



Public Trustee (Suing as Personal Administrators of the Estate of Jacob Manjichi Ombonya- Deceased) v Murimi (Environment & Land Case 610 of 2011) [2023] KEELC 560 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 560 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 610 OF 2011
EK WABWOTO, J
JANUARY 26, 2023**

BETWEEN

**PUBLIC TRUSTEE PLAINTIFF
SUING AS PERSONAL ADMINISTRATORS OF THE ESTATE OF JACOB
MANJICHI OMBONYA- DECEASED**

AND

NICHOLAS KABUCHO MURIMI DEFENDANT

JUDGMENT

1. The plaintiff filed the subject suit *vide* a Plaint dated November 4, 2011 and sought the following reliefs;
 - a. A declaration that Plot Q Shauri Moyo Estate forms part and parcel of the Estate of Jacob Manjichi Ombonya.
 - b. A permanent injunction to prohibit the Defendant by himself or through his servants or agents from trespassing upon plot Q Shauri Moyo Estate or leasing, transferring, building upon or continuing to build upon the said property or otherwise dealing with the same howsoever.
 - c. An order directing the Defendant at his own cost to demolish all structures illegally erected upon plot Q Shauri-Moyo Estate
 - d. Eviction and demolition orders against the Defendant and or any person or persons claiming under him.
 - e. Costs of the suit.



2. Following the filing of the subject suit, the defendant herein entered appearance and filed statement of defence dated February 7, 2012 in respect of which the defendant disputed the claim by the plaintiff.
3. Subsequently, the said matter was set down for hearing and proceeded on November 7, 2022. The Defendant despite being served and notified of the hearing date, never participated in the hearing of the suit.
4. During the hearing of the suit, Mercy Kiplagat a State Counsel attached to the Public Trustee office testified as PW1 and the sole Plaintiff's witness. She informed the Court that the case related to Plot Q Shauri Moyo which the deceased had bought from Thomas Mulamula through a deed of assignment in 1996.
5. In support of her case, PW1 also adopted her witness statement dated November 8, 2017, bundle of documents and supplementary list of documents dated October 6, 2022 that was filed and produced as part of her evidence in chief.
6. During the hearing of the case, Counsel for the Plaintiff made an oral application which application was allowed seeking to substitute the name of Irene Nyaboke Nyariki with that of Mercy Kiplagat in respect to witness statement dated November 8, 2017.
7. In submissions dated December 23, 2022, the Plaintiff identified three issues for determination:
 - a. Whether the property being Plot Q Shauri Moyo Estate forms part of the estate of the deceased.
 - b. Whether the defendant should be forced to vacate the premises as they form part of the estate of the deceased.
 - c. In the alternative, whether the defendant are entitled to the suit property by way of adverse possession having lived in the suit property since 2007.
8. On the first issue, it was argued that there is no indication that the Susan Waithira had been paying rates or an explanation on how the property was acquired by the Defendant.
9. Relying on the case of Nyahururu ELC No. 144 of 2017 *Zacharia Wambugu Gathimu & another v John Ndung'u Maina* it was argued that since the deceased beneficiaries had followed proper channels in respect to the succession proceedings, they should be at liberty to take possession of the suit property and demolish the existing structures on the land.
10. It was also submitted that on the alternative issue of ownership by adverse possession, it was posited that the issue of adverse possession could not apply herein since the property was subject to court proceedings from 2004 and therefore it cannot be said that the Defendant has lived peacefully and uninterrupted for of twelve (12) years.
11. As earlier stated, the defendant entered appearance and filed statement of defence dated February 7, 2012 in which he denied the Plaintiff's claim and sought for the suit to be dismissed with costs.
12. It was averred that the Defendant purchased plot Q *vide* an agreement for sale dated November 21, 2007 made between himself and Susan Waithira Mbugua for a consideration of Kshs 900,000. Pursuant to the sale, the City Council of Nairobi transferred the allotment letter dated 18th November 1993 in favor of Susan Waithira Mbugua to upon which he acquired ownership of the said property. In his defence, the defendant also averred that has paid up all his dues to the City Council of Nairobi and that on 5th April 2010, the City Council of Nairobi approved for him building plans and he has since developed on the said plot a five-story building with a basement. He also stated that there have been previous proceedings in respect to the suit property pursuant to HCCC ELC No. 525 of 2010 between



- Hilary Samora Omboya and himself. Defendant neither attended the hearing nor filed submissions in support in his case.
13. The Court having considered the pleadings of the parties, evidence tendered and submissions, is of the view that the following issues are for determination;
 - i. Whether the Plaintiff has proved his case to the required threshold?
 - ii. Whether the Plaintiff is entitled to the prayers sought?
 - iii. Who bears the costs of the suit?
 14. Although the Defendant did not participate in the trial, the Plaintiff has a duty to formally prove their case on a balance of probabilities as is required by law.
 15. In the case of *Kirugi and another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
 16. Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants 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.”
 17. According to the Plaintiff, it was a mischief that the suit property was subject to a court process for confirmation of grant when the defendant was acquiring the land via purchase by Susan Waithira. In addition, the Defendant’s failure to defend the case was further evidence of mischief.
 18. It is trite law that he who alleges must prove. This 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.”
 19. It was argued that the confirmation of grant and consequent amendment includes the property as part of the estate, which to date was never cancelled and therefore confirms that the property belonged to the deceased.
 20. On the other hand, the Defendant lay claim of ownership by virtue of purchase from Susan Waithira an allottee as per the letter from the Nairobi City Council dated 18th November 1993.
 21. From the evidence adduced, it was clearly demonstrated that the transfer of the property to the Plaintiff was not done in accordance with the applicable provisions of the law so as to take effect. There was no evidence confirming the registration of the deed of assignment and neither was the court furnished with any copies of the transfer forms in respect to the said property. Section 43 of the *Land Registration Act* No.3 of 2012 stipulates as follows:-
 13. 43. Instruments of dispositions.



- (1) Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.
 - (2) No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made. [emphasis added]
22. I also align myself with the sentiments in *Rajendra Sanghani & another (Both Suing in their Capacities as Administrators of the Estate of Ratilal Gordhandas Sanghani) v Fairmile Investments Limited & another* [2021] eKLR where the Court held that:
- “...the said assignment did not convey proprietorship interests in the suit property to the deceased since it was not registered”.
23. In *Macfoy v United Africa Co. Ltd.* (1961)3 All ER 1169, Lord Denning stated as follows at page 1172:
- “If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.” [Emphasis Mine]
24. In view of the foregoing, the assignments dated June 16, 1996 and November 24, 1992 to Jacob Ombonya (deceased) and Thomas Mulamula respectively could not confer any proprietary interest for want of registration. The court was not furnished with any evidence to the effect that the assignment was registered.
25. The Plaintiff sought for several reliefs as were stipulated in the Plaint. However, having found that the Plaintiff’s case has not been proven to the required threshold, the reliefs sought cannot be granted.
26. In respect to costs, although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with section 27 of the *Civil Procedure Act* (cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court for good reason directs otherwise. However considering that the Defendant did not take party during the hearing of the suit save for filing a defence, I direct that each party will bear own costs of these proceedings.
27. From the foregoing analysis, the plaintiff has failed to prove the case on a balance of probabilities against the defendant and accordingly the suit is dismissed with an order that each party bears own costs of the suit.

It is so ordered.

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

E. K. WABWOTO

JUDGE

In the Presence of:

Ms. Abutika for the Plaintiff.



N/A for the Defendant.

Court Assistants: Caroline Nafuna and Philomena Mwangi.

