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Court:	Environment and Land Court at Kisii
Case Action:	Judgment
Judge:	Ann Jacqueline Akhalemesi Mogeni
Citation:	Diana Amolo Opala v Hurlingham Squatters' Development & another [2021] eKLR
Advocates:	-
Case Summary:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 1482 OF 2016**

**DIANA AMOLO OPALA.....PLAINTIFF**

**VERSUS**

**HURLINGHAM SQUATTERS' DEVELOPMENT.....1<sup>ST</sup> DEFENDANT**

**TALLAM ABRAHAM.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By an amended Plaint dated 7/05/2021 the plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -

a) A declaration that the suit property namely Number A3 in Amboseli Court situated in Chokaa Ward Njiru along Kangundo Road lawfully belongs to the plaintiff.

b) A permanent injunction be issued restraining the Defendant by himself, his servants, workmen, legal representatives or any other person claiming interest through them for trespassing, entering, remaining, constructing, alienating, working on or dealing with the suit property being House No. A3 situated in Chokaa Ward in Njiru along Kangundo Road in any manner whatsoever.

c) A permanent injunction restraining the Defendant from entering or remaining on the suit property.

d) An eviction order to issue against the 2<sup>nd</sup> Defendant

e) In the alternative to (b) and (c and (d above an order of compensation do issue equivalent to the current market value of the suit property at the time of judgement.

f) Cost for the suit be provided.

2. Despite being served with summons to enter appearance, the defendants neither entered appearance nor filed a defence. The suit therefore proceeded *ex-parte*.

3. It was the plaintiff's uncontroverted evidence that they are the legal and bona fide owner of Plot No. 51 C situated in Chokaa Ward in Njiru along Kangundo Road having purchased the same from Hurlingham Squatters Development vide a sale agreement dated 23/02/2011 for a consideration of Kenya Shillings three hundred and forty thousand (Kesh 340,000). The plaintiff annexed a copy of the sale agreement and receipt evidencing payment.

4. The Plaintiff avers that upon execution of the Agreement and payment of the purchase price they were issued with a Certificate of Ownership No. 1107. The certificate was annexed to the affidavit. Further that at the time of the purchase the land was not surveyed and there were no titles.

5. The Plaintiff avers that they were issued with a certificate of ownership from Hurlingham Squatters Development No. 1107 dated 23/02/2011 which was annexed to the affidavit
6. The Plaintiff avers that they sought temporary injunctive orders vide the Notice of motion dated 28/11/2016 which were granted on 16/05/2017.
7. Despite being served with Summons to Enter Appearance which is indicated through the various affidavits of service filed the Defendant failed enter appearance or file any Defence. The matter proceeded for formal proof hearing, wherein the Plaintiff gave evidence for herself and called no witness.

#### **PLAINTIFF'S CASE**

8. **PW1 – Diana Amolo Opala** adopted her witness statement dated **13/10/2021**, including the list of documents dated 28/11/2016 and the supplementary list of documents dated 7/08/2021. She testified that she bought the suit land from the 1<sup>st</sup> Defendant for Ksh 340,000/= which she paid and was issued with a receipt dated 23/02/11. He produced the list of documents as **exhibits 1 to 3 and 5 to 15 showing** different documents including the sale agreement, the official receipts, certificate of ownership no. 1107 all from the 1<sup>st</sup> Defendant who is Hurlingham Squatters Development. Others are Exhibit 13-15 and Exhibit 21-21 which are photographs.
9. She testified that she had started constructing a house and this is demonstrated by exhibit 4 which has various photographs.
10. The plaintiff stated in her evidence that her property was however taken over by unknown people who demolished her structure and she later came to learn that it is the 2<sup>nd</sup> Defendant who instigated this and they took over her land and illegally constructed another structure despite there being a court order that dated 16<sup>th</sup> May 2017 that has been issued stopping any construction on the suit property until the suit was heard and determined.
11. Upon close of her case, the Plaintiff informed the Court that she would wish to court to give an eviction order to those who have encroached on her piece of land. She had joined the second defendant to the suit vide the amended plaint dated 7/05/2021.
12. With that evidence, the Plaintiff closed its case and they were given time to file their written submissions. The Plaintiff filed their submission dated 27<sup>th</sup> October 2021 in which they urged that that Plaintiff had proved their case and prayed that judgment be entered for the Plaintiff in terms of the prayers in the Amended Plaint.
13. Through the written submissions the plaintiff prays for compensation in the Alternative. The Plaintiff asks the court to consider a compensation for her from the defendants jointly and severally at the current market value of the suit property.
14. The plaintiff seeks on a without prejudice basis a compensation of Ksh 10,000,000 having bought the property in 2011 at Ksh 340,000.

#### **DEFENDANT'S CASE**

15. The defendants did not enter appearance and neither did they file any defence nor any written submissions. The Plaintiff's case is therefore unchallenged and uncontroverted

#### ***Analysis***

16. The Court has now carefully read and considered the pleadings, the submissions and the evidence adduced and the exhibits thereto and renders itself as follows; -
17. The Defendants failed to enter appearance and thereby defend the suit. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted. However the Plaintiff is still required to prove their case on the required standard of balance of probability. See the case of **Shaneebal Limited... Vs... County Government of Machakos (2018)eKLR**,

\_ where the Court cited the case of Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, where it was held that:-

*“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant’s and or their Counsel to cross examine her on evidence, the Plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”*

18. The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of 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 a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR, where 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.”*

19. Further the case of Gichinga Kibutha...Vs...Carooline Nduku (2018) eKLR, where 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 proof his case however much the opponent has not made a presence in the contest.”*

20. The Plaintiff has alleged that they entered into a sale agreement with the 1<sup>st</sup> Defendant for the purchase of the suit property. Further that the same was reduced into writing and signed by all the parties. Section 3 (3) of the Contract Act provides that;

*3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—*

*(a) the contract upon which the suit is founded—*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

21. The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the property size and the purchase price which is the consideration thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of Nelson Kivuvani.....Vs.....Yuda Komora & Another, Nairobi HCCC No.956 of 1991, where the Court held that:-

*“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.*

22. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that

no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

23. 13. The second issue is whether the Plaintiff has proved that the Defendants trespassed onto his land. The Plaintiff testified that the 2<sup>nd</sup> Defendant has constructed a house on the suit the suit property. The court had issued a temporary injunction but the Defendants after being served chose not to obey the court order.

24. In the case of **Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018** Okong'o J observed as follows:

Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01 defines trespass as follows:

***“Any unjustifiable intrusion by one person upon land in possession of another.” ....Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”***

25. From the evidence on record, it is my finding that the 2<sup>nd</sup> Defendant is unlawfully occupying the suit property. This amounts to trespass to land.

26. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks various remedies; a permanent injunction against the Defendants and in default thereof an order of eviction against them.

27. The principles that guide the court in granting an order of injunction are set out in the celebrated case of **Giella V Cassman Brown & Company Limited 1973. E.A 358** as follows:

*“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”*

28. From the Plaintiff's evidence stated above, it is my finding that they have met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order in the event that the Defendants do not vacate the suit property.

#### ***Determination***

29. Having considered the pleadings, evidence on record and the Plaintiff's written submissions, the issues that arise for determination are as follows:

a) *Whether the Plaintiffs are the registered owners of plot Number 51C which is not constructed and is now House Number A3 in Amboseli Court.*

b) *Whether the Defendants have trespassed on the suit property.*

c) *Whether the Plaintiff is entitled to the reliefs sought.*

30. It was the PW1's uncontroverted evidence that the Plaintiff is the legal bonafide owner of Plot Number 51C now number A3 in Amboseli Court after construction which is the suit property. In support of the Plaintiff's case they produced exhibits **1 to 3 and 5 to 15 which** include the sale agreement, receipt of payment and Certificate of among other documents to show how the Plaintiff acquired the suit property.

31. The plaintiff testified that they bought the suit property formerly Plot No. 51 C and now House Number A3 Amboseli Court in 2011 for Kshs, 340,000. They produced a copy of the sale agreement dated 23/2/201.

32. At the time of the purchase the land was not surveyed and with no registered title deeds

33. They further testified that they later realized that the defendants were trespassing on the plot. Whenever they visited the suit property the those who had trespassed on the property hauled insults and threatened to use force and violence against the plaintiff. They plaintiff sought the assistance of the Administration Police to visit the plot.

34. The Plaintiff explained that despite visiting the offices of the 1<sup>st</sup> Defendant they did not get any assistance or the matter of the trespass to the formerly Plot No.51 C now House Number A3 resolved.

35. From the evidence adduced which stands uncontroverted, the plaintiff has demonstrated that they are the lawful proprietor of formerly Plot Number 51 C now House Number A3 Amboseli Court. The Plaintiff produced the sale agreement showing that they purchased the suit property in 2011 for the sum of Kshs. 340,000. They also demonstrated that they tried to stop the defendants from trespassing on the Plaintiff's land, in vain.

36. Regarding the title, they plaintiff explained that the title was not available because the land was not surveyed and there were no registered titles. I also take judicial notice that sometimes it takes a while to process title deeds after purchase of land.

37. The upshot of the foregoing is that the plaintiff has proved their case on a balance of probabilities. I therefore enter judgment in the Plaintiff's favour as prayed in the amended plaint and order as follows:

a. That declaration is hereby issued that the Plaintiff is the lawful proprietor of previously PLOT NO, 51C now House Number A3 in Amboseli Court situated in Chokaa Ward Njiru along Kangundo Road

b. An order of permanent injunction be and is hereby issued restraining the defendants by themselves jointly and severally, their agents servants, workmen, legal representatives or any other person claiming interest through then for trespassing, entering, remaining, constructing, alienating, working on or dealing with the suit property adversely interfering with the plaintiff's enjoyment of their absolute and inalienable proprietary rights with respect to all that parcel of land known as House No. A3 formerly Plot No. 51 C situated in Chokaa Ward in Njiru along Kagundo Road.

38. An eviction order is hereby issued ejecting the 2<sup>nd</sup> defendant from the plaintiff's Plot formerly Plot No.51C and now House No. A3 within the next 3 months.

39. The OCS of Kayole Police Station to supervise the implementation of this Court Judgment

40. The defendants shall pay the costs of this suit.

**DATED, SIGNED AND DELIVERED THIS 9TH DAY OF NOVEMBER 2021**

.....

**MOGENI J**

**JUDGE**

**In the presence of:**

Diana Amolo Opala (in person).....Plaintiff

NA.....Defendant

Vincent Owuor.....Court Assistant



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