELC 307 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 307 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1154 OF 2015
OA ANGOTE, J
JANUARY 26, 2023**

BETWEEN

LUCY WANJIRU NJERU PLAINTIFF

AND

JOSEPH OKWARO OLENDO DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant vide a Plaint dated 11th November, 2015, seeking the following reliefs;
 - i. A declaration that the Plaintiff is the lawful owner of Plot No 0487, L.R No 11531/14 Hurlighum Development Scheme.
 - ii. A permanent injunction restraining the Defendant whether by himself and or through agents, servants or employees from trespassing, encroaching upon or from commencing and/or continuing with construction on Plot No 0487 Hurlighum Development Scheme Chokaa.
 - iii. Costs of the suit.
 - iv. Any other relief deemed apt and fitting.
2. It is the Plaintiffs case that on or about 9th August, 2013, she purchased the property known as Plot No 0487 on L.R No 11531/14, Hurlingham Squatters Development, Nairobi (hereinafter the suit property) and was issued with certificate no 0345 and that upon purchasing the said plot, she commenced development thereon and constructed a house up to the first floor.
3. The Plaintiff averred in the Plaint that she temporarily ceased construction due to financial constraints and that sometime in December, 2014, the Defendant attempted to encroach on the suit property leading her to report the matter at Kayole Police Station.



4. It is the Plaintiff's case that during investigations, it emerged that one Lawrence Mutugi Kirimi had forged certificate no 851 for plot 0485, Hurlingham Squatters Development, and backdated it to 19th December, 2012 and sold the same to the Defendant and that on 18th September, 2015, the Chairman of Hurlingham Squatters Development wrote a letter confirming that the Plaintiff is the registered owner of plot 0487.
5. According to the Plaintiff, whereas Lawrence Kirimi forged documents and sold plot no 0485 to the Defendant, the Defendant has encroached on plot number 0487 which belongs to her and that she fears the Defendant may unlawfully seize, encroach and develop the suit property.
6. Vide the statement of Defence dated 16th June, 2016, the Defendant denied the allegations as set out in the Plaintiff's statement stating that contrary to the Plaintiff's assertions, he is the one who commenced development of the suit property after purchasing it and has constructed and erected a house to the first floor and that after the Plaintiff falsely accused him of encroaching on her property, he lodged a complaint with the National Police Service complaining of harassment by the Kayole Police Station. The Defendant averred in the Defence that the Plaintiff does not disclose any reasonable cause of action against him and ought to be dismissed.

Hearing and Evidence

7. PW1 was the Chairman of Hurlingham Squatters Development Group. It was his testimony that the Plaintiff went to their offices seeking to purchase a property from the group being a plot in L.R 11531/14; that ordinarily, once a buyer goes to their office, they are handed over to their surveyor to take them round the vacant plots and once he/she picks a plot, he/she comes to the office to process the purchase and that the surveyor thereafter gives them a beacon certificate and a ballot.
8. PW1 informed the court that the buyer can thereafter embark on developing his plot; that in the present case, the Group issued the Plaintiff with a certificate number 0345 for Plot No 0487 dated 9th August 2013 duly signed by himself and the Group secretary, Mr. George Omondi and that the Plaintiff was also issued with ballot no 782 with respect to Plot 0487, and a surveyors receipt no 236 dated 9th August, 2013.
9. According to PW1, he wrote the letter dated 18th September 2015 affirming the Plaintiff's proprietorship of the suit property after she went to the office and complained that someone was constructing on her land; that he was aware that the Plaintiff had started but not completed constructing on her plot; that certificate number 857 is with respect to Plot No 0485 issued to Joseph Okwaro Olendo; that the signatures on the certificate are fraudulent and don't belong to either himself or the secretary and that there is no way Lawrence Mutugi Kirimi would have sold the plot without involving them.
10. On examination by the Court, PW1 stated that the certificates issued to Mr. Mutugi and Mr. Olendo are forgeries and were not signed by either himself nor the secretary. Because PW1 was deceased at the time the matter came up for cross-examination, the Court indicated that it would consider his evidence but the same would be subject to the fact that it was not tested on cross-examination.
11. The Plaintiff, PW2, testified that she is an employee of the Ethics and Anti-Corruption Commission at Malindi; that she is the owner of Plot 0487 which is a portion of LR No 11531/14; that sometime in 2013, her friend informed her that plots were being sold at Hurlingham Squatters Development Group and that she visited the site and balloted for Plot No. 0487 and started making payments in installments.



12. It was the evidence of PW2 that when she finished paying, she was issued with a certificate duly signed by the officials of the group; that she paid Kenya shillings 20,000 to Land Consult Survey and Associates and begun constructing on the plot; that she constructed up until the first floor but stopped for about two months due to financial constraints; that she received a call from a neighbor telling her that someone was constructing on her plot and that the Group officials advised her to make a report to police station.
13. It was the evidence of PW1 that when she went to the police station, it turned out that one Lawrence Mutugi had forged a certificate and sold a plot being 0485 to the Defendant, which plot adjoins her plot 0487; that the Defendant came in and continued building on the foundation she had started and that the Defendant is now occupying the finished house.
14. During cross-examination, PW2 stated that the signatures on the certificates number 345 and 857 are similar; that her certificate is with respect to Plot 0487 while the Defendant's is for Plot No 0485; that the proposed subdivision shows plots 485 and 487 and that she no longer in a relationship with Lawrence Mutigi Kirimi as their courtship ended. According to PW2, she used to visit the construction site with him.
15. PW2 stated that she acquired the suit land in 2013 but had started paying for it in 2012; that she had the plot when she met Lawrence who used to supervise the construction and pay the fundis on her behalf; that she never transferred the suit property to Florence and that all her original certificates were with her parents.
16. PW3 was Nicholas Omondi Omedo, a land surveyor by profession having worked as such for 10 years. It was his evidence that the property in issue is L.R No 11531/14 located at Chokaa in Njiiru area and that he has been instructed by Hurlingham Squatters as a project's surveyor. It was the evidence of PW3 that on 9th August, 2013, the Plaintiff went to the Hurlingham Squatters offices seeking to buy a plot and that he was asked to go and show her an unoccupied plot which he was aware of as he was the one who carried out the sub-divisions and had all the records.
17. According to PW3, he was paid the survey fees and issued a receipt; that upon issuance of a receipt, he issued to the Plaintiff a duly signed ballot number 782 for Plot 0487; that as the project surveyor, he is privy to all instructions with respect to the property owned by Hurlingham Squatters Group; that he does not know anyone by the name of Mutegi Karimi and that Plots 0485 and 0487 are distinct plots.
18. During cross-examination, PW3 affirmed that he conducted the survey and prepared the proposed sub-division; that he was last on the ground in October, 2020; that it is the sub-division plan that he prepared that was used to grant the certificates to the purchasers and that plot 0485 is adjacent to 0487.
19. On re-examination, he stated that his responsibility as the property surveyor involved surveying, sub-dividing, creating the plan and plot numbers; that he was called to identify the plots that were not sold, which he would point out to the buyers and issue them with ballot cards; that the buyer would then be issued with a certificate whose number emanated from the plan and that he could not get the number in the certificate wrong because he had his records.
20. The Defendant, DW1, stated that sometime in 2014, his close friend, the late Paul Wafula who stayed at Chokaa Kayole informed him that his neighbor, one Lawrence Mutigi was selling his plot; that they met Lawrence together with the Plaintiff herein, who is his wife, who informed him that they were selling their plot due to financial constraints and that Lawrence gave him a copy of certificate no 851 for the property which showed that he was the owner of the plot.



21. According to DW1, Lawrence agreed on the purchase price of Kshs 800,00 because he had developed the suit property; that they signed the agreement on 5th November, 2014 pursuant to which he was to pay a deposit of Kshs 400,000 and pay the balance in a week's time; that in November, 2014, he finished paying the purchase price and immediately thereafter began construction and that when the house was almost complete, the Plaintiff showed up and alleged that the property was hers.
22. On cross-examination, DW1 stated that he resides on plot 0485 and had started constructing thereon in 2018; that the property was sold to him by one Lawrence Mutigi; that he has not called him to testify as he is not aware of his present location and that his attempts to locate him have been futile. According to the Defendant, his plot is 0485 while 0487 belonged to the late Paul Wafula.
23. In cross examination, DW1 stated that he has no evidence proving that Plot 0487 belonged to the late Paul Wafula; that him, together with Lawrence, went to the office of Hurlingham Squatters who prepared the certificate after he paid the requisite fees; that the Chairman and Surveyor of the Group signed the Surveyors Certificate and that he does not know the names of the officials of Hurlingham Squatters Scheme who told him to continue constructing.
24. DW2 stated that sometime in May, 2014, the Late Paul Wafula contracted their services to finish the construction of his house; that adjacent to Pauls' plot was Plot no 0485 owned by Lawrence Kirimi; that Lawrence together with the Plaintiff whom he introduced as his wife frequented the late Pauls' house seeking to know the design of Pauls' house and that Paul asked him to explain the same to them.
25. It was the evidence of DW2 that in July, 2014, Lawrence and the Plaintiff put up the foundation of their house but were unable to finish construction due to financial constraints and informed Paul that they wished to sell the house and that Paul introduced them to the Defendant who agreed to buy the property.
26. It was the evidence of DW2 that the Defendant purchased the property and they began construction thereon; that the constructions proceeded peacefully until 2015 and when they were about to complete building, the Plaintiff showed up claiming the plot belonged to her.
27. On cross-examination, DW2 stated that he is a mason and does not have any academic papers; that the Defendant's house is on plot 0485; that he saw the Defendant's certificate in the Advocates files; that he saw Pauls' plot when he went to apply for electricity for him; that he knows that Paul died in 2017 and it is his eldest son who manages the home and that after completing Pauls' house, he went to work on the Defendant's house.
28. DW3 stated that he is an official of Hurlingham Squatters Development; that the Group was formed in 2011 to manage Alpha Court in the property known as L.R No 11531/14; that the Group has four officials being Benson Ochoko, (Chairman), Martin Oluoch (Treasurer), George Omondi (Vice-chairperson), and himself; that they began sub-dividing the property in 2011 after which they started selling the plots and that sometime in July 2014, while conducting their duties in the office, Lawrence came and informed them that he was looking for a potential purchaser of his plot.
29. It was the evidence of DW3 that in December, 2014, the Defendant reported that the Plaintiff showed up at his plot claiming that she owns plot no 0487 which she claimed was the one that the Defendant had been constructing on; that the Defendant invited them on the disputed land and that they confirmed that his house was standing on plot 0485.
30. DW3 informed the court that on confronting the Plaintiff, she informed them that she had been issued with a certificate by the Chairman and Surveyor but had no sale agreement nor proof of any payments for the transfer; that they confronted the Chairman to inquire how the Plaintiff had been issued with



a certificate for the plot belonging to the late Paul and that the Plaintiff was irregularly issued with a certificate for plot 0487.

31. On cross-examination, DW3 stated that he is the Vice Chair of Hurlighum Squatters Development Group; that whereas the Group has a constitution, he did not carry it; that the Chairman's function was to chair meetings and sign documents; that as the Chairman's assistant, he could sign documents on his behalf in his absence; that in the absence of both the Chairman and his Vice, the treasurer acts on their behalf and that neither his signature nor the Chairman's signature was on certificate no 857 issued to the Defendant.
32. DW3 further stated on cross-examination that the Plaintiff was not the owner of the developed plot; that she did not have the agreement and receipts for the transfer; that he also purchased his plot from the office as an original owner; that original owners were issued with a certificate of ownership and ballot cards; that there was no need for a sale agreement for an original allottee; that the Plaintiff's documents did not emanate from the office; that the Defendant's documents originated from the office and that he does not know whether the Defendant cleared the balance of the purchase price because once the relevant fees are paid to the office, the buyer and seller handle the rest.
33. On re-examination, he stated that initially, the property was in the name of the organization but they sub-divided it and sold it; that where the property was bought from an initial allottee, a transfer fee had to be paid; that they issued the Defendant with the documents whereas the Plaintiff's documents did not emanate from the office and that as per their records, the plot claimed by the Plaintiff belongs to Paul.

Submissions

34. The Plaintiff, through her counsel, submitted that the facts and evidence as adduced by the Plaintiff are consistent contrary to those of the Defendant; that whereas it is asserted vide the Defence that the Defendant developed the property after purchasing it, the evidence by the Defence witnesses contradicts this assertion and that as held by the Court in Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd [2018] eKLR parties are bound by their pleadings and any evidence at variance with the pleadings must be disregarded.
35. It was submitted by the Plaintiff's counsel that it is the Plaintiff who has proved that she developed the plot in dispute; that with respect to authenticity of documents, the Plaintiff's documents were verified while the Defendant's were not and that the evidence by the deceased Chairman is admissible pursuant to Sections 33 and 34 of the [Evidence Act](#).
36. It was the Plaintiff's counsel's submissions that from the Defendant's evidence, it is clear that he was aware that the Plaintiff had some interest in the plot; that none of the witnesses challenged the role played by the surveyor who testified for the Plaintiff and that the Plaintiff has proven her case on a balance of probabilities and is entitled to the orders sought.
37. The Defendant's counsel submitted that the Plaintiff's claim is in relation to plot number 0487 whereas the Defendant's claim is based on plot No 0485; that the Plaintiff has set out the history of how she acquired plot 0487 having purchased the same from Hurlighum Squatters Development on 9th August, 2013 and subsequently issued with a certificate of ownership and that vide his testimony, the surveyor confirmed the existence of both plots No 0485 and 0487 affirming that plot 0487 was issued to the Plaintiff whereas plot 0485 belongs to the Defendant having been acquired from its original owner, Lawrence Mutigi.



38. It was submitted that the Defendant followed all the relevant procedures and has all the relevant documents evincing his purchase of plot 0485, which property is distinct from plot No 0487; that should the Court find that the suit property is plot 0485, the Plaintiff's title thereon is defeasible pursuant to Section 26 of the Land Registration Act having led the Defendant to believe that the same was plot No 0485 and that the Defendant, relying on the representations by the Plaintiff and Lawrence Mutugu Kirimi, bought the suit property and any defects that may be evident are not attributable to him as an innocent purchaser for value.

Analysis and Determination

39. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the following arise as the issues for determination;

- i. Whether the Plaintiff is the bonafide owner of the suit property and if so,
- ii. Whether the Defendant has encroached on the suit property?
- iii. What are the appropriate orders to issue?

40. The Plaintiff instituted this suit seeking, inter-alia, a declaration that she is the legitimate owner of the suit property being plot no 0487 in L.R No 11531/14 and permanent injunctive orders restraining the Defendant from in any way interfering with the property.

41. It is the Plaintiff's case that she purchased the suit property from Hurlighum Squatters Development sometime in 2013 after which she commenced constructions thereon; that sometime in December, 2014, the Defendant attempted to encroach on her property leading her to lodge a complaint where it was discovered that the Defendant had been fraudulently sold plot 0485 and that the aforesaid notwithstanding, the Defendant wanted to enter into and continue with the construction on her plot.

42. In support of her claim, the Plaintiff adduced into evidence a copy of a Certificate no 0345 for the suit property in her name, the ballot certificate number 782, receipt from Landconsult surveys and associates dated 9th August, 2013 for Kshs 20,000, letter from the Chairman dated 18th September, 2015 affirming her ownership of the suit property, certificate no 851 for plot 0485 in the names of Lawrence Mutigi Kirimi, certificate no 857 for plot no 0485 in the names of Joseph Okwaro Olendo, a map of the proposed sub-division for L.R No 11531/14, building plans and photographs of the development on the suit property.

43. On his part the Defendant maintains that he is the owner of plot no 0485 having purchased the same from one Lawrence Kirimi and that it is this plot that he is constructing on and not the Plaintiff's plot 0487. The Defendant adduced into evidence a sale agreement dated 5th November, 2014 with respect to the sale of plot 0485, certificate no 857 in his name, certificate no 851 in the name of Lawrence Mutigi, ballot certificate no 0802 in his name and a receipt for Kshs 55,000/= for plot 0485 issued by Hurlighum Squatters Development

44. As aforesaid, the Plaintiff seeks a declaration that she is the legitimate owner of the suit property which the Defendant has encroached thereon, and as such, has the onus to prove this assertion. This position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provide 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.”

45. And Sections 109 and 112 of the same Act which states 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.”

46. 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.”

47. The Court will be so guided.

48. As regards the Plaintiff’s claim on the suit property, it was her testimony that she purchased the plot from Hurlighum Squatters Development. She adduced into evidence a copy of the certificate in that respect issued by the scheme, the ballot certificate and a receipt from the surveyor. PW1 and PW3, the Chairman and Surveyor of Hurlighum Squatters affirmed her ownership thereof.

49. In contrast, the Defendant and his witnesses contend that the suit property was acquired by the Plaintiff through fraud. It is noted that despite the testimonies with respect to fraud by the Defendant and his witnesses, the same was not pleaded in the Defence, neither was a counter-claim filed.

50. The principle that parties are bound by their pleadings remains steadfast. It was re-affirmed by the Court of Appeal in *David Sironga Ole Tukai vs Francis Arap Muge & 2 Others Civil Appeal No. 76 of 2014* [2014] eKLR where the Court stated as follows:

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made.”



51. From the foregoing, it follows that the only recourse available to the court is to disregard the Defendant's testimony with respect to the alleged fraud. The Court is in this respect guided by the Court of Appeal decision in Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR where the Court placed reliance on the expression by Aderemi J.S.C. of the Nigerian Supreme Court in Adetoun Oladeji (NIG) Ltd vs Nigeria Breweries PLC S.C. 91/2002 who stated;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

52. While consistently testifying that the plot occupied by the Plaintiff, Plot No. 0487, originally belonged to Paul, no evidence was adduced to support this allegation. Indeed, the documents produced in this court shows that the Plaintiff is the legitimate owner of plot 0487, having purchased the same from the scheme.

53. While the Plaintiff insists that the Defendant has encroached on plot 0487, it was the evidence of the Defendant and his witnesses that he is developing plot 0485, which he purchased from Lawrence, who, according to the Defendant, was the husband to the Plaintiff.

54. PW3, the surveyor who was best placed to guide the Court in this matter merely affirmed the existence of both plots 0485 and 0487 asserting that plot 0487 belonged to the Plaintiff. He did not provide any evidence by way of a report or otherwise distinguishing the two plots and showing that as alleged, the Defendant has encroached on plot 0487.

55. Whereas as aforesaid the Plaintiff as the owner of the plot 0487 is entitled to all the rights appurtenant thereto, she failed to prove that the Defendant had indeed encroached on plot 0487. Indeed, it is not clear to this court if the Defendant is residing on plot number 0485, which he purchased from Lawrence or on plot number 0487, which belongs to the Plaintiff. The burden of proving that the property that the Defendant had developed was on plot number 0487 and not 0485 was on the Plaintiff, which she failed to do.

56. For those reasons, the Plaintiff's case partially succeeds in the following terms:

- i. A declaration be and is hereby issued that the Plaintiff is the lawful owner of Plot No 0487, L.R No 11531/14, Hurlighum Development Scheme, while the Defendant is the lawful owner of Plot No 0485, L.R No 11531/14, Hurlighum Development Scheme.
- ii. A declaration be and is hereby issued that the claim of the Defendant having encroached on Plot No 0487 has not been proved, and the same fails.
- iii. The officials of Hurlighum Development Scheme to identify the beacons of plot numbers 0485 and 0487, and in any event, within 90 days of the date hereof.
- iv. Each party to pay his/her own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JANUARY, 2023.

O. A. Angote

Judge



In the presence of;

Ms Njoki for Matata for Plaintiff

Mr. Munyithya for Defendant

Court Assistant - Valentine

