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Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Judgment
Judge:	Oscar Amugo Angote
Citation:	John Mbugua Boro & 3 others v Ann Wairimu Ndung'u (as the Chairlady of Urutagwo Mwiruti Women Group) [2022] eKLR
Advocates:	Mr. Omondi for Mr. Gachie for the Plaintiff
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nairobi
Docket Number:	-
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Case Outcome:	Suit dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 60 OF 2015**

**JOHN MBUGUA BORO.....1<sup>st</sup>**  
**PLAINTIFF**

**NICHOLAS NJUE MATL.....2<sup>nd</sup>**  
**PLAINTIFF**

**JOSEPHAT MICHIRA MOGAKA.....3<sup>rd</sup> PLAINTIFF**

**GEORGE WAMBIRI NDAMAIYU.....4<sup>th</sup> PLAINTIFF**

(Suing for and on behalf of Emmaus Welfare Society)

**VERSUS**

**ANN WAIRIMU NDUNG'U (As the Chairlady of Urutagwo Mwiruti Women Group).....DEFENDANT**

**JUDGMENT**

**Background**

1. In the Complaint dated 28<sup>th</sup> January, 2015, the Plaintiffs averred that at all material times, the Defendant was the beneficial owner and later on the registered and equitable owner of all that parcel of land known as L.R No 6845/67 (*the suit property*) and that they are the owners and or purchasers of plot numbers 131, 139 and 90 located within the suit premises and bring the suit on their own behalf and on behalf of other purchasers of the various plots numbering close to 140.

2. It was averred in the Complaint that the Plaintiffs, as prospective buyers, formed an association and the Defendant sub-divided the suit property into plots and sold it to them; that after the sale, the Defendant issued them with certificates of ownership with a promise of pursuing the respective titles; that the Plaintiffs have had quiet possession and occupation of the various plots for close to 25 years, which plots they have developed with residential buildings and other investments and that they have been paying land rates to the City Council of Nairobi, now the Nairobi County Government.

3. According to the Plaintiffs, despite the title to the suit property having been processed, the Defendant has refused to process and issue the Plaintiffs with their respective titles and is instead demanding for further payments in order to process and issue the same and that the Defendant is equally threatening them with eviction if they do not make the aforesaid payments.

4. In the Complaint, the Plaintiffs have prayed for the following reliefs;

*i. A permanent injunction restraining the Defendant whether by herself or through her agents, servants and/or workers from trespassing, harassing, evicting, disposing off, selling and/or in any other manner interfering with the Plaintiffs quiet use, possession and occupation of their respective plots in Land Reference No 6845/67.*

*ii. A declaration that the Defendant is under a duty to give effect and to transfer the suit premises to the various Plaintiffs and all others in proportion to the plots(s) each acquired.*

*iii. In the alternative to Prayer (ii) above, an order authorizing the Deputy Registrar of this Honourable Court to execute all the necessary consents and conveyance documents to give force to the effectual transfer of the suit premises and registration of each plot in the names of its respective purchaser.*

*iv. Costs of the suit and interests thereof.*

*v. Any other relief that this Honourable Court may deem fit to grant.*

5. The Defendant filed a Defence on 24<sup>th</sup> July, 2018 in which she averred that whereas she is the owner of the suit property, she never sold the plots to the Plaintiffs; that she is a stranger to Emmaus Welfare Society and that there is no privity of contract between herself and the aforesaid society; that the suit plots belong to the society and not to her as an individual; that the suit is incompetent for non-joinder of the society and that any alleged occupation of the suit property by the Plaintiffs is without her knowledge or consent and is tantamount to trespass.

## **HEARING & EVIDENCE**

### **The Plaintiffs Case**

6. The matter proceeded for hearing on 8<sup>th</sup> November, 2021. The 2<sup>nd</sup> Plaintiff, PW1, adopted his witness statement dated 24<sup>th</sup> April, 2019, as his evidence in chief. He produced the bundle of documents filed on 28<sup>th</sup> January, 2015 as PEXHB 1-7.

7. PW1 informed the court that the Plaintiffs filed the suit against the Defendant on their own behalf and on behalf of other purchasers of the various plots within the suit premises numbering about 140; that the said purchasers are collectively registered as Emmaus Welfare Society; that as prospective purchasers, they formed the society after the Defendant sub-divided the suit premises being L.R No 6845/67 into about 140 plots; that the Defendant issued them with certificates of ownership with the promise of pursuing titles and that they have been living on the suit property for more than 25 years.

8. According to the evidence of PW1, they have been paying the requisite land rates to the City Council of Nairobi; that by virtue of the certificates of ownership, they are the equitable and beneficial owners of the plots in question and that despite the title to the suit property having been processed, the Defendant has refused to issue them with their respective titles.

9. In cross-examination, PW1 stated that a meeting was held by the Plaintiff's society in which it was resolved that the present suit be instituted; that the Plaintiffs purchased the plots as individuals, at different times and under different terms; that he bought his plot number 131 seventeen (17) years ago and that he did not produce the agreement for sale nor the receipts for payment of the plot that he purchased.

10. PW1 stated that he was issued with a certificate of ownership after buying the land and that the suit property is in the name of Anne Wairimu Ndungu and not Urutagwo Mwiruti Womens Group; that the suit was filed in 2015 which was 17 years from the date of purchase; that the rates receipts are in the names of different parties while others are in the names of the Defendant and that they pooled together to pay the rates that were due and owing.

11. According to PW1, the three plots mentioned by the Plaintiffs in the Plaint are representative of the rest of the plots; that the suit is in respect of more than 140 plots which he has mentioned in his witness statement and that all the certificates of ownership produced are signed and sealed.

12. During re-examination, PW1 affirmed that he was in possession of the original certificate issued by the Defendant; that the certificate of ownership is in the name of Urutagwo Mwiruti Women Group; that his receipt shows parcel number 6845/67/131 which represents the plot number while L.R No. 6845/67 is for the mother title and that the Defendant has not pleaded fraud in her defence.

13. It was the evidence of PW1 that he has been on the suit land for approximately 17 years and has constructed a permanent house thereon; that the Defendant has always known that the Plaintiffs are on the property and has never stopped them from developing the land nor taken any action against them and that the Plaintiffs began receiving threats of eviction in the year 2015. According to PW1, at the time of coming to court, the land rates were in arrears of Kshs 5,092.

### **The Defendant's case.**

14. DW1 was Anne Wairimu Ndung'u. She adopted her witness statement dated 24<sup>th</sup> July, 2018, as her evidence in chief and produced the documents filed on the same date as DEXHB 1-8. It was her testimony that she is the owner of L.R 6845/67, the suit property herein, and does not know Emmaus Welfare Society.

15. It was DW1's evidence that although she owns the suit property, she never transferred the same to the Plaintiffs; that the property belongs to her and the society and was sold by the society to several people and that the suit having been brought against her alone is a non-starter.

16. In cross-examination, DW1 admitted that she is the Chairlady of Urutagwo Mwiruti Women Group; that she has a title to the suit property which she caused to be sub-divided into 140 plots, which plots she sold to several individuals in the year 1990; that she has a register of all the persons she sold the plots to and that they all live on the suit property and have constructed thereon.

17. According to DW1, once a party purchases a portion of the suit property, the Defendant issues them with receipts and on completion certificates of ownership; that she does not know Nicholas, Joseph and George, the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs herein; that she did not sign the certificates of ownership produced by the Plaintiffs; that the certificates are forgeries and that for instance, plot number 131 belongs to a different person and not the 2<sup>nd</sup> Plaintiffs herein.

18. DW1 stated that there have been complaints of people taking over other peoples' plots; that she paid rates for the whole property and has the receipt; that some people have resold portions of the suit land and that since it is a block, she has to surrender the whole title and be involved in the transfer process.

19. It was the evidence of DW1 that she has not sought any funds to release the title; that the sub-division plan shows it was done by Urutagwo Mwiruti Women Group after which they issued titles to those who paid for the land; that the aforesaid payment was Kshs 75,000; that it is untrue that she is holding the titles to continue getting money from the Plaintiffs and that she has so far issued about 89 titles to the purchasers.

### **Submissions**

20. The Plaintiff's counsel submitted that whereas the Defendant denied knowing the Plaintiffs in her statement of Defence, she admitted during trial that she knew them and had sold to them the suit property; that fraud is a matter of evidence; that the Defendant having failed to allege the same in her Defence, she cannot raise the same during cross-examination and that the Defendant's allegations that the duly signed and sealed share certificates are forgeries is baseless and misleading.

21. It was submitted by the Plaintiffs' counsel that no proof has been adduced with respect to any fraud by the Plaintiffs. Reliance was placed on the case of *Gichinga Kibutha vs Caroline Nduku [2018] eKLR* where the court affirmed that allegations of fraud call for detailed evidence and the standard of proof is above the standard of balance of probabilities in civil cases but below proof beyond reasonable doubt.

22. On whether the Plaintiffs are entitled to specific performance, counsel submitted that the Plaintiffs have paid the full purchase price as well as all outstanding land rates and rent for the suit property; that the Defendant issued the Plaintiffs with share certificates as proof of full payment aforesaid and that the Plaintiffs legitimately expected to be issued with titles.

23. It was submitted that by failing to issue titles to the Plaintiffs, the Defendant is in breach of contract and the court is entitled to issue an order of specific performance; that there is no alternative remedy available to the Plaintiffs as they have constructed on the suit property and that having settled on the suit property for over 20 years, the Plaintiffs will irreparably suffer if an order of specific performance is not granted.

24. Reliance was placed on the case of *Reliable Electrical Engineers (K) Limited [2006]eKLR* where the court in discussing the jurisdiction of specific performance stated that the remedy of specific performance is based on the existence of a valid and enforceable contract; that the same will however not be ordered where there is an adequate alternative remedy and that even where damages are an adequate remedy, specific performance may still be refused where it will cause severe hardship to the Defendant.

25. The Defendant's counsel submitted that the Plaintiffs have not proven ownership of the suit property and are non-suited to institute this suit; that the Plaintiff's society was not involved in the alleged purchase of the suit property having been registered after the purchases and that despite alleging to have instituted this suit on behalf of themselves and 140 other members, the Plaintiffs have not disclosed the names of the said members.

26. It was submitted that it is difficult for the court to determine whether or not the share certificates are genuine as the Defendant's alleged signature thereon is disputed and that without supporting documents or the examiner's forensic report, the certificates are of no probative value.

27. According to counsel, there is no privity of contract between the Plaintiffs and the Defendant as they came into existence in 2011 after the alleged purchase of the suit property which was undertaken by different individuals and on different terms; that the Plaintiffs have no feasible cause of action against the Defendant and that the Plaintiffs have failed to prove their case on a balance of probabilities.

28. Reliance was placed on the case of *Kenya Women Finance Trust vs Bernard Oyugi Jaoko & 2 others [2018] eKLR* where the court relied on the Court of Appeal Case of *Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another (2015) eKLR*, held *inter-alia* that a contract cannot confer rights or impose obligations on any person other than the parties to the contract.

29. Counsel submitted that the suit is in any event time barred as PW1, in his testimony, admitted that he purchased plot number 131 over 25 years ago and he came to court 17 years after the alleged purchase without seeking leave of court and that the Plaintiff should be ordered to pay costs for having abused the process of the court in instituting this suit.

#### **Analysis & Determination**

30. Having carefully considered the pleadings, testimony and submissions, the issues that arise for determination are:

**i. Whether the suit is incompetent and fatally defective"**

**ii. Whether the Plaintiffs are entitled to the reliefs sought"**

31. It is the Defendant's position that the suit is incompetent and fatally defective for the reasons that first, despite this suit having been instituted in a representative capacity, there are no particulars of the members sought to be represented and the plots they claim; second, that there is no privity of contract between the Plaintiffs as representatives of Emmaus Welfare Group and the Defendant because the Group came into existence after the plots had been sold; thirdly, that the plots were sold to individuals and not the group and lastly, that the suit has been instituted as against the Defendant whereas the impugned plots were sold by Urutagwo Mwiruti Women Group.

32. The Plaintiffs have averred that they have instituted this suit on their own behalf and on behalf of members of Emmaus Welfare Society. The Defendant contends that no particulars have been given with respect to the members of the said Emmaus Welfare Society whom the Plaintiffs allege to represent.

33. The law with respect to institution of representative suits is set out under **Order 1 Rule 8** of the **Civil Procedure Rules** which provides as follows:

*“(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.*

*(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.*

*(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the Court to*

*be made a party to such suit.”*

34. On the other hand, **Order 1 Rule 13 (1) and (2)** of the **Civil Procedure Rules** provides as follows:

*“(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.”*

*(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”*

35. The Plaintiff's society, Emmaus Welfare Society, is a Self-Help Group which is an unincorporated body. As such, it can only sue or be sued through its membership. An unincorporated body may also institute a representative suit pursuant to the provisions of **Order 1 Rule 8** of the **Civil Procedure Rules**. As held by the court in *Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank (1992) eKLR*:

*“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules...”*

36. Where persons such as the Plaintiffs seek to institute a representative suit on behalf of the members of the group, the said members must be clearly identifiable. The court is in this regard persuaded by the reasoning of Munyao J in the case of *Kipsiwo Community Self Help Group vs Attorney General and 6 Others [2013] eKLR* who stated thus:

*“The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order.”*

37. In the instant case, whereas the Plaintiffs have annexed a signed copy of the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs authorizing the 1<sup>st</sup> Plaintiff to act, plead and swear all the affidavits on their behalf, there is no evidence with respect of any authority by the other members of the society to institute the suit nor indeed any notice issued pursuant to **Order 1 Rule 13** and **Order 1 Rule 8(2)** of the **Civil Procedure Rules**.

38. Indeed, the court is unaware who the members of the named society are, and whether they are all interested in the suit and if so, the details in respect of the alleged 140 plots they claim to own. As it were, even if the court was to find in favour of the Plaintiffs, it would be unclear who would benefit from the Judgment.

39. In the circumstances, this court is of the opinion that the suit as filed on behalf of Emmaus Welfare Society is unsustainable. However, to the extent that the Plaintiffs have pleaded that the suit is also brought on their own behalf, and the other three Plaintiffs having given the 1<sup>st</sup> Plaintiff authority to act on their behalf, this suit is sustainable, but only in respect of the four Plaintiffs, and not any other member of Emmaus Welfare Society.

40. According to the Defendant, she is a stranger to Emmaus Welfare Society and that there is no privity of contract between her and the aforesaid society because as at the time of the sale of the impugned plots, the society was not yet in existence. Further, it is the Defendant's case that the plots were sold to individuals and not to the society.

41. This court is inclined to agree with the Defendant's submissions. The dispute herein is with respect to title to the suit plots which the Plaintiffs are seeking to have transferred to them after purchase. The society not having been a party to the purchase, nor indeed being in existence as at the time of the purchases, has no cause of action against the Defendant. In the case of *Savings & Loan (K) Limited vs Kanyenje Karangaia Gakombe & Another (supra)*, the Court of Appeal held as follows:

*“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations*

*on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”*

42. According to the Defendant, the institution of the suit against her and in the absence of other officials of the Urutagwo Mwiruti Women Group constitutes a fatal misjoinder and that no remedy can lie therefrom. Whereas the Plaintiff did not submit on this issue, PW1 maintained that the suit property is in the name of the Defendant.

43. It is trite that the presence of proper parties before the court is *sine quo non* to the exercise of jurisdiction of the court. This position was reiterated by the court in *Apex Finance International Limited & another vs Kenya Anti-Corruption Commission [2012] eKLR* citing with approval the Nigerian Supreme Court case of *Goodwill & Trust Investment Ltd & Anor vs Will & Bush Ltd* where the court held as follows:

*“it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”*

44. It is apparent that the Defendant has been sued in her capacity as the Chairlady of Urutagwo Women Group. Indeed, the Defendant has admitted that she is the Chairlady of the aforesaid group, her only contention being that she is not the only official. The Court of Appeal in the case of *Anderson Mole Munyaya & 3 others vs Morris Sulubu Hare [2017] eKLR*, while determining who constitutes an office holder with respect to an unincorporated body, with the capacity to sue or be sued, placed reliance on the definition of ‘officer’ under **section 2** of the **Societies Act** stated thus;

*“It is not in dispute that the 4<sup>th</sup> appellant is registered under the Societies Act and as such, it is an unincorporated body which lacks the requisite legal capacity to sue or be sued. [See *Grace Mwenda Muthuri vs The Trustees of Agricultural Society of Kenya - Civil Appeal No. 250 of 2015 (unreported)*.] It can only sue and be sued through its office holders. Section 2 of the Societies Act defines an officer -*

*“officer”, in relation to a society, means the president, vice-president, chairman, deputy chairman, secretary or treasurer thereof, or any member of the committee, council or governing body thereof, or any person who holds in the society any office or position analogous to the foregoing, but does not include a trustee, auditor or patron who takes no part in the management of the society;...”*

45. Taking into account the entirety of the evidence by the parties, it appears that the Defendant was solely responsible for all matters regarding the suit property. That being so, and in light of her admission that she is the chairlady of the group, it follows that the onus was on the Defendant to prove that she cannot be sued alone which she failed to do.

46. It is trite that other than the general proposition placing the burden of proof upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, there is an evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. This is captured in **Sections 109** and **112** of the Evidence Act as follows:

*“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.”*

47. The Defendant has in this case not shown either through the constitution of the society or otherwise, that a suit against herself as the only official of Urutagwo Women Group is a non-starter. In the circumstances, the court finds that the Defendant can be sued on behalf of Urutagwo Mwiruti Women Group.

48. During the trial, counsel for the Defendant alluded to the fact that the suit is statute barred. It was submitted that the Plaintiffs having admitted to have instituted the suit 17 years after purchase of the property, the same is statute barred.

49. Section 7 of the **Limitation of Actions Act** provides:

*“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”*

50. When did the right of action accrue" The Plaintiffs are seeking to compel the Defendant to issue them with titles for the suit plots. That being so, it follows that the Plaintiffs' right of action only accrued from the date the title was issued to the Defendant in 2014. Indeed, it is from this date that the Defendant could legally sub divide the suit property and have the titles issued in favour of the purchasers. That being the case, and this suit having been filed in the year 2015, it is the finding of the court that the suit is not statute barred.

51. The Plaintiffs have instituted this suit seeking *inter-alia* for permanent injunctive orders and a declaration that the Defendant is obligated to effect registration of the suit property in their names.

52. According to the Plaintiffs, they purchased the suit plots from the Defendant after which they were issued with certificates of ownership and were promised that titles would be issued in their names; that despite the title to the suit property having been processed in favour of the Defendant, the Defendant has refused to issue them with their respective titles and is attempting to ask for extra monies in order to facilitate the transfer.

53. In support of their claim over the suit plots, the Plaintiffs adduced into evidence copies of the certificates of ownerships issued to them by Urutagwo Mwiruti Women Group and a copy of the official search of the suit property.

54. The Defendant on her part denies having sold the suit plots to the Plaintiff. According to the Defendant, all the persons she sold the suit property to have sale agreements and receipts. The Defendant denied signing the alleged certificates of ownership adduced by Plaintiffs.

55. It is trite that he who alleges must prove. **Sections 107, 108 and 109** of the **Evidence Act Cap 80** Laws of Kenya clearly captures these aspects and they provide as follows:

**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 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.”*

**109. Proof of particular fact.**

*“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.”*

56. As described in the **Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14:**

*“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”*

57. The Plaintiffs claim on the suit plots is founded on the certificates of ownership which they allege to have received after paying for the suit plots. The Defendant has refuted signing the certificates of ownership presented by the Plaintiffs. **Section 70** of the **Evidence Act** provides as follows;

*“If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.”*

58. As it is the Plaintiffs contention that the signatures and therefore the certificates of ownership in their possession are authentic, they had the onus to prove the authenticity of the same. The Plaintiff did not adduce any independent evidence in this regard such as an expert report from a handwriting expert to aid the court in coming to a determination that the documents were authentic. As stated by the Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi (2013) eKLR*:

*“...Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the Appellant to call the expert witness. The Appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”*

59. In light of the foregoing, the Plaintiffs cannot attempt to shift the burden of proof of the validity of the signatures on the certificates of ownership on the Defendant.

60. Further, other than the certificate of ownership which is disputed, the Plaintiffs did not adduce any independent evidence to establish the root of the certificates of ownership. Indeed, the Plaintiffs did not produce the receipts for the purchase which they claimed to be in possession of nor the sale agreements.

61. Despite averring that they have occupied the suit plots for over 20 years, which fact was equally disputed by the Defendant, there was no evidence of the same nor indeed any evidence of the extensive developments they have made on the land. The totality of the foregoing is that the court finds that the Plaintiffs have not proved their case to the required standards and are subsequently not entitled to any of the orders sought.

62. For those reasons, the suit is dismissed with costs to the Defendant.

**Dated, signed and delivered virtually in Nairobi this 21<sup>st</sup> day of April, 2022**

**O.A. Angote**

**Judge**

**In the presence of;**

Mr. Omondi for Mr. Gachie for the Plaintiff

No appearance for the Defendant

Court Assistant: John Okumu



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