



**County Government of Siaya v Okumu (Environment and Land Appeal E035 of 2022) [2023] KEELC 16876 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16876 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E035 OF 2022**

**AY KOROSS, J**

**APRIL 20, 2023**

**BETWEEN**

**COUNTY GOVERNMENT OF SIAYA ..... APPELLANT**

**AND**

**ANDREW OTIENO OKUMU ..... RESPONDENT**

*(Being an Appeal from the Judgment of Principal Magistrate Hon. L. Simiyu delivered on 21/09/2022 in Siaya SPM Land Case No. E031 of 2021)*

**JUDGMENT**

**Introduction**

1. In summary, the background of this appeal emanated from a plaint dated April 12, 2021 that was filed by the respondent in which he alleged he was the registered proprietor of an alleged parcel of land known as Plot No Uns.Commercial F-Kanu ('hereinafter 'suit property'). The same having been allocated to him by the defunct municipal council of Siaya (hereinafter 'council'). Despite paying annual rates, the appellant had threatened to rescind his allocation for allegedly failing to pay for it. He sought for orders of permanent injunction and a declaration he was entitled to a right of redemption.
2. The appellant entered appearance and filed a defence and counterclaim dated May 10, 2021. It denied the assertions made in the plaint and contended the suit property was unsurveyed public land and had never been available for allocation. It particularised irregularity and fraud.
3. The suit was subsequently set down for hearing. The respondent testified and was cross examined by the appellant's counsel Mr Okanda. The respondent closed his case. For some reason, the respondent's counsel, Mr Sala intimated to court that the appellant had not filed a defence and the defence acceded to it. The defence case was closed.



4. At the behest of counsels, submissions were filed and judgment was subsequently rendered on September 21, 2022. In it, the trial magistrate asserted that the council had taken steps to vest public land upon the respondent which culminated into the allotment letter dated November 12, 2008.
5. The trial magistrate found the respondent had not followed due process in acquisition of the suit property. However, the trial magistrate found that notwithstanding the absence of a part development plan ('PDP'), the appellant had acquiesced the non-compliance by receiving land rates from the respondent. The trial court found the process of land acquisition was at the tail end and the appellant could not stop the process. It entered judgment for the respondent.

### **Appeal and Cross Appeal**

6. Dissatisfied with the judgement, the appellant preferred an appeal to this court. In its memorandum of appeal dated 5/10/2022 it raised 4 grounds of appeal. However, in its submissions, it consolidated the grounds into a singular ground;

#### **a) The learned trial magistrate totally misunderstood the respondent's suit and evidence thus arrived at a wrong decision.**

7. The appellant prayed for the appeal to be allowed, the impugned judgment be set aside and it be awarded costs of the appeal.

### **Appellant's Submissions**

8. The appeal was disposed of by written submissions. The appellant's submissions were filed on January 31, 2023 and it identified one issue for determination; whether the appeal was merited.
9. Placing reliance on Section 107 of the *Evidence Act*, the appellant asserted it was trite law he who alleges proves. It was the appellant's contention the respondent's main bone of contention was the appellant intended to repossess the suit property on account of non-payment of land rates yet no shred of evidence was tendered to affirm this position. According to the appellant, the respondent did not prove his case.
10. It blamed the trial magistrate for not considering a document it had tendered before the trial court at the preliminary stage.
11. It contended the trial magistrate erred in finding that an allotment letter had been issued yet none had been produced as evidence. Further, notwithstanding the trial magistrate found the respondent had not followed the statutory steps in acquisition of the suit property, it still entered judgment for the respondent.
12. It submitted courts had numerous held that a letter of allotment must be accompanied by a PDP and it placed reliance on several authorities including *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR which held:-

"It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees."



13. The appellant asserted the minutes that were produced by the respondent did not show that the suit property had been allocated to the respondent. Its asserted that in the absence of crucial documents to assert ownership, the respondent's case should have been dismissed by the trial magistrate.

### **Respondent's Submissions**

14. The respondent's counsel, Mr Sala, filed written submissions dated 9/02/2023. He contended the appellant neither filed a defence nor called a witness to testify. He also placed reliance on Section 107 of the *Evidence Act*. Counsel contended that by the provisions of Section 108 of the *Evidence Act*, it was apparent that whosoever desired a judgment on a legal right or liability had to prove the existence of facts.
15. Counsel submitted that the process of acquisition of the allotment letter was not the subject for determination before the trial magistrate and any challenge on a document conferring ownership of title could only be challenged by Section 26 (1) of the *Land Registration Act*. Counsel asserted that by the allotment letter, the respondent was the registered owner of the suit property. Counsel asserted that the appeal was misplaced.

### **Analysis And Determination**

16. I agree with the appellant that the role of a 1<sup>st</sup> appellate court is to revisit the evidence, evaluate it and reach its own conclusion. It should also give allowance that it never heard or saw the witnesses. In the often-cited case of *Mbogo & Another v Shah* [1968] EA 98, Sir Charles Newbold, P. aptly expressed himself as follows:  
  
‘...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.’
17. I have thoroughly considered the records, consolidated ground of appeal and submissions. I will adopt the condensed ground of appeal as the singular issue for determination.

#### **a) The learned trial magistrate totally misunderstood the respondent's suit and evidence thus arrived at a wrong decision.**

18. I agree with both counsels that it is trite law that he who alleges must prove and this is well encapsulated in Section 107 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.”
19. A revisit of the evidence shows the respondent laid a basis of his alleged registration status on three documents; an offer letter by the council dated May 18, 2008, a letter by then office of the deputy prime minister and ministry of local government and, minutes of a meeting held by the council on April 22, 2008.
20. On the alleged repossession for failure to pay the land rates over the suit property, the respondent produced a rates clearance certificate which demonstrated his payment status was upto date.



21. Upon analysis of the evidence that was adduced before her, the trial magistrate stated as follows:

"...the initial steps were carried out by the defunct municipal council leading to issuance of an allotment letter as in PEX2...prior to the issue of ...PEX2, there was the offer letter in PEX1...the plaintiff has not availed any evidence to show firstly he followed all the steps and that he complied with the required conditions of payment within the 30 days' period... payment of rates cannot confer interest in land without showing that other conditions of the allotment letter and that due process was followed prior to the allotment...non compliance has been acquiesced by the defendant's conduct of issuance of rates clearance certificate... Finally, on the lack of title documents by the plaintiff, I am guided that this is at the tail end of the process...I find that the plaintiff has proved her (sic) case on a balance of probabilities."
22. Respectfully, at the outset, I find the reasoning of the trial magistrate contradictory, on the one hand, the trial magistrate alludes that even if the presence of a rates clearance certificate title could not be confer ownership and affirms that due process was not adhered to, she states that the act of acquiescence by the appellant overshadowed the irregularity. Be that as it may, the appellant has appealed to this court and this court will analyze the evidence to establish if the respondent proved his case.
23. The offer letter that was produced by the respondent shows it was made on May 18, 2008 by the council whose office was taken over by the appellant upon the enactment of its office by the 2010 [Constitution](#).
24. At the time of issuance of the offer letter, public land was managed under the [Government Lands Act](#) (Repealed) and public land could only be disposed of by either the then commissioner of lands or the president in exercise of his special powers.
25. With the enactment of the 2010 [Constitution](#), the role that was vested on these two persons were vested with the national land commission. What was the procedure for alienation of public land to a private individual prior to enactment of 2010 [Constitution](#) or in other words which was the applicable process when the respondent initiated the acquisition of the suit property? It is paramount I answer this question because it is at the heart of this appeal.
26. Within the provisions of the [Trust Land Act](#) (Repealed) and [Government Lands Act](#) (Repealed), the council and commissioner of lands played a crucial role in allocation of land within councils.
27. The council would recommend land for allocation to the commissioner of lands. An offer letter by the council had to be ratified by the commissioner of lands.
28. These powers of the council emanated from Section 13 of the [Trust Land Act](#) (Repealed) where the council could set apart trust land including for private use.
29. Once this had been put in motion, the commissioner of lands would under Section 52 of the [Trust Land Act](#) (Repealed) administer land on the councils' behalf including executing documents, issuing leases and licenses. The commissioner of lands did not have a free hand and within Section 52 (b)(i) of the [Trust Land Act](#) (Repealed), he had to act according to the general directions of the council.
30. Upon such recommendation, the commissioner would allocate it in accordance with Section 5 of the [Government Land Act](#) (Repealed). Such an allotment could only be ratified by the commissioner of lands which could only take place if a PDP had been approved.
31. Thereafter, a raft of processes would take place under Sections 11, 13 and 15 of the [Government Land Act](#) (Repealed) which included setting the upset price, its terms and conditions. A gazettelement would subsequently take place and the property would be sold on auction.



32. Once the terms were fulfilled within a specific period, an allotment letter would be issued by the commissioner of lands. A cadaster survey would be conducted and approved and a beacon certificate would ensue.
33. The last process would be issuance of a certificate of lease. On these processes see *Leah Magoma Ongai v Attorney General* [2015] eKLR, *Nelson Kazungu Chai & 9 others v Pwani University (supra)* which was upheld by the Court of Appeal in *Nelson Kazungu Chai & 9 others v Pwani University College* [2017] eKLR and *Mako Abdi Dolal v Ali Duane & 2 others* [2019] eKLR.
34. This regulatory and statutory processes was well summarized by Cherono J in *Mako Abdi Dolal v Ali Duane & 2 others (supra)* 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."
35. In applying these procedures, did the respondent satisfy that he was the registered proprietor? My answer is in the negative. I am not satisfied the evidence before trial magistrate supported the respondent's claim that he was the registered proprietor of the suit property. He did not produce a certificate of lease.
36. I also agree with the appellant that none of the documents produced by the respondent was an allotment letter as envisaged by the *Government Land Act* (Repealed). Even if such an allotment was produced which for the benefit doubt it was not, it could not confer ownership.
37. The trial magistrate found PEX2 was an allotment letter. Far from it, what was produced was a mere correspondence from the retired office of the deputy prime minister and ministry of local government to the commissioner of lands. I find the trial magistrate erred in finding the said document was an allotment letter.
38. The minutes that were produced show that the full council, in a meeting dated April 22, 2008, upheld the decision of the works, town planning and markets committee for undeveloped land to be repossessed and reallocated.
39. In those minutes, the parcels of land were not disclosed and secondly, the process the council adopted was irregular. The provisions of Section 13(2) of the *Trust Land Act* (Repealed) provided for the process of conversion of trust land by the council as follows: -

(2) The following procedure shall be followed before land is set apart under subsection (1) of this section—

- (a) the council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;



- (b) the council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;
- (c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;
- (d) the recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council:

Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.’

40. Although I agree with Mr Sala that the issue before the trial magistrate was not on the process of acquisition of an allotment letter but rather that the respondent held an allotment letter, I respectfully disagree with him that the two issues could be separated.
41. I say so because having alleged that the respondent was the registered proprietor and not producing a certificate of lease or title, the trial magistrate and this court had no choice but to interrogate the documents that allegedly deemed the respondent the registered proprietor of the suit property. The provisions of Section 26 of the [Land Registration Act](#) could not come to the respondent’s aid since the suit property was unregistered.
42. From the record, the respondent never produced a notice showing that the appellant had threatened to repossess the suit property on grounds that he had failed to pay rates. I agree with the appellant that this claim was not proved to the required standards. I find the trial court erred.
43. I must mention that it is absurd the appellant contended that the trial magistrate failed to consider a document that it tendered in a preliminary application.
44. In the absence of producing and proving the document, how did he expect the trial magistrate to interrogate it? The onus of discharging proof of this document lay with it. Section 108 of the [Evidence Act](#) provides as follows: -
 

"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."
45. This position of law was aptly stated in the Court of Appeal decision of [Kenneth Nyaga Mwige v Austin Kiguta and 2 others](#) [2015] eKLR which stated as follows on the issue of production of documents: -
 

"Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted



into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account."

46. I adopt this position of law, I need not say more on this issue.
47. My net finding on the consolidated ground is that I find the trial court erred when it found the respondent had proved his case on a balance of probabilities.
48. Ultimately, I hereby set aside in entirety the judgment and decree of the trial court and in its place, I substitute it with a judgment dismissing the respondent's suit with costs to the appellant. It is trite law that costs follow the event and for this reason, I award the appellant the costs of this appeal.

**DELIVERED AND DATED AT SIAYA THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**20/04/2023**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

**In the Presence of:**

Mr Okanda for the appellant

Mr Sala for the respondent

Court assistant: Ishmael Orwa

