



**Kasinde v Seurey & another (Environment & Land Case 454 of 2013)
[2023] KEELC 16041 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16041 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 454 OF 2013**

**LA OMOLLO, J
MARCH 9, 2023**

BETWEEN

ABDALLAH MOHAMMED A. KASINDE PLAINTIFF

AND

ANTONY NGETICH SEUREY 1ST DEFENDANT

ROSETTA MUKIMA GATHOGO 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit *vide* a Complaint dated 8th July, 2013 and amended on 7th August, 2013.
2. In the amended Complaint he avers that he is the proprietor of land parcel no Nakuru Municipality/Block 13/314 (previously Bondeni Estate Plot no 52) having purchased it on 9th December, 1992.
3. He further avers that after purchase, he took possession and later leased the property to tenants who pay monthly rent to him and that he derives his livelihood from money paid to him by them.
4. It is his averment that he has been paying annual rates and that on 1st July, 2013, the firm of M/s Olonyi & Co. Advocates wrote a notice to his tenants notifying and directing them to pay rent to the 2nd Defendant.
5. He further avers that on the same date, the 2nd Defendant through an estate agent served a notice upon the said tenants demanding that they pay their monthly rents to its offices with effect from 1st July, 2013.
6. It is the Plaintiff's averment that he is aggrieved by the said unlawful notices as he has neither sold his property nor instructed any agent to sell the property.



7. He avers that his claim is for temporary injunction orders as well as a permanent injunction to restrain the Defendants and their agents, servants or employees from further interference with the property.
8. The Plaintiff prays for judgement against the Defendants for:
 - a. A temporary injunction to restrain the Defendants and secure the suit property pending the hearing and determination of this suit.
 - b. A permanent injunction to restrain the Defendants by themselves, their agents, servants, employees and others whoseever from selling, transferring, leasing out, charging, taking possession and occupation of, developing or in any way interfering with property title number Nakuru Municipality/Block 13/314.
 - c. Costs of this suit.
 - d. Any other relief deemed appropriate.
9. The Defendants filed their Statement of Defence and Counterclaim dated 29th July, 2013. They deny the Plaintiff's averments in the Plaint.
10. The Defendants state that the suit property initially belonged to Adijah Binti Malik (Deceased), the 1st Defendant's grandmother who passed on in the year 1974.
11. The Defendants also aver that upon her death and vide Probate and Administration Cause no 341 of 1975, the deceased's sister one Chebande Alima also now deceased was appointed the administratrix of her estate.
12. The Defendants state that the property was taken up and managed by the Public Trustees Office until the 1st Defendant obtained Letters of Administration which were confirmed in Nakuru Succession Cause no 391 of 2010.
13. The Defendants further state that Miriam Cheruto Boit was never appointed as the Administrator of the Estate of Chebande Alima as alleged and the property was at that time under the management of the Public Trustee.
14. The Defendants also state that the Plaintiff's Sale Agreement was forged with a view to grab the said land. They also state that if at all the Plaintiff paid any rates to the Municipal Council of Nakuru, the same was done illegally and with the intention to grab the suit property and they allege that he fraudulently changed the records and addresses at the Municipal Council without the requisite legal documents.
15. In their counterclaim, the Defendants state that the 1st Defendant is one of the Legal Representatives of the estate of Chebanda Alima together with Joshua Mzee Ketion.
16. They also state that the Grant of Letters of Administration was issued by the High Court in Nakuru on 3rd November, 2010 and was confirmed on 15th June, 2012.
17. The Defendants further aver that pursuant to the said confirmation, the 1st Defendant sold the suit property to Rosetta Mukima Gathogo who is the new owner of the property.
18. The Defendants set out particulars of fraud and seeks the following orders against the Plaintiff;
 - a. The purported sale agreement be declared null and void.
 - b. A Declaration that Rosetta Mukima Gathogo is the rightful owner of the suit premises.



- c. An order that the tenants do pay rent, to the new owner Rosetta Mukima Gathogo.
- d. Costs of this suit.

Factual Background.

19. This suit came before me on 7th July, 2022 for hearing of a Notice to Show Cause. The reason for issuance of the said notice, the matter was last in court on 22nd June, 2020.
20. On 7th July, 2022 counsel for the Plaintiff explained why the suit had not been listed for hearing owing to the interruptions to court operations during the Covid-19 pandemic. Counsel further informed the court that he had earlier complied with pre-trial directions and prayed that the suit be set down for hearing.
21. On account of this explanation, the suit was set down for hearing on 24th October, 2022 and the Plaintiff asked to serve the Defendants and file an affidavit of service.
22. An affidavit was service sworn on 14th July, 2022 was filed as evidence of service of hearing notice upon the Defendants. The court on being satisfied that service on the Defendants was properly effected, ordered the matter to proceed to hearing.

Plaintiff's Evidence.

23. During the hearing of the Plaintiff's case, Abdalla Mohammed Kasinde testified as PW1. It is his evidence that he purchased land parcel no Nakuru Municipality/Block 13/314 previously known as Bondeni Estate Plot no 52 from Miriam Cheruto Boit.
24. He states that he entered into the sale agreement dated 9th December 1992 which agreement was drawn by Kagucia & Co. Advocates adding that he paid ksh 189,000/= as the purchase price. He produced the said agreement as Exhibit P1.
25. He produced the documents attached to his list of documents dated 8th July, 2013 and his Supplementary List dated 9th April, 2015 as follows:
 - a. Rates payment request as Exhibit P2.
 - b. Invitation to Bondeni Landlords meeting as Exhibit P3.
 - c. Municipal Council of Nakuru Enforcement Notice dated 9th May, 2012 as Exhibit P4.
 - d. Letter of Omwenyo & Co. Advocates as Exhibit P5.
 - e. Letter by the 1st Defendant dated 11th July, 2007 as Exhibit P6.
 - f. Letter dated 1st July, 2013 by Olonyi & Co. Advocates as Exhibit P7.
 - g. Letter dated 1st July, 2013 written by Just for Properties as Exhibit P8.
 - h. Rent demand Notice by Just for Properties as Exhibit P9.
 - i. Letter by Omwenyo & Co. Advocates dated 4th July, 2013 as Exhibit P10.
 - j. Orders of Succession Cause no 391/2019 issued on 27th February, 2015 as Exhibit P11.
 - k. Affidavit of Succession for Succession Cause 391 of 2010 as Exhibit P12.



26. He testified that after purchase of the suit property, he took occupation adding that there were also other tenants on the property and that he continued to live on the sit property and receive rent from them from the year 1992.
27. It was PW1's testimony that after purchase he went with Miriam Boit to the Municipal Council and effected transfer from her name to his name. He stated that this is evidenced in Exhibit P2.
28. He further testifies that he had a letter of invitation from Practical Answers to Poverty inviting him to a Landlords meeting. They were working in consortium with the Municipal Council to improve environment, water and Sanitation. This is Exhibit P3.
29. He testifies that the Enforcement Notice is also proof that he is the owner of the suit property. The notice was demanding that he demolishes part of his building which was encroaching on Allan Kungu Mwangi's plot and made reference to Block 13/314 old no 52. This is Exhibit P4.
30. It is his evidence that he responded to the enforcement notice on 14th May, 2012 through the letter written by his advocates Omwenyo & Co. Advocates. This is Exhibit P5.
31. He testifies that the 1st Defendant -Antony Ngetich Seurey – in the year 2007 laid claim to the suit property and other parcels. He went onto testify that the 1st Defendant was arrested and taken to Bondeni Police Station on 11th July, 2007.
32. It was his testimony that while at the police station the 1st Defendant asked for forgiveness and stated that he had no claim over the suit property and other parcels. The 1st Defendant then wrote the letter dated 11th July, 2007 which stated that he had no claim over the suit property. The said letter was produced as Exhibit P6.
33. He states that despite the said letter (Exhibit P6), the 1st Defendant did not stop making claims over the suit property but went to Just for Properties who wrote the letter dated 1st July, 2013 addressed to him and all the tenants, indicating that they are the management agents of the suit property and that rent should be paid to them.
34. He testified that there was also a letter dated 1st July, 2013 from Olonyi & Co. Advocates naming Just for Properties as the new property managers for the suit property.
35. PW1 further testified that he did his own investigations and went to Olonyi & Co. Advocates office where he found that the suit property was sold on 2nd July, 2013 to their client Rosetta Mukima Gathogo, the 2nd Defendant herein.
36. It was his further testimony that he did not agree to the instructions from Olonyi Advocates to pay rent to the agents named and instead, he went to his advocates on record who wrote a letter dated 4th July, 2013 to Olonyi Advocates. The letter is Exhibit P10.
37. He states that he wrote to Just for Properties on 5th July, 2013 informing them that the suit property belongs to him and that he has not sold it. The said letter was produced as Exhibit P13.
38. It is his evidence that he did not get a response from the Advocates and Just For Properties so he instituted this suit as he needed to end the claims by the Defendants.
39. He testifies that his tenants also ignored letters from Olonyi Advocates and Just For Properties.
40. He further testifies that there is another suit between him, other persons (Antony Ngetich and Joshua Kition and the 1st Defendant adding that the suit is Succession Cause no 391/2010 in the matter of the



Estate of the late Chebande Alima. He explained that the two people are the ones they went with to Bondeni police station to lodge a complaint against the 1st Defendant.

41. It is also his evidence that Alima Chebande is the mother of Miriam Cheruto Boit from whom he had purchased the suit property. The agreement stated that the transferor is the administrator of the estate of Chebande Alima alias Halima Nasoor.
42. It is also his evidence that they challenged the grant and got the orders in Succession Cause no 391 of 2019 which he Produced as Exhibit P11.
43. He testifies that the Letters of Administration were revoked and the court ordered that the present matter be concluded before it makes further orders.
44. He also testifies that the affidavit of service confirms that the 1st Defendant was aware of the proceedings and the orders made in Succession Cause no 391 of 2019.
45. He further testifies that the suit property is yet to be re-transferred back to his name as the records were cancelled on account of the grant that was obtained by the 1st Defendant, which grant was revoked.
46. He ends his testimony by praying for orders as in the Plaintiff.
47. The plaintiff's amended written statement dated 7th August, 2013 mirrors the Plaintiffs evidence save that the amendment describes Miriam Cheruto Boit as the Administrator of the Estate of one Hadija Binti Malik and not Chebande alias Halima Nasoor.
48. The Plaintiff closed his case.
49. The Defendant's case was also closed for the reason that they received the hearing notice but did not attend court for hearing.

Issues For Determination.

50. The Plaintiff filed his submissions on 8th November, 2022.
51. He identifies the following issues for determination:
 - a. Whether the Plaintiff lawfully acquired property Title no Nakuru Municipality/Block 13/314 (Formerly Bondeni House no 52).
 - b. Whether the Defendants have a legitimate claim to property Title Number Nakuru Municipality/Block 13/314 (Formerly Bondeni House no 52).
 - c. Whether the Plaintiff is entitled to the relief sought.
 - d. Whether the Plaintiff has proved his case.
 - e. Who pays the costs of the case?
52. The Plaintiff submits that by the agreement dated 9th December, 1992, he purchased the suit property from Miriam Cheruto Boit the personal representative of Chebande Alima alias Halima Nasoor who was the allottee of the suit property.
53. He also submits that the Municipal Council of Nakuru gave a consent to the Vendor to transfer the land to him and the records altered to reflect the change in ownership.
54. He further submits that even though the 1st Defendant filed documents in support of his defence, they did not amount to much in light of the orders granted to the Plaintiff in Succession Cause no 391



of 2010. The orders revoked the grant issued to the 1st Defendant and therefore he no longer has any interest in the suit property.

55. On the second issue the Plaintiff reiterates that the 1st Defendant's claim to the suit property is hinged on the Grant of Letters of Administration which has now been revoked. He makes reference to Plaintiff Exhibit 6 which is a letter written by the 1st Defendant admitting that he wanted to unlawfully acquire the suit property.
56. On the third and fourth issues, the Plaintiff relies on the cases of *Japheth M Wepukbulu v Fred Simiyu* [2020] eKLR, *James Munui Mucheru v National Bank of Kenya Ltd*, *CMC Aviation Ltd v Cruisair Ltd* no 1 1978 KLR – 103 [1976-80 1 KLR 835] and submits that the pleadings filed by the Defendants are mere statements that cannot assist the court.
57. He Concludes his submissions by seeking that the court awards him costs.

Analysis And Determination.

58. After considering the pleadings, submissions and the testimony of the Plaintiff, the following issues arise for determination;
 - a. Whether the Plaintiff is the owner of the suit property.
 - b. Whether a declaration should issue that land parcel no Nakuru Municipality Block 13/314 belongs to the 2nd Defendant.
 - c. Whether the Plaintiff is entitled to an order of permanent injunction against the Defendants restraining them from interfering in any way with land parcel no Nakuru Municipality Block 13/314.
 - d. Who should bear costs of this suit.

A. Whether the Plaintiff is the legal owner of the suit property.

59. It is the Plaintiff's case that he bought land parcel no Nakuru Municipality/ Block 13/314 (formerly Bondeni Estate Plot no 52) from Miriam Cheruto Boit on 9th December, 1992.
60. In his evidence he stated that Miriam Cheruto Boit sold the suit property as the administratrix of the estate of Chebande Alima. The Sale Agreement dated 9th December, 1992 between himself and Miriam Cheruto Boit as the Administrator of the Estate of Chebande Alima is produced as Exhibit P1
61. It is further his case that after purchase, he took possession of the suit premises and begun to collect rent. He also went to the Municipal Council and the suit property was transferred to his name.
62. The Plaintiff also produced documents as evidence of recognition by the Municipal Council that he is the owner of the suit property i.e. the rates payment request dated 1st August, 2012 in his name and two receipts dated 28th December, 2006 and 3rd November, 2006 issued by the Municipal Council of Nakuru to Halima Nasoor as (Exhibit P2), an enforcement notice addressed to him (Exhibit P4) and an invitation to attend a landlords' meeting (Exhibit P3).
63. Sometime in the year 2013 the Plaintiff and his tenants started receiving letters from Olonyi & Co. Advocates directing them to pay rent to the 2nd Defendant after he investigated the basis for this direction he discovered that the 1st Defendant was claiming ownership of the suit property.



64. The plaintiff narrated that he reported the matter to the police and when summoned to the police station, the 1st Defendant, in writing, stated that he had no claim over the suit property the letter dated 11th July, 2007 is produced as Exhibit P6.
65. The Defendants filed a Statement of Defence and Counterclaim but they did not tender evidence in support of their case.
66. The Court in the case of *Propwa Company Limited v Justus Nyamo Gatondo & another* [2020] eKLR held as follows:

“The fact that the evidence is not challenged does not entirely mean that the Court will not interrogate the evidence tendered by the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with logical conclusion as *ex parte* evidence is not automatic proof of a case on the required standard. The Plaintiff has to discharge the burden of proof. See the case of *Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR, the Court 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 is unchallenged or not.”

Further 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 prove his case however much the opponent has not made a presence in the contest.”

67. The Sale Agreement was signed between the Plaintiff and Miriam Cheruto Boit who is described as the persona representative of Chebande Alima alias Halima Nasoor the allottee of Nakuru Municipality/Block 13/314 (Plot Number 52 Section xxviii).
68. Nothing was produced by the Plaintiff to show that Miriam Cheruto Boit was the administratrix of the estate of Chebande Alima alias Halima Nasoor the alleged allottee of Nakuru Municipality/Block 13/314 (Plot Number 52 Section xxviii).
69. The Plaintiff in his evidence that the grant issued to the 1st Defendant and one Joshua Mzee Kition in respect to the estate of Chebande Alima in Succession Cause no 391 of 2019 (Exhibit P11) was revoked. The said order further states that the 1st Defendant and the said Joshua Mzee Kition are restrained from taking possession of, entering into, selling, leasing out, transferring, charging or in any other manner dealing in properties title numbers Nakuru/block 13/314 9 (the suit property), 320 and 321 pending the hearing and determination of this suit. The Order revoking the grant was issued on 27th February, 2015.
70. The 1st and 2nd Defendant in their statement of defence state that Miriam Cheruto Boit was never appointed as the administrator of the Estate of Chebande Alima and that as at the time of the purported sale to the Plaintiff in 1992 the suit property was still under the management of the Public Trustee and is therefore null and void.
71. Section 7 of the *Land Act* provides for methods of land acquisition and they are: (a) allocation; (b) land adjudication process; (c) compulsory acquisition; (d) prescription; (e) settlement programs; (f)



transmissions; (g) transfers; (h) long term leases exceeding twenty-one years created out of private land; or (i) any other manner prescribed in an Act of Parliament.

72. Section 2 interprets the word transfer and transmission as follows;

“transfer” means the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law and includes the instrument by which such passing is effected;

“transmission” means the passing of land, a lease or a charge from one person to another by operation of law on death or insolvency or otherwise howsoever, and includes the compulsory acquisition of land under any written law

73. In my view, purchase is proof of beneficial interest. After purchase, the process of transfer is set in motion and it culminates to issuance of documents of title to the transferee, thereby conferring upon him/her ownership. Section 26 of the [Land Registration Act](#) provides that a Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner.

74. The Plaintiff’s evidence is that after purchase, the suit property was transferred to him. He produced the rates payment request in his name as evidence of this transfer. Property rates payment request in the name of any person, the plaintiff included, is not and cannot be proof of ownership. Invitation to Bondeni Landlords meeting and the enforcement notice are also not proof of ownership of the suit property.

75. According to the sale Agreement of 9th December, 1992 Miriam Cheruto Boit is allegedly selling as the Administrator of the Estate of Chebande Alima alias Halima Nasoor. From the pleadings filed herein it is alleged that the suit property belonged to one Adija Binti Malik. It is not clear how the suit property passed to Amina Chebande alias Halima Nasoor whom the Plaintiff in his evidence confirms is the mother of Miriam Cheruto Boit. Curiously, the Plaintiff amended his written statement dated 7th August, 2013 in which he describes Miriam Cheruto Boit as the Administrator of the Estate of one Hadija Binti Malik and he goes on to state that he purchased property from her. This is a departure from his oral evidence that she, Miriam Cheruto Boit, is the Administrator of the Estate of Chebande alias Halima Nasoor. Which version should this court believe? The sale agreement (Exhibit P1) which the Plaintiff has produces as evidence of purchase of the suit property states that he bought it from Miriam Cheruto Boit, the Administrator of the Estate of Chebande alias Halima Nasoor. There is a glaring contradiction in documents produced, oral evidence and written statement of the Plaintiff. The amendment to the Plaintiff’s written statement is a failed attempt to correct this disparity.

76. It is trite law that he who alleges must prove. The Plaintiff has not been able to prove, on a balance of probability, that he is the owner of the suit property. He has not even able to state with certainty the legal capacity of Miriam Cheruto Boit from whom he allegedly bought the suit property.

B. Whether a declaration should issue that land parcel no Nakuru Municipality Block 13/314 belongs to the 2nd Defendant.

77. The Defendants in their counterclaim are seeking a declaration that the 2nd Defendant, Rosetta Mukima Gathogo is the rightful owner of the suit property.



78. It is also important to note that the Plaintiff in his evidence stated that the grant issued to the 1st Defendant pursuant to which he allegedly sold the suit property to the 2nd Defendant was revoked. A sale arising out of a nullity cannot be upheld.
79. Despite service upon the Defendants, they chose not to adduce evidence in support of their counterclaim. The Learned Judge in *Grace Nzula Mutunga v Joyce Wanza Musila* [2017] eKLR cited with approval the decision in *Janet Kaphiphe Ouma & another v Marie Stopes International (Kenya)* Kisumu HCCC no 68 of 2007 wherein it was held as follows;
- “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...Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”
80. Taking cue from this decision, the fact that the Defendant failed to offer any rebuttal to the evidence adduced by the Plaintiff and also failed to tender evidence in support of their counterclaim, the Counterclaim fails.

C. Whether the Plaintiff is entitled to an order of permanent injunction against the Defendants restraining them from interfering in any way with land parcel no Nakuru Municipality Block 13/314

81. Bearing in mind my finding on issue A above, I find this question in the negative. The Plaintiff and the Defendant need to resolve the question of Succession to the Estate Adija Binti Malik and Alima Chebande Alias Halima Nasoor persons through whom they both claim the suit property and have both made reference to in their pleadings and/or oral testimony.

D. Who should bear costs of this suit.

82. The general rule is that costs shall follow the event. This is in accordance with the provisions of 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.

Disposition.

83. The upshot of the foregoing is that the Plaintiff and Defendants have both failed to discharge their burden of proof. Consequently, this Suit and Counterclaim are hereby dismissed with no order as to costs.
84. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9TH DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Omwenyo for the Plaintiff

No appearance for the 1st and 2nd Defendants.



Court Assistant; Monica Wanjohi.

