



**Kamanga v Kirara & another (Environment & Land Case
1057 of 2015) [2025] KEELC 278 (KLR) (3 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1057 OF 2015**

**EK WABWOTO, J
FEBRUARY 3, 2025**

BETWEEN

RHODA WANJIKU KAMANGA PLAINTIFF

AND

CATHERINE MUMBI KIRARA 1ST DEFENDANT

**MERCY WANGARI MWANGI (CHAIRLADY) TOM GISIORA (TREASURER)
JAMES KIGURU KIBE (SECRETARY) SUED AS THE OFFICIALS OF KAYOLE
BIDII JUA KALI ASSOCIATION 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 27th October 2015 seeking for the following reliefs:-
 - a. An order demolishing the perimeter wall and declaration that the plaintiff is the legal and/or beneficial owner of the suit property comprised in Kayole Bidii Jua Kali Association Plot 232.
 - b. That a permanent injunction do issue against the defendants, their agents, servants, employees and/or representatives stopping them from sub-dividing, erecting a perimeter wall, selling, alienating, excavating and/or trespassing on the suit property and more particularly known as Kayole Bidii Jua Kali Association Plot 232.
 - c. Costs of this suit and interest.
2. The suit was contested by the Defendant. The 1st Defendant filed a statement of defence and Counterclaim dated 24th June 2016 wherein she denied the averments made in the plaint and sought for the following reliefs in her Counterclaim:-
 - a. The Plaintiff's suit be dismissed with costs to the 1st Defendant.



- b. A permanent injunction be issued against the Plaintiff from interfering, intimidating, trespassing and/or threatening to evict the 1st Defendant from Plot No. A1 – 607 Kayole.
- c. The 1st Defendant be declared the legal owner of Plot No. A1 – 607 Kayole.

The Plaintiff's case

3. It was the Plaintiff's case that she was allotted the suit property by the 2nd Defendant in 1997 and subsequently was registered as the owner of all that land known as Kayole Bidii Jua Kali Association Plot 232. On or about 24th day of October 2015, the 1st Defendant without any color of right trespassed onto the Plaintiff's property and began to demolish the structures, excavate and erect a perimeter wall on the suit property consequently blocking access to the same.
4. During trial, the Plaintiff testified as the sole witness in support of her case. She relied on her witness statement dated 25th July 2022 and bundle of documents of even date in her evidence in chief. She added that she has never had any engagement with the 1st Defendant and she does not know why she trespassed on her land.
5. On cross-examination, she stated that her Plot No. is A1602 which is different from A1607. She also stated that Plot No. 232 is also known as A1602. She denied being an official of Kayole Jua Kali Association and she also stated that she was not aware if the 1st Defendant is a member. She also stated that she acquired the plot in 1997.
6. On further cross-examination she stated that she did not have a survey map and neither had she produced any before court. She also stated that she was not issued with any share certificate from the Association and neither had she produced any receipt of the same before court. She also conceded that she did not have the allotment letter of the Association.
7. When re-examined she stated that she was issued a receipt by the 2nd Defendant. The same was issued in December 1997. She paid Kshs. 5,000/= for membership. She also stated that no membership register had been produced by the 2nd Defendant. She also stated that the property was interfered with by the people sent by the 1st Defendant. She also stated that the County Government had confirmed that the plot belonged to her.

The 1st Defendant's case

8. The 1st Defendant filed a Statement of Defence and Counterclaim dated 24th June 2016. It was contended that she bought Plot No. A1-607 Kayole for the sum of Kshs. 620,000/= on 19th December 2008 from Francis Njenga Kamau who had bought the land from Dickson Wathika who had been allocated the land in 1994 by Nairobi City Council.
9. It was the 1st Respondent case that she took possession of the land and paid the necessary premiums to the Nairobi City Council uninterruptedly until October 2015 when the Plaintiff trespassed on the said property and erected a fence. It was averred that upon inquiry, the 1st Defendant found out that the Plaintiff claimed ownership of the land referring to it as Kayole Jua Kali Association Plot 232 and that she had been allocated the parcel by the 2nd Defendants who are allegedly the officials of an amorphous body.
10. The 1st Defendant sought for the following reliefs in her Counterclaim:-
 - a. The dismissal of the Plaintiff's suit with costs to the 1st Defendant.



- b. A permanent injunction against the Plaintiff from interfering, intimidating, trespassing and/or threatening to evict the 1st defendant from Plot No. A1-607 Kayole.
 - c. The 1st Defendant to be declared the legal owner of Plot No. A1-607 Kayole.
11. During trial, the 1st Defendant Catherine Njeri Kirana testified as the sole witness in support of the 1st Defendant's case. She relied on her witness statement and bundle of documents dated 24th June 2016 which had been produced in evidence in her evidence in chief.
 12. It was her testimony that her plot is No. 607 and the one for the Plaintiff is 232. It was also her testimony that as per the map the same are different. The plots are not the same and the Plaintiff did not do due diligence.
 13. On cross-examination by the Counsel for the Plaintiff, she stated that she bought the property after paying in cash as a lumpsum. Francis Njenga Kamau was her accountant. She was given an allotment and a beacon certificate. She visited the property at the time of purchase. There was an incomplete structure having a foundation of 2 rooms and it was not fenced. The perimeter wall was put up by her.
 14. She also stated in cross-examination that the Plaintiff is claiming property that is not hers. She also stated that she is not a member of Kayole Bidii Jua Kali and neither does she does not know Mercy Wangari.
 15. When asked about the payments made she stated that she could not remember when she finalized making the said payments and she did not have any receipt of rates paid. She also stated that she had a beacon certificate dated 19th July 2006.
 16. On further cross-examination she maintained that she did due diligence and historical search before purchase.
 17. When re-examined, she stated that the properties did not have titles. There only existed letters of allotment. The power of attorney in question was registered. She is not a member of the 2nd Defendant. The 2 plots are different on the ground and on paper.

The 2nd Defendant's case

18. Tom Nyaroro Gisiora testified on behalf of the 2nd Defendants. He stated that he is the assistant Secretary of the 2nd Defendant's group. He relied on his witness statement dated 22nd February 2024. He stated that from their records, they have never received any payments from the Plaintiff nor the 1st Defendant. He also stated that the Association's mother title is A1602 and the Plaintiff is claiming A1-607. It was also his testimony that all plots belonging to members of the Association were regularized and handed to County Government for purposes of processing leases.
19. On cross-examination by Counsel for the Plaintiff he stated that he is still an official of Kayole Bidii Jua Kali Association. He also stated that the Plaintiff had been listed as a member of Kayole Bidii Jua Kali Association as per PExhibit 2. He conceded that he had not filed any list of members in court. He also stated that he was not sure if the Plaintiff had made any payment to them and that he was not sure of the receipt that was produced in court belonged to the Plaintiff. He also stated that the Plaintiff and the 1st Defendant plots are different which are not the 2nd Defendant's plot. They were not involved in the subsequent sale. He did not have a map before court. He also stated that before any sale could be conducted, the Association ought to have prepared the transfer before any sale could be effected.
20. On cross-examination by Counsel for the Defendant, he stated that the Association forwarded the list to the County so that every member could pay rent. He also stated that from the map produced, the



plots are not the same. He also stated that the said map did not belong to the 2nd Defendant. He also stated that Plot A1602 belongs to Kayole Bidii while A1607 is not their property.

The Plaintiff's submissions

21. The Plaintiff filed written submissions dated 6th June 2024. It was submitted that the Plaintiff was formally enrolled as a member of Kayole Bidii Jua Kali Association on 19th December 1997 and paid Kshs. 5,000/= as membership fee. She produced the receipt as PExhibit 1. She was later assigned Plot No. 232 in 2013 and in December 2014, she visited the Dandora City Council offices to finalize the required formalities in the company of the Chairlady. It was also submitted that the plot formalization card which was produced as PExhibit No. 2 referred Plot No. 232 as Plot No. A1-602. It was also her submissions that the County confirmed the Plaintiff's registration vide a letter dated 26th October 2015 which was produced as PExhibit No. 4.
22. It was submitted that the 1st Defendant does not possess any plot formalization card nor did she produce any document indicating that she is a member of Kayole Bidii Jua Kali Association since the plots belonged exclusively to the members of Kayole Bidii Jua Kali Association exclusively.
23. It was also submitted that the 1st Defendant's plot related to plot serialized as A1607 while her plot was A1-602. She also submitted and maintained that she acquired Plot A1-602 in 1988 and has been in occupation ever since. The cases of Danson Kimani Gacina & Another =Versus= Embakasi Ranching Company Ltd (2014) eKLR and Caroline Awinja Ochieng & Another =Versus= Jane Anne Mbithe Gitau & 2 Others (2015) eKLR were cited in support and the court was urged to grant the reliefs sought on the basis that the Plaintiff had proved her case to the required standard.

The 1st Defendant's submissions

24. The 1st Defendant filed written submissions dated 28th June 2024. Counsel submitted on the following issues; whether the suit property belongs to the Plaintiff, whether the 1st Defendant trespassed onto the suit property and whether the orders sought by the Plaintiff should be granted and costs of the suit.
25. On the first issue, it was submitted that the 2nd Defendant controverted the receipt produced by the Plaintiff confirming her membership. It was also submitted that the Plaintiff did not produce any evidence to show that she has been paying either land rates or rents from the time she allegedly got the property.
26. It was further submitted that the suit property is different. The Association's mother title is A1-602 and not A1-607 claimed by the Plaintiff. The Plaintiff never procured the services of a registered surveyor to establish the actual location of the property and also whether to confirm if the same was related to the 1st Defendant's property.
27. It was also submitted that the 1st Defendant bought the plot on 19th December 2008 as Plot No. A1-607 Kayole from Francis Njenga Kamau for a consideration of Kshs. 620,000/= and an agreement in that regard was drafted and a Power of Attorney registered. The 1st Defendant took possession of the suit property and paid the necessary premiums of the Nairobi City Council uninterruptedly until October 2015 when the Plaintiff trespassed the said property.
28. On whether the 1st Defendant trespassed the suit property, it was submitted that the 1st Defendant cannot be said to have trespassed the property A1-607 Kayole since the said property belongs to her.
29. Citing the cases of Bandari Investments Company Ltd =Versus= Martin Chiponda & 139 Others (2022) eKLR, Giella =Versus= Cassman Brown & Company Ltd (1973) EA 358 and Keiyian Group



Ranch =Versus= Samuel Onita & 9 Others (2021)eKLR, it was submitted that the Plaintiff has not established a prima facie case and this has not met the threshold required to warrant the grant of the permanent injunction and in view of the foregoing the court was urged to dismiss the Plaintiff's suit and grant the prayers sought in the Counterclaim.

The 2nd Defendant's submissions

30. The 2nd Defendant filed written submissions dated 18th August 2024. It was submitted that neither party had proved its case as against the 2nd Defendant since according to their records none of the parties appear as having been listed in their records. The court was urged to dismiss the suit as against the 2nd Defendants with costs.

Analysis and Determination

31. The parties herein did not agree on any list of issues. That notwithstanding this court having considered the pleadings, evidence tendered and written submissions filed, is of the view that the following issues are for determination herein:-
- i. Whether the Plot No. 232 is the same as A1-607 Kayole.
 - ii. Whether the Defendant trespassed onto the Plaintiff's property.
 - iii. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 - iv. Whether the 1st Defendant's Counterclaim is merited.
 - v. What orders should issue as to costs.

The court shall now proceed to analysis the said issues sequentially.

Issue No. 1 Whether Plot No. 232 is the same as A1-602

32. According to the Plaintiff, the genesis of the acquisition of her plot 232 (also known as No. A1-602) was in 1988 from Kayole Bidii Jua Kali Association and later in December 2014 she visited the Dandora City Council offices to finalize the acquisition of the said plot upon which she signed the plot formalization card which captured her details.
33. The 1st Defendant on the other hand testified as having acquired Plot A1-607 Kayole through purchase from one Francis Njenga Kamau for a consideration of Kshs. 620,000/= According to the 1st Defendant Francis Njenga had bought the property from Dickson Waithika.
34. During trial, both the 1st Defendant and the Plaintiff testified and maintained in their respective positions that Plot A1-607 Kayole and Plot No. 232 were not the same. Tom Gesora who testified on behalf of the 2nd Defendant equally testified that they have no records of the said plots and the two plots appear to be different.
35. As a general rule, parties are bound by their pleadings and issues flow from the pleadings. The documents produced by the parties during trial together with the testimony of the 2nd Defendant's witness DW2 was to the effect that the two plots are not the same. It is always the duty of the litigants to place material in support of their case. It is not the mandate of the court to go on a fact finding mission. In this case none of the parties called a Surveyor even after being granted an opportunity to do so. The testimony of the Surveyor would have been useful as it would have assisted the court in establishing whether or not the two plots are the same.



36. In view of the foregoing and with the evidence on record, this court is unable to find the two plot number referred to one and the same plot.

Issue No. (ii) Whether the suit property belongs to the Plaintiff

37. It was the Plaintiff's case that she is the owner of Plot No. 232 otherwise known as A1-602 and that the 1st Defendant had trespassed onto the same.

38. It is trite law that It is trite law that 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.”

Sections 109 and 112 of the same Act states;

“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 that 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 that fact is upon him.”

39. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”



40. With respect to the burden of proof, the learned Judges of Appeal in the case of Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] eKLR, posited thus:

“Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

41. The Court will be guided by the aforementioned provisions and cases. When the court is faced with such a dispute the proof to such land ought to be by tracing the root or history of its ownership as was held in the case of cases of Caroline Awinja Ochieng & Another =Versus= Jane Anne Mbithe Gitau & 2 Others (2015) eKLR and Kwale ELC Case No. 100 of 2021 Mwaja & 5 Others =Versus= National Land Commission & Another (Environment & Land Case 100 of 2021) (2023) KEELC 16458 (KLR) (27 March 2023) (Judgment).
42. In instances such as the one before court proof of ownership will ordinary be based on both documentary and oral evidence. The Plaintiff must establish on a balance of probability that the suit belongs to no one else but her. To support ownership of the suit property she produced plot formalization card as P Exhibit No. 2, she also produced a letter dated 26th October 2015 as P Exhibit No. 4. Save for these documents the Plaintiff was unable to produce any evidence on payment of rates in respect to the said plot. The court also notes that there is a gap as to the Plaintiff’s testimony and claim to the said property. The Plaintiff alleged to have acquired the said property in 1997 but it was only around 2015 when she got the plot authorisation card purportedly confirming that she was the owner of the said plot.
43. While the Plaintiff argued that she had a plot formalization card confirming that she was the owner of the suit property. The testimony of the 2nd Defendant’s witness was to the effect that they have no such plot in their records and the Plaintiff is not known to them.
44. From the evidence on record, the Plaintiff has not produced any evidence to show that she has been paying either land rates and rates since the acquisition of the property. The court also notes that as per the testimony of DW2, the Association’s mother title is A1-602 and not A1-607 and as such, this court is not satisfied that the Plaintiff has been able to prove that she is the bonafide and lawful owner of the said parcel.

Issue No. (iii) Whether the 1st Defendant’s Counterclaim is merited

45. The 1st Defendant filed a Statement of Defence and Counterclaim dated 24th June 2016 in which they sought for dismissal of the suit and a permanent injunction against the Plaintiff from interfering with Plot A1-607 Kayole. They also sought an order declaring the 1st Defendant as the legal owner of Plot No. A1-607.



46. During trial, the 1st Defendant testified that he acquired the property through purchase from Francis Njenga Kamau on 19th December 2008 for a sum of Kshs. 620,000/= The 1st Defendant also testified that Francis Njenga Kamau had acquired the property from Dickson Wathika who according to him he had been allocated the land by Nairobi City County.
47. The court having considered the said evidence notes that the purported allocation letter which was produced in evidence by the 1st Defendant was not an allocation letter but merely a letter from Nairobi City County dated 18th February 2015. The court also noted that the testimony of DW2 was to the effect that they equally did not have any records of the 1st Defendant's property and neither was the 1st Defendant known to them. In view of the foregoing it is the finding of the court that the 1st Defendant's Counterclaim has not been proven to the required standard and as such the same is not merited. The 1st Defendant equally was unable to produce any evidence demonstrating that the plot was actually allocated to Dickson Wathika by Nairobi City Council in 1994 to enable him transfer it to Francis Njenga. No allotment letter was produced to that effect. See the cases of Caroline Awinja Ochieng & Another =Versus= Jane Anne Mbithe Gitau & 2 Others (Supra) and Kwale ELC Case No. 100 of 2021 Mwaja & 5 Others =Versus= National Land Commission & Another (Supra)

Issue No. (iv) What are the appropriate reliefs to grant herein

48. Considering that the Plaintiff's claim has not been proved to the required standard and the 1st Defendant's Counterclaim has equally been found to be unmerited, this court has no option but to dismiss the Plaintiff's suit and the 1st Defendant's Counterclaim since none is deserving for grant of the orders sought.
49. In respect to costs, considering that both parties have not been successful in their respective claim, this court directs that each party to bear own costs of the suit and counterclaim.

Final Orders

50. In conclusion, this court makes the following final orders:-
- a. The Plaintiff's suit is dismissed.
 - b. The 1st Defendant's Counterclaim dated 24th June 2016 is equally dismissed.
 - c. Each party to bear own costs of the suit and counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 3RD FEBRUARY, 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

N/A for Plaintiff.

Ms. Muthoni h/b for Mr. Okoli for 1st Defendant.

Ms. Waweru h/b for Mr. Gachomo for 2nd Defendant

Court Assistant: Mary Ngoira

