



REPUBLIC OF KENYA



KENYA LAW
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**Mageto v Ayiga (Environment & Land Case 551 of 2015)
[2023] KEELC 113 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 551 OF 2015**

**A OMBWAYO, J
JANUARY 19, 2023**

BETWEEN

CHARLES MOMANYI MAGETO PLAINTIFF

AND

ELKANAH SALAMBA AYIGA DEFENDANT

JUDGMENT

1. Charles Momanyi Mageto hereinafter referred to as the plaintiff sued Elkan Salamba Ayiga (hereinafter referred to as to Defendant) claiming that at all material times the plaintiff has been the proprietor of a plot situate within the Municipality of Kisumu and known as Plot No 556 Migosi Site & Service Scheme Phase 1 which he bought from one Michael folly Ongoro on September 29, 2011. The plaintiff immediately took possession of the said Plot No 556 Migosi Site & Service Scheme Phase 1 and occupied the same and commenced development of the same.
2. On November 24, 2011 the defendant encroached into and entered the said plot No 556 Migosi Site & Service Scheme Phase 1 and commenced development of the same despite the plaintiff's protests.
3. The defendant has maintained and continues to maintain that the said Plot No 556 Migosi Site & Service Scheme Phase 1 was allocated to him and his wife by the Municipal Council of Kisumu, but the plaintiff has since confirmed that the allocation to the defendant was nullified after the said plot was repossessed vide Minute No HDC/03/03 (Resolution No.HDC/03/01) of the Housing Development Committee of the Municipal Council of Kisumu dated May 16, 2003, and a Public Notice issued in the Daily Nation of August 29, 2003, and that thereafter the said plot was allocated to one Elizabeth Akinyi Rabuogi who in turn sold the same to Michael Folly Ongoro.
4. The plaintiff has requested the Defendant to halt any development on the said disputed plot but the Defendant has refused to heed this request, with the consequence that the plaintiff now stands to lose the whole of the said plot No.556 Migosi Site & Service Scheme Phase 1.



5. The plaintiff is now apprehensive that the Defendant may continue with his development of the disputed site and occupy the same before this suit is heard and determined, and this may render the plaintiff's suit nugatory. According to the plaintiff, the defendant's actions were unlawful and without any colour of right or legal justification and they have caused a lot of harm and damage to the plaintiff.
6. The plaintiff prays for general damages and an order that the defendant do vacate all portions of the said Plot No 556 Migosi Site & Service Scheme Phase 1 forthwith or be evicted therefrom, and a permanent order of injunction restraining the defendant by himself, or his agents or servants or proxies or any of them from entering, remaining on, developing, occupying or using any portion of the said plot No 556 Migosi Site & Service Scheme Phase 1 or doing anything else which may restrict, curtail, diminish or interfere with the plaintiff's quiet possession, use and enjoyment of the said plot No 556 Migosi Site & Service Scheme Phase 1.
7. The defendant in his defence denies the allegations by the plaintiff and states that he is the proprietor of plot No 556 Migosi Site and Service Scheme having bought it from Charles Lutta Kassamani the initial allottee way back in 1996 and that he is a stranger to the existence of plot No 556 Migosi Site and Service Scheme Phase 1 and if such a plot exist then it is different. The defendant further avers that he bought plot no 556 Migosi Site and Service Scheme from Charles Lutta Kassamani who was the first allottee and that the allotment to Charles Lutta Kasamani was not annulled.
8. When the matter came up for hearing the plaintiff testified that on September 29, 2011 he bought plot No 556 Migosi Site & Service Scheme Phase from one Michael Folly Ongoro at Kshs 300,000 who had purchased it from Elizabeth Akinyi Rabuogi. After buying the plot he commenced construction of a building of his own. The plaintiff states that the allocation to the defendant was nullified after the said plot was repossessed vide Minute No NDC/03/03 Resolution No HDC/03/01) of the Housing Development Committee of the Municipal Council of Kisumu dated May 16, 2003 and public Notice issued in the Daily Nation of August 29, 2003.
9. After the plot was repossessed it was allocated to Elizabeth Akinyi Rabuogi who sold it to Michael Folly Ongoro. The said Michael Folly Ongoro had applied for planning permission. He prays that the defendant vacates the land.
10. PW2, Michael Folly Ongoro states that he bought the suit land form Elizabeth Akinyi Rabuogi. The housing Development Department confirmed that the property belonged to Elizabeth Akinyi Abuogi. The Housing Development department confirmed that the property had been recovered from Charles Lutta Kassamani vide minutes No HDC/03/03 resolution No HDC/03/01) of the housing Development Committee of the Municipal council of Kisumu, dated May 16, 2003 and after a public notice had been issued in the Daily Nation of August 29, 2003. There was no transfer.
11. That from the records shown at the Housing Development Department, there was no transfer from Charles Lutta Kassamina to Elkanah Salamba Ayiga and Ruth Salamba.
12. That after satisfying himself that the plot was available, he requested an officer from Housing Development Department to take him to the site of the plot and identify it to him in the absence of the said Elizabeth Akinyi Rabuogi, and this was done, and he confirms that the said plot was vacant.
13. That the officer from Housing Development Department then assured him that it was safe to buy the plot from the said Elizabeth Akinyi Rabuogi.
14. That from the Housing Development Department, he was given copies of documents which were part of their records in their files and he was further given a note to take to Town Planning Department, where he was given the green light to pay the rates arrears before the plot could be transferred.



15. That on April 20, 2020 he paid to the then Municipal Council of Kisumu: Kshs 2,000 in rates, Kshs 20,500 vide receipt No 9490 which was referred to as “administration costs”, and Kshs 3,500/= for change of name from Elizabeth Akinyi Rabuogi to me. That on the following day, April 21, 2010, he signed an agreement with the said Elizabeth Akinyi Rabuogi, by which she sold the said plot to him at Kshs 370,000/= which he paid in full.
16. That later, the Municipal Council of Kisumu confirmed in writing on May 4, 2010, that the said plot had been legally transferred to him, and his ownership of the said plot was further confirmed by letters dated July 23, 2010 and August 20, 2010, also from the Municipal Council of Kisumu. That he later applied for planning permission and his building plans were approved by the Municipal Council of Kisumu on August 20, 2010.
17. That on September 29, 2011, he sold the said Plot No 556 Migosi Site & Services Scheme Phase 1 to the plaintiff herein. That he verily believes that at the time he was selling the said plot to the plaintiff he had a valid title to the same.
18. Pw3, Arnold Omondi Guya an employee of the County Government of Kisumu and the Director of Housing states that the suit property, initially belonged to Elizabeth Akinyi Rabuogi and was transferred to Michael Folly Ongoro. Before Elizabeth Akinyi Rabuogi the plot was repossessed from Charles Lutta Kassamani. He produced the relevant documents.
19. The defence called Charles Lutta Kassamani a lawyer by profession and the initial allottee of the property. He bought the suit property in the late 1980’s and decided to sell it in 1996. He sold the suit property to the Salambas. He had not procured the lease but he surrendered the letter of allotment to the Salambas. He signed an informal transfer to enable the Salambas process a title . They took possession. He relinquished his interest in 1996. He did not receive any notice of repossession.
20. Defence witness 2, Elkanah Salamba Ayiga a pastor in the office of the Pentecostal Association of God. He states that he bought the parcel of land jointly with his wife from Charles Lutta Kassamani who was the lawful allottee Charles Lutta Kassamani signed a transfer from. He paid stamp duty and applicable fees to the Director of Survey. He presented building plans to the Municipal Counsel of Kisumu and was given terms of the construction and paid for the extension of the validity period for the approval Plans. He is at advanced state of construction on the premises. The defendant did not receive the letter dated June 23, 2003 from the Municipal Council of Kisumu.
21. The plaintiff submits that in the records of the defunct Municipal Council of Kisumu, this plot does not appear to have been transferred from Charles Lutta Kassamani to the defendant, so in effect the defendant has never had or held any documents of title by way of letter of change of name or confirmation of ownership from the Municipal Council.
22. That even if the defendant ever had any rights or title to the disputed plot No.556 Migosi Site & Service Scheme, those rights were totally extinguished and lost after the said plot was repossessed. The repossession is supported by the minutes of Municipal Council of Kisumu’s Housing Development Committee meeting of May 16, 2003.
23. The plaintiff contends that before the repossession took place, both the defendant (by a letter dated June 23, 2003) as well as Charles Lutta Kassamani were duly given notice to develop the suit property, failing which the same would be repossessed.
24. Both the defendant as well as Charles Lutta Kassamani were also served with a public notice published in the daily Nation issued on August 29, 2003, the effect of the public notice is the same as a publication



of notice in The Kenya Gazette; one cannot escape the consequences of a public notice published in the daily newspapers by merely claiming that he did not see it

25. The defendant took no steps to stop the repossession, and to date he has not challenged it or sued the Municipal Council of Kisumu or taken any other action to reverse the repossession. If he ever had any title (which we submit he never did) then the same has been extinguished and his only remedy is against the Municipal Council of Kisumu.
26. After the said plot No 556 Migos Site & Services Scheme had been lawfully repossessed from the defendant, it was allocated to Elizabeth Akinyi Rabuogi who in turn sold the same to Michael Folly Ongoro on April 21, 2010, Michael Folly Ongoro in turn sold the same to the plaintiff and his wife.
27. According to the plaintiff, the said Michael Folly Ongoro had a letter of change of name dated July 23, 2010 and issued by the Municipal Council of Kisumu as well as confirmation from the said Council that the said plot belongs to him.
28. That as between the defendant and Michael Folly Ongoro, it is only Michael Folly Ongoro who had a proper title to the disputed plot, and this is the title which was passed on to the plaintiff and his wife. In the circumstances, it is only the plaintiff who is entitled to possession of the suit premises.
29. The defendant submits that the plaintiff failed to prove that he is the proprietor of the suit property. The defendant contends that the plaintiff did not have any documents of ownership of the property. The defendant contends that the plaintiff did not draw any plans for approval and did not plan for any construction but was relying on another person's plans.
30. On the issue of repossession, the defendant argues that the same is immaterial and irrelevant. Moreover, that the property was first allocated to Charles Litta Kassamani who sold his interest to the defendant and his wife. He submitted that the notice for repossession was not effective as it was not received by the defendants. The defendant argues that the list of the plots being repossessed was not shown to court and there was no evidence that the suit property was part of what was being repossessed. The defendant argues that the repossession was unlawful.
31. I have considered the pleadings, evidence on record and rival submission and do find that the main issue for determination is that who the legal owner of the suit property is and whether the process of re-possession was regular and lawful. The burden of proof that the process of repossession was lawful falls on the plaintiff because he is the one that asserts that there was re-possession.
32. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:
 - (1) 107 "(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.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."
33. In the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR the court held as follows with regard to the burden of proof:

....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into



the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs 98,200/= the debt being claimed herein.”

34. I also refer to treatise of The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
1. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”
2. It is clear that the plaintiff and defendant are claiming the same property described as Kisumu/Migosi/Phase 1/556 by the plaintiff and the plot number 556 Migosi site and service scheme by the defendant. Attempting to identify the two as different plots will be like attempting to split hairs.
 3. The background facts of this matter are that on December 23, 1996, the Commissioner of Lands through J H Waithaka offered Mr Charles Lutta Kassamani an unsurveyed residential site 556 Migosi Site and Service Scheme in Kisumu Municipality vide a letter of allotment ref No.149089/11/18R PDP. It is not clear how Charles Lutta Kassamani was offered the plot because there is no evidence of the process leading to the offer and any advertisement prior to the offer but the letter of allotment speaks for itself.
35. It is on record that Mr Charles Lutta Kassamani and Elkanah Salamba Ayiga entered into an agreement of sale on May 15, 1996, 6 months before allotment. Mr Charles Lutta Kassamani testified that he bought the plot in the 1980' and therefore it is possible that he sold the plot before the letter of allotment was issued.
36. On the March 14, 2002 Mr. Charles Lutta Kassamani and Elkanah Salamba Ayiga and Ruth Salamba executed a form of transfer that was also executed by the Commissioner of Lands and it was agreed that the grant or lease in respect of the suit property be registered in the names of the defendant. The DW1 produced receipts for consent to transfer, receipts for rent payment, stamp duty. The defendant took possession of the land. the defendant caused a building plant to be prepared by his architects and on June 17, 2003 an invoice of Kshs 8070 was made by the Kisumu Municipal Council being the



- Architectural approving fees, Public Health Inspector fees, Structural fees, this was through invoice number B No.044202. The amount was paid on June 17, 2003 by Mr and Mrs Salamba.
37. On June 17, 2008 the town clerk Kisumu notified the defendant of the approval for the development on plot No 556/Migosi Site and Service Scheme Phase 1 Kisumu Municipality. Mr Salamba paid rates for the plot until 2012.
 38. On the same plot, it was alleged that under Minute No HDC/03/03 (undeveloped plots in the second urban areas), that the Director of Housing presented a list of the undeveloped plots in the 2nd urban areas and members went through the list and it was then proposed by Clir David Okwach and seconded by Clir Pamela Omino and it was resolved that a 3 months' notice be given to the plot owners to complete them failure of which the plots would be repossessed. It is worth noting that this court was not favoured with the list to discern the same and ascertain that the plot was amongst the list.
 39. Moreover, the minutes relied upon by the plaintiff for the meeting held on May 16, 2003 are not signed and are not dated and are not certified as emanating from the Kisumu County. It was upon the plaintiff to produce authentic minutes from the County Government of Kisumu.
 40. On June 23, 2003, the Town Clerk wrote to the defendant and his wife informing them of the resolution and gave them 3 months to complete the construction. It is not clear that the defendant received the communication. There is no evidence of postage. However it is worth noting that by the time this letter was being written the municipal council had received the application for approval of the building plans and had even been paid the approval fees. However, the Kisumu Municipal Council went ahead and allocated the plot to Elizabeth Akinyi Rabuogi who sold the plot to Michael Folly Ongoro who later sold it to the plaintiff.
 41. This court finds that the repossession of the plot from Mr. Salamba was not done properly within the law and there is no evidence that the plot was in the list of plots to be re-possessed as the list was not produced. Even if the plot was listed the defendant was not given notice at as there is no evidence of postage or service of the notice. The whole process of repossession was a nullity and therefore what comes from a nullity remains a nullity. It follows that the process of allocation of the plot to Elizabeth Akinyi Rabuogi was a nullity and therefore she had nothing to transfer to Michael Folly Ongoro who in turn sold the plot to the plaintiff. The plaintiff has failed to prove that there was a regular and lawful process by the Municipal Council of Kisumu to recover the suit property and therefore the plaintiff has failed to discharge his burden of proof on a balance of probabilities and the upshot of the above is that the suit is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF JANUARY 2023.

A O OMBWAYO

JUDGE

