



**Naisho v Ismael & another (Environment and Land Appeal
5 of 2018) [2023] KEELC 16686 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 5 OF 2018**

**MN KULLOW, J
MARCH 22, 2023**

BETWEEN

DENNIS NAISHO APPELLANT

AND

ANWARALI KASSAM ISMAEL 1ST RESPONDENT

ABDULGANI KASSAM ISMAEL 2ND RESPONDENT

(Appeal emanates from the Judgment and Decree of Hon. T. Gesora in Chief Magistrates' Court at Narok in Civil Case No. 21 of 2011, delivered on 3rd April, 2018.)

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon T Gesora in Chief Magistrates' Court at Narok in Civil Case No 21 of 2011, delivered on April 3, 2018. The grounds in the Memorandum of Appeal dated May 21, 2018 are that: -
 - i. The Learned Magistrate erred in law and fact in finding that parcel No 113A and 113B form one indivisible and inseparable parcel known as Narok Township No 113A Block 7.
 - ii. The Learned Trial Magistrate fatally misconceived the facts when he held that the Respondents were issued with a Lease Certificate when there was none on record.
 - iii. The Learned Magistrate failed to appreciate that the alleged Letter of Allotment dated June 1, 1999 from Commissioner for Lands was fake and did not indicate that plot number 113A was the specific plot that was being allocated to Anwarali Kassam Ismael
 - iv. The Learned Magistrate failed to appreciate that the Letter of Allotment was unprocedurally issued for it ought to have been preceded and/or accompanied with a letter of no objection from the Narok County Council together with a Rates Clearance Certificate from the council.



- v The Learned Magistrate erred in law and fact in failing to observe that the PDP was a manipulation by the Respondents and the acreage on the PDP manifests itself as superimposed to grab the Appellant's plot.
 - vi. The Learned Magistrate erred in law and fact in putting reliance and credence on the testimony of PW2 which evidence contradicts and not in tandem with the records held by the local authority.
 - vii. The Learned Magistrate erred in law and fact in ignoring the Appellant's defence that parcel No Narok Township 113B is in existence but the Respondents hatched a scheme to disposes him of his property.
2. The Appellant therefore prays for: -
 - a. The Appeal be allowed with costs.
 - b. Ruling and subsequent Orders against the Appellant be set aside.
 3. A brief background to contextualize the Appeal herein; the Plaintiffs filed a suit against the Defendant vide an Amended Plaint dated March 18, 2014 seeking the following orders; a Permanent Injunction restraining the Defendant from further trespass, a Declaration that the suit parcel belongs to the Plaintiffs together with costs of the suit. It was the Plaintiff's claim that he is the registered allottee and owner of the suit parcel Plot No 113A Block 7 Narok Township, having been allocated the same by the County Council of Narok on October 13, 1992 and by the Commissioner of Lands on June 21, 1999. That sometimes on February 10, 2011, the Defendant made claim that his Plot No 113B Block 7 Narok Township was within the Plaintiff's Plot No 113A Block 7 Narok Township and without any lawful justification trespassed into and claimed half of the suit plot, with a view of dispossessing the plaintiff and interfering with his peaceful possession.
 4. The Defendant filed a Statement of Defence dated April 11, 2011 wherein he denied all the allegations made against him. It was his contention that he was allocated plot No 113B Block 7 Narok Township on October 15, 1992 and he is therefore the bonafide legal owner of the same. It was his claim that the orders sought against him cannot be granted in respect to plot No 113B Block 7 Narok Township which is significantly different from Plot No 113 A Block 7 Narok Township. He thus urged the court to dismiss the suit with costs.
 5. The matter proceeded for main hearing suit; both parties called their respective witnesses, adduced their evidence in support of their rival claims and subsequently Judgment was delivered on the April 3, 2018 whose effect was to allow the Plaintiffs' claim hence the instant Appeal.
 6. On February 24, 2020, I directed that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 14 days for each party. Both parties filed their rival submissions together with authorities, which I have read and taken into account in arriving at my decision.

Appellant's submission

7. The Appellant submitted on 2 main issues; whether Plot No 113B existed and whether trial magistrate erred in his finding and judgment. It was his submission that plot No 113B exists and has a separate and distinct allotment letter and lineage and the same was further supported by the Dexh 2, whose validity was not challenged. He maintained that the trial magistrate disregarded his evidence on record and relied on the testimony of PW2 which was in contradiction with the records held by the local authority.



8. He maintained that the learned magistrate fatally misconceived the facts when he held that the Respondents were issued with a Lease Certificate when there was none on record and failed to appreciate that the Letter of Allotment was unprocedurally issued for it ought to have been preceded and/or accompanied with a letter of no objection from the Narok County Council together with a Rate Clearance Certificate from the council.
9. In conclusion, he maintained that parcel No 113B is in existence and is separate from the Respondent's parcel. He thus urged the court to allow the Appeal, set aside the judgment and pronounce itself that plot No 113B belongs to the Appellant.
10. He relied on the following cases in further support of his claim; *Selle v Associated Motor Boat Co* [1968] EA 123 and *Nancy Wanjiru Kunyiba v Samuel Njoroge Kamau* [2018] eKLR.

Respondents' Submission

11. The 2nd Respondent collectively submitted on all the grounds of Appeal. It was his submission that the 1st Respondent was the registered allottee of Plot No 113A Block 7 Narok Township, having been allocated the same by the County Council of Narok on October 13, 1992 vide minute 5/91. The 1st Respondent thereafter applied to the Commissioner for Lands for the issue of a Certificate of Lease and after the payment of Kshs 48,700/=, he was issued with the allotment letter dated June 21, 1999, which clearly showed the size of the plot as 0.34Ha.
12. He further outlined copies of the evidence produced at the trial court record as follows; a copy of the original allotment letter dated October 13, 1992 as Pexh 2 and a copy of the letter of allotment from the Commissioner of Lands as Pexh 3. He produced copies of plot rent receipts for the payments of rents as Pexh 4 a, b and c. Pexh 5 was a copy of the receipt of Kshs 48,700 being the fees paid to the Commissioner of Lands dated October 25, 1999. Letter. Pexh 6 was the Physical Planner report dated May 4, 2010 together with the PDP plan which showed that plot No 113A was not divided into two.
13. He relied on the testimony of PW2, who is the Physical Planning Assistant, who testified that plot 113A belonged to the 1st Respondent as a whole and there was no subdivision within plot No 113A creating 113B. That the plot was later updated and issued a new number Plot No 210A and the same is still registered in the name of the 1st Respondent.
14. It was his contention that the Appellant did not produce a copy of the original allotment letter allegedly issued in 1992 but only produced the one for 2012. Further, there was no proof of payments of the requisite land plot rents by the Appellant to prove ownership of the said plot from 1992 to date. That the Appellant confirmed that the map produced by him was not approved by the Physical Planning Department but the same were only signed by Town Administrator who was his colleague.
15. In conclusion, he reiterated that the documents produced in the trial court were consistent and credible to enable the court make a just and irrefutable finding that the whole of the suit property Plot No 113A Block 7 (now Plot No 210A Block 7) Narok Township formed part of the estate of the late Anwarali Kassam Ismail. He thus urged the court to dismiss the Appeal with costs.
16. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the rival submissions in totality; I find that the main issue for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside its judgment delivered on 03.04.2018.



17. The Court of Appeal in *Selle v Associated Motor Boat Co* [1968] EA 123) held as follows: -

“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

18. This court’s jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The issue before the trial court was on the ownership of the suit parcel and whether or not the Defendant had encroached and/or trespassed onto the Plaintiff’s suit land.

19. I will now proceed to re-evaluate and re-assess each of the party’s claim and the evidence adduced by each party from the trial court record in order to determine whether the trial magistrate rightly exercised his discretion allowing the Respondent’s claim.

20. I have carefully looked at the record of appeal and I do note that the Respondent’s ownership of the suit land is not in contention. Both PW1 and PW2 testified to the effect that the Respondent is the actual and sole owner of the suit plot. However, what appears to be in dispute is the existence of Plot 113” B”/ 210” B” and whether the same is separate and distinguishable from Plot No.113 “A”/ 210” A” Block 7.

21. I have looked at the testimony and evidence adduced by PW2 in respect of the existence of 113B and to this end, I am inclined to agree with the trial magistrate. PW2 outlined the elaborate process to be followed before the subdivision of a Plot. The Appellant on the other hand did not demonstrate that he fully complied with the said procedure or adduced any document in support of the same. Further, the Physical Planner authenticated the documents produced by the Respondent in support of his ownership claims.

22. In the case of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others* [2021] eKLR Cheron J in outlining the procedure governing the alienation of public land held in part as follows: -

“...it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant’s case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.”

23. The Respondent in the trial court produced the original allotment letter as Pexh 1, an Allotment letter from the Commissioner for Lands as Pexh 3, a Part Development Plan as Pexh 6 and bundle of receipts for the payment of ground rent as Pexh 4 (a- c) in support of his ownership claims and to further prove that there was no subdivision of the suit plot No 113 “A” to form No 113 “B” as alleged by the Appellant.



24. Further, despite the Appellant alleging that the Letter of Allotment dated June 1, 1999 was fake and that the process of issuing the said letter was unprocedural, he did not produce any contrary document to challenge the evidence adduced by the Respondent. He did not demonstrate how the said process was unprocedural and/how the same was flawed in any way. The PDP produced as Pexh 6 in support of the Respondent's case indicate the plot number as 113 "A"/ 210 "A" and there is no indication of Plot No 113 "B" as alleged by the Appellant. Again, the Appellant did not produce any evidence to contradict the said Pexh 6 by the Respondent and the same remains uncontroverted.
25. In *Mutsonga v. Nyati* [1984] K.L.R 425 this Court stated thus: -
- “Allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer.”
26. Further, he did not produce any evidence in the form of an Allotment Letter from the Commissioner for Lands, a Part Development Plan or receipts showing the requisite payments of the ground rent. Guided by the above decision in *Ali Mohamed Dagane* (supra), this court is of the view that the Appellant did not sufficiently prove the existence of Plot No 113B and his interests and ownership claims thereof. This court is therefore unable to make a finding in his favor.
27. It is trite law that he who alleges must prove. Where a person is bound to prove the existence of any fact the burden of proof lies on that person. The Appellant did not adduce any evidence to rebut the testimony and evidence of the PW2, the Physical Planner and/or to sufficiently prove that the two plots are distinct and separate. Section 107(i) of the *Evidence Act* provides that: -
- “Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Conclusion

28. In conclusion, I accordingly find that the Appeal is not merited and is accordingly dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED and DELIVERED virtually at **MIGORI** on **22ND** day of **MARCH, 2023**.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Nonappearance for the Appellant

Mr. Kiptoo for the Respondents

Court Assistant - Tom Maurice/ Victor

