



**Maina v Nyakundi & 2 others (Environment & Land Case 254 of 2020)
[2023] KEELC 20504 (KLR) (2 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 254 OF 2020**

**J OMANGE, J
OCTOBER 2, 2023**

BETWEEN

JOSEPH KENNEDY MAINA PLAINTIFF

AND

MOSIARA CYRUS NYAKUNDI 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

EMBAKASI RANCHING CO LIMITED 3RD DEFENDANT

JUDGMENT

1. This case arises from Nairobi/Block/105/5458 in Embakasi Ranching Company hereinafter referred to as the suit property.
2. In a plaint dated November 30, 2020 the plaintiff deponed that at all material times he is the bona fide owner of Nairobi/Block/105/5458 of the suit having purchased it from Amos Kiriga Warui vide sale agreement dated June 12, 2014 and as result was issued with a share certificate No 3386. He depones that on or about November 2020 when he started the process of acquiring title to the suit property he realized that the 1st defendant in collusion with the 2nd and 3rd defendants illegally and fraudulently falsified documents for registration of title of the suit property to the 1st defendant.
3. He therefore prayed for the following orders;
 - i. A declaratory order that the registration of Nairobi/Block/105/5458 in the name of the 1st defendant was fraudulently obtained and the same be cancelled.
 - ii. An order for permanent injunction restraining the defendants whether by themselves, servants, agents or otherwise from selling, disposing of, leasing, charging, pledging, transferring, interfering or in any other manner whatsoever



alienating the property known as Nairobi/Block/105/5458, pending hearing and determination of this suit.

- iii. An order directing the 2nd defendant to rectify the register so as to remove the entries in favour of Mosiara Cyrus Nyakundi and the certificate of lease be registered in favour of Joseph Kennedy Maina as proprietor of Nairobi/Block/105/5458.
 - iv. Costs of the suit plus interest thereon.
4. The defendants were duly served with all relevant pleadings and failed to file their statement of defence. The matter proceeded by way of formal proof. The plaintiff called one witness.
 5. The plaintiff testified in court on July 7, 2022 and relied on his witness statement dated July 30, 2020 in which he told the court that he had purchased the suit property herein Nairobi/Block/105/5458 in 2014 from one Amos Kiriga who was a shareholder of the 3rd defendant and holder of share certificate. He informed the court that the sale was formalized *vide* a sale agreement dated June 12, 2014. He then took possession of the suit property and fenced the property. He also erected a semi-permanent structure and connected water.
 6. He stated that he has been in occupation of the land from the year 2014 and was able to produce documents he has been issued arising from payments made to various government agencies such as Nairobi Water Company and Kenya Revenue Authority. It was his evidence that he became aware of illegal and fraudulent activities on the title when he commenced the process of acquiring title of the suit property. He learned that a title had been issued in the name of the 1st defendant herein.
 7. Following this complaint the plaintiff lodged a complaint with the 3rd defendant, who after investigations confirmed that he is the bona fide owner of the suit property. The 3rd defendant *vide* letter dated November 3, 2020 informed the Permanent Secretary Ministry of Lands and Planning that the plaintiff is the owner of share certificate, plot No P2744.
 8. PW2 who is the plaintiff's friend told the court that he accompanied the plaintiff to the seller Amos Kariga. He further confirmed that he was present when the 3rd defendant instructed the surveyor to show the plaintiff the suit property which has been allocated to him. He insisted that the plaintiff was the rightful owner owing to the fact that had had paid requisite fees to the 3rd defendant and been issued with transfer documents in his name confirming ownership.
 9. Counsel on record for the plaintiff submitted that going by evidence on record, which evidence had not been disputed, the plaintiff was the rightfully placed person to acquire title in regards to plot No Nairobi/Block/105/5458. Counsel stated that the plaintiff had acquired the title legally and procedurally and the 3rd defendant herein was a party and witness to the transactions that effected title ownership to the plaintiff. Counsel further relied on the provisions of section 26(1) of the [Land Registration Act](#) which section states that issuance of a certificate of title is prima facie evidence that the proprietor named on the title is the absolute and infeasible owner and should be taken into account by courts and cannot be challenged unless (i) it is established that the title was obtained fraudulently through misrepresentation and (ii) obtained illegally, unprocedurally and through a corrupt scheme.
 10. Counsel submitted that the 1st defendant's title should be revoked as it was obtained in a questionable way. Counsel urged the court to register the title in the name of the plaintiff. The plaintiff placed referred the court to the case of [Mumbi M Nabea v David M wachira](#) (2016) eKLR which highlights standard of proof in civil liability claims.



11. On the question of costs counsel submitted costs should follow the event especially considering the plaintiffs testimony was unchallenged. Counsel cited the case of *Joseph Oduor Anonde v Kenya Red Cross Society B* (2012) in which the court stated that it is the general rule in civil procedure that costs do follow an event which was defined in *Cecilia Karuru Nganyu vs Barclays Bank of Kenya and another* (2016) eKLR to mean that costs should compensate the successful party for the trouble taken in prosecuting the suit .
12. The 1st defendant in this case did not file any statement of defence despite entering appearance through its advocate. The case of *Daniel Kenga Katana & 4 others v Dzitu Toto Bokole & 3 others* [2022] eKLR addressed the issue of uncontroverted evidence. The learned judge in coming up with his judgment stated; “The issue that the court has to deal with is whether the plaintiff discharged the burden of proof. The plaintiff gave evidence to proof ownership of the suit land by adducing oral and documentary evidence which was uncontroverted. It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the defendants fail to call a witness to adduce evidence and be cross-examined to test the evidence.” He further went to restate the quote by Justice Mwongo in *Peter Ngigi & another (suing as legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondiki Oduor & Another* 2019 eKLR wherein he stated “The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements”.
13. Although the plaintiffs case was unchallenged and uncontroverted, the plaintiff still has to discharge the burden of proof as envisaged by sections 107 and 108 of the *Evidence Act* which define the burden of proof thus;
 107. Burden of proof
 - (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. Incidence of burden

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.”
14. In 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.’ The same sentiments have been echoed in the case of *Gichinga Kibutha v Carooline Nduku* (2018) eKLR “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.”
15. The plaintiff told the court that the 1st defendant has a title which should be defeated as it was obtained fraudulently and cannot be explained in any other manner. Having challenged the 1st defendants title



it was the responsibility of the 1st defendant to prove the legality of the title. See the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, in which the court stated;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

16. In this case the 1st defendant has made no effort to establish how he acquired the title. On the other hand, is the plaintiff who has produced documents that show a clear paper trail. A share certificate and identification documents in the name of Amos Kiriga Warui, a sale agreement and a transfer by the 3rd defendant that shows the nexus between the sellers share certificate number 13177 and his share certificate number 3386. He has also annexed receipts to the 3rd defendant, Kenya Revenue Authority and the Nairobi Water Company. All the documents bear the plot number P2744. A survey report confirms that plot P2744 is one and the same the title Nairobi/ Block/ 105/ 5488, the suit property. Lastly, he has attached communication by the 3rd defendant which confirms that he is the owner.
17. Having considered the foregoing, I find that I am satisfied that the plaintiff has proved his case on a balance of probability. Consequently, judgement is entered for the plaintiff against the defendant in the following terms;
 - a. A declaratory order is hereby issued that the registration of Nairobi/Block/105/5458 in the name of the 1st defendant was fraudulently obtained and the same should be cancelled.
 - b. An order for permanent injunction is hereby issued restraining the defendants whether by themselves, servants, agents or otherwise from selling, disposing of, leasing, charging, pledging, transferring, interfering or in any other manner whatsoever alienating the property known as Nairobi/Block/105/5458.
 - c. An order directing the 2nd defendant to rectify the register so as to remove the entries in favour of Mosiara Cyrus Nyakundi and the certificate of lease be registered in favour of Joseph Kennedy Maina as proprietor of Nairobi/Block/105/5458.
 - d. Costs of the suit plus interest thereon.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF OCTOBER 2023.

JUDY OMANGE

JUDGE

