



Mbugua as Chairman & 2 others (All Suing as the Officials of the Gospel Disciple Society) v Msabaa & 4 others (Environment & Land Case 26 of 2016) [2023] KEELC 253 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 26 OF 2016
NA MATHEKA, J
JANUARY 25, 2023**

BETWEEN

**BISHOP JAMES NJENGA MBUGUA AS CHAIRMAN 1ST PLAINTIFF
PETER MWAKUPHA KANDONGO AS SECRETARY 2ND PLAINTIFF
ELIUD KURIA KARIUKI AS TREASURER 3RD PLAINTIFF
ALL SUING AS THE OFFICIALS OF THE GOSPEL DISCIPLE SOCIETY**

AND

**PAUL MSABAA 1ST DEFENDANT
VICTORIA MSABAA (ALL TRADING AS IYALE MIKINDANI JUNIOR
ACADEMY) 2ND DEFENDANT
JERALD MOKA ALVAN 3RD DEFENDANT
ALVAN MWASEZI MOKA 4TH DEFENDANT
FRANK ZEBEDEE NYAMBU 5TH DEFENDANT**

JUDGMENT

1. The Gospel Disciples Society is the registered owner/proprietor as an allottee of all that property known and described as Plot No. GIO/ 1551 at Mikindani. The Plaintiffs state that the 1st and 2nd Defendants have without any colour or right trespassed and or continue to trespass upon the Plaintiffs' property. The Plaintiffs has neither entered into a lease agreement with nor authorised the 1st and 2nd Defendants to occupy the suit premises, or any part thereof. The 3rd, 4th and 5th Defendants are not Trustees of the Plaintiff. They have never been appointed as Trustees and have unlawfully and or illegally been posing and or passing off as such Trustees with the 1st and 2nd Defendants knowledge. The Plaintiff



does not have any appointed or elected Trustees and none of the Plaintiffs organs or any organ acting with the authority of the Plaintiff has entered into a lease agreement with the 1st and 2nd Defendants. The Plaintiff seeks a Declaration from this Honourable Court that it is the Lawful owners of the suit premises. The Plaintiffs prayer is for order of eviction forthwith, of the 1st and 2nd Defendants either jointly and or severally and/or together with their servants, employees, or agents and or any person(s) claiming from them and or through them, from the Plaintiffs property known and described as Plot No. GK2/ 1551 at Mikindani. The Plaintiff seeks an order of permanent injunction restraining the 1st and 2nd Defendants either jointly and or severally and/or together with their servants, employees, of agents and or any person(s) claiming from them and or through them, from trespassing, occupying and of interfering in any manner with the Plaintiffs right of possession and or ownership and or occupation of the property known and described as Plot No. GK2/1551 at Mikindani. The Plaintiff also seeks an Order of permanent injunction restraining the 3rd, 4th and 5th Defendants, either jointly and or severally and/or together with their servants, employees, or agents and or any person(s) claiming from them and or through them, from occupying, leasing out, holding themselves as proprietors and/or trustees and or interfering in any manner whatsoever with the Plaintiffs ownership and or occupation of the property known and described as Plot No. GK2/1551 at Mikindani, without express permission from the Plaintiff. The Plaintiff had previously leased the premises to Iyale Academy a Secondary school at the rate of Kshs. 30,000/ = per month. The 1st and 2nd Defendants are unlawfully leasing the premises at the rate of Kshs. 50,000/ = per month from the 3rd, 4th and 5th Defendants. The Plaintiff hence seeks mesne profits at the rate of Kshs. 50,000/ = per month from the 1st and 2nd Defendants from October 1, 2013 the date when the trespass and the lease agreement is said to have commenced until hand over vacant possession to the Plaintiff.

2. The Plaintiff avers that there is no other suit pending and that there have been no previous proceedings in any Court between the Plaintiff and the Defendants over the same subject matter, save for the following suits:- (Mombasa) CMCC No. 2215 Of 2005 Benson Mwaliwa & 2 Others t/a Iyale Academy -Vs- Rev. James Mbugua. A Ruling was delivered by the Learned Senior Resident Magistrate T. Mwangi on September 16, 2005 dismissing with costs, the Plaintiffs application for an injunction. The suit was subsequently withdrawn. (Mombasa) HCCC No. 250 of 2008 *Iyale Academy -vs- Jim {Mugambo Mbugua & 2 Others (Sued as Officials Of Gospel Disciples Society)}*. The same is still pending the Hearing and determination of a dispute of rent arrears and eviction between the previous Tenants (the Secondary School). (Mombasa) HCCC No. 25 of 2012 "0.9' *Rev. Jerald Alvan vs James N. Mbugua & Another (Sued as Officials of Gospel Disciples Society)* The Plaintiff's prayer for an injunction was dismissed on June 4, 2012 by Honourable Justice Francis Tuiyot. The matter is yet to proceed for a full hearing and does not touch on the current lease to the 1st and 2nd Defendants.
3. The Plaintiff prays for judgment against the Defendants jointly and severally for:-
 - a. A Declaration that Plot No. GK2/1551 at Mikindani belongs to the Plaintiff.
 - b. An order of eviction forthwith, of either jointly and or severally and/or together with their servants, employees, or agents and or any person(s) claiming from them and or through them, from the Plaintiff's property known and described as Plot No. GK2/ 1551 at Mikindani.
 - c. An Order of permanent injunction restraining the 1st and 2nd Defendants either jointly and or severally and/or together with their servants, employees, of agents and or any person(s) claiming from them and or through them from trespassing, occupying and of interfering in any manner with the Plaintiff's right of possession and or ownership and or occupation of the property known and described as Plot No. GK2/1551 at Mikindani.



- d. An Order of permanent injunction restraining the 3rd, 4th and 5th Defendants either jointly and or severally and/or together with their servants, employees, or agents and of any person(s) claiming from them and or through them, from occupying, leasing out, holding themselves as proprietors and or trustees and or interfering in any manner whatsoever with the Plaintiffs ownership and or occupation of the property known and described as Plot No. GK2/ 1551 at Mikindani, without. express permission from the Plaintiff.
 - e. The 1st and 2nd Defendants do pay mense profits to the Plaintiffs at the rate of Kshs. 50,000/ = per month from October 1, 2013 until the 1st and 2nd Defendants quit or vacate and/or hand over vacant possession of the suit premises Plot GK 2/1551 at Mikindani to the Plaintiff.
 - f. Costs
 - g. Interest
 - h. Further of any other reliefs that the Honourable Court deems just and fit to grant in the circumstances of this case.
4. The 3rd, 4th and 5th Defendants were served but failed to attend court or provide any defence. The 1st and 2nd defendants aver that they are in occupation of the suit property under and by virtue of an agreement entered into between themselves and the trustees of the Plaintiff society who are under the Plaintiff's constitution the body entitled to deal with the Plaintiff's property. That any notice capable of terminating the Defendants tenure on the suit premises would be subject only to the terms of the tenancy under which the Defendants hold. That they are not liable to the Plaintiff in mesne profits as alleged or at all the consideration by way of rental due on their tenure having been paid to the Plaintiff's trustees in reliance of duly executed and subsisting records of the Plaintiff society and or its affiliates. In the circumstances the 1st and 2nd Defendants cannot be liable for matters and or losses if any arising out of the internal dealings of the Plaintiff.
 5. This court has considered the evidence and the submissions therein. DW1 Paul Msabaa testified that they are in occupation of the suit property under and by virtue of an agreement entered into between themselves and the trustees of the Plaintiff society who are under the Plaintiff's constitution the body entitled to deal with the Plaintiff's property. He produced the trust deed, tenancy agreement and the Plaintiff's constitution as exhibits. PW1 James Njenga Mbugua testified in court and stated that they do not recognize the trust deed. That the Society now church was founded in 1978 and he became a member in 1990. He became an official in 2006. That the 3rd Defendant was the founder and they only recognize the earlier lease agreement. That they currently do not have any trustees. I have perused the documents produced in this matter and find that the Plaintiffs are the office bearers of Gospel Disciples Society. I also note that the 1st and 2nd Defendants have a lease agreement of the suit property tendered into by the 3rd 4th and 5th Defendants as per the trust deed produced in court. The same is registered in 2003 long before PW1 became an official. The Constitution of the said Society also states that they would have trustees. I find that the 1st and 2nd Defendant rightfully entered into the said lease agreement and if the same was a forgery they would not have had any knowledge on of leadership squabbles within the Society. Indeed, the Plaintiffs have stated that the leadership of the Society has changed severally since its inception. They submit that since their evidence was not controverted by the 3rd, 4th and 5th Defendants the court ought to declare the suit property belongs to Gospel Disciples Society and the three officials are the Plaintiffs.
 6. There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the instant case where the defence did not show up at the trial. The general position running through



such authorities is that uncontroverted evidence bears a lot of weight and that a statement of defence without any evidence to support the assertions therein will amount to mere statements.

7. In the case of *Janet Kaphiphe Ouma & Another vs Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga vs Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

" In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of 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...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

8. In *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the Defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted. Mulwa J, however in the case of *Kenya Power and Lighting Company Limited vs Nathan Karanja Gachoka & another* (2016) eKLR stated:

" I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not."

9. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

10. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same *Act* 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 the 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 the fact is upon him.

11. The two provisions were dealt with in *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* (2005) 1 EA 334, in which the Court of Appeal held that:

" As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*."



12. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendants, depending on the circumstances of the case. In *Evans Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR it was held that:

" As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

13. I agree that the Court of Appeal's position in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another* (2014) eKLR espouses the correct legal position that;

" It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

14. The issue then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau vs George Thuo & 2 Others* (2010) 1 KLR 526 stated that;

" In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

15. In light of all these authorities above I find that the Plaintiffs have failed to discharge the legal burden of prove in this matter under Section 107 (1) of the *Evidence Act*. It was not established that the said trust deed was a forgery and that the trustees named therein had no authority to enter into the said lease agreement. In their final submissions they stated that the 1st and 2nd Defendants had already moved out of the suit premises and the payment of rent order can be made against the 3rd 4th and 5th Defendants. It has also been pleaded by the Plaintiffs that they are other matters pending in court namely, (Mombasa) HCCC No. 250 of 2008 *Iyale Academy vs Jim Mugambo Mbugua & 2 Others (Sued as Officials Of Gospel Disciples Society)*. The same is still pending the Hearing and determination of a dispute of rent arrears and eviction between the previous Tenants (the Secondary School). (Mombasa) HCCC No. 25 of 2012. *Rev. Jerald Alvan vs James N. Mbugua & Another (Sued as Officials of Gospel Disciples Society)* dealing with different issues and maybe the leadership wrangles are part of this. For those reasons I find that the Plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs to the 1st and 2nd Defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY, 2023.



N.A. MATHEKA
JUDGE

