Kangu v Nairobi City County & another (Environment and Land Appeal 11 of 2020) [2023] KEELC 16925 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16925 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 11 OF 2020

EK WABWOTO, J

APRIL 13, 2023

BETWEEN

WALLACE KINUTHIA KANGU ..... APPELLANT

AND

NAIROBI CITY COUNTY ..... 1ST RESPONDENT

FRANCIS KARANJA MWANGI ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment and orders of the Senior Principal Magistrate at Nairobi by Hon. Orenge K. I. delivered on 28th February 2020 in which the Learned Magistrate dismissed the Appellant (then Plaintiff) suit with costs to the Defendants (Respondents)

2. The Appellant being dissatisfied with the outcome filed this appeal through Memorandum of Appeal dated 5th March 2020. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal: -

    i. The Honourable Magistrate erred in fact and in law in failing to consider the aspect that the piece of land known as plot no C-1603 Daandora Community development project herein the subject matter piece of land was illegally and irregularly repossessed from the appellant.

    ii. The Honourable Magistrate erred in fact and in law in failing to consider the fact that the 2nd defendant was on the piece of land subject matter without the authority of the appellant.

    iii. The Honourable Magistrate erred in fact and in law in failing to consider the fact that the 1st defendant could not pass ownership of the land subject matter

to anyone, not even to the 2nd defendant when he had irregularly, illegally and fraudulently repossessed the said plot from the appellant.

iv. The Honourable Magistrate erred in fact and in law in failing to consider the aspect that the 1st defendant was in possession of the documents showing he is the one who transferred the subject matter plot to the 2nd defendant and he chose not to avail and/or produce the documents in court as evidence.

v. The Honourable Magistrate erred in fact and in law considering issues that were not raised at trial and/or at the hearing.

vi. The Honourable Magistrate erred in fact and in law in failing to take in consideration the aspect that the appellant's evidence was not rebutted and/or controverted by the defendants.

vii. The Honourable Magistrate erred in fact and in law in failing to consider the aspect that proof in civil matters is on a balance of probability not beyond reasonable doubt.

viii. The Honourable Magistrate erred in fact and in law in failing to grant the orders sought by the plaint in the further amended plaint.

3. On the basis of those grounds, the Appellant sought the following orders: -

a) This Appeal be allowed and the lower court Judgment as against the appellant be set aside.

b) A permanent injunction restraining the respondents from trespassing into, dispossessing, harassing the Plaintiff or in any way interfering with the Plaintiff's quiet occupation and possession of the plot number C – 1603 Dandora Community Development Project.

c) An order directing the 1st Defendant to cancel the allocation of the plot no C-1603 Dandora, Dandora Community Development Project Phase II to the 2nd Defendant and revert the same back to the Plaintiff.

d) Compensation for the value of plot no. C – 1603.

4. The appeal was canvassed through written submissions. The Appellant filed his written submissions dated 21st November 2022 which were filed by Mutuku Wambua & Associates Advocates. In the said submissions Counsel submitted on the following issues; whether the Plaintiff proved his case on a balance of probability and whether the repossession of the Plaintiff land was lawful.

5. The Appellant began his submissions by outlining the facts of the case that were presented before the subordinate court. It was submitted that the Appellant was allocated Plot No. C -1603 Dandora, Dandora Community Project by the 1st Defendant sometime in 1997. That the Appellant used to pay his rent religiously from the day he occupied the plot until sometime in 2012 when he tried paying for the rent and the 1st defendant declined to accept his payment without giving any reason. It was upon investigating that the Appellant found out that the said plot had been allocated to the 2nd Defendant unlawfully. The matter proceeded for hearing and the Learned Magistrate dismissed the Plaintiff's claim on the grounds that he had not adduced evidence to proof his case.

6. In this Appeal, the Appellant submitted that it was the Appellants testimony during trial that he had applied in 1977 and was allocated Plot No. C – 1603 Dandora Community Development Project Phase II and that the process of allocation of the said plot was transparent as it went through all the balloting procedural requirements which was confirmed by the 1st Defendant's Council's Resolutions.

7. It was also submitted that the Appellant also produced copies of allotment and acceptance letters together with receipts for payment of rents from 1977 until the year 2012 as proof that he had been allocated the parcel of the subject matter and that the 1st Respondent had confirmed this aspect in his submissions.

8. The Appellant contended that the 1st Respondent despite filing a defence did not call any witness and neither did they produce any documents to disapprove the Appellant's allegations.

9. The Appellant further contended that the 1st Respondent did not bring any evidence before court in support of the averment that they had reallocated the parcel of land to Habiba Huko Gedo and not the 2nd Respondent. The 2nd Respondent though served with summons did not enter appearance and consequently the Plaintiff's evidence to the effect that the 1st Respondent reallocated the parcel of land subject matter to the 2nd Respondent remained uncontroverted.

10. The Appellant placed reliance on the cases of John Muturi Njuguna & 4 others v Municipal Council of Eldoret & Another [2018] eKLR and Juko Alex Tabulo v A.M. Fadhel Khan & Another [2018] eKLR and Geoffrey Koma Mungai v Peter Kihoto Kiiri & 2 others [2020] eKLR in support of his submissions.

11. On whether the repossession of the Appellant's land was lawful, it was submitted that the Appellant was not notified of the repossession herein, that he did not receive any notice from the 1st Respondent that he kept paying rates until the year 2012 when his attempts to pay rates were frustrated and he consequently learned that the 1st Respondent had repossessed the suit parcel subject and re-allocated it to the 2nd Respondent. The Appellant cited the cases of Dismas Paul Nyongesa v Lawrence Mokaya [2014] eKLR and CKC & Another (suing through their mother and next friend JWN) v ANC [2019] eKLR in support of his position on the enjoyment of the right to own property.

12. Citing the case of Wanjiku Nganga v Elizabeth Shigadi David & 2 others [2020] eKLR, the Appellant submitted that he had proved his case on a balance of probability that the parcel of land known as Plot NO. C- 1603 Dandora, Dandora Community Project which he had been allotted in 1977 had been illegally repossessed. Hence therefore the 1st Respondent did not have a good title to transfer the parcel of land subject matter and as such the 2nd Respondent could not pass a good title to a third party.

13. On whether the Appellant is entitled to the reliefs sought, it was submitted that an order for cancellation of the allocation should be granted since it's repossession was irregular.

14. The Appellant also submitted that the plot had been valued for kshs 2,275,000/- as at April 2017 and hence the Appellant should be compensated for the said loss.

15. The Appellant further submitted that an order for demolition of the buildings put up in the said suit property should be granted for the reasons that they were put up illegally. The Appellant concluded his submissions by urging the court to grant the orders sought in his Memorandum of Appeal.

The 1st Respondent's written submissions.

16. The 1st Respondent filed its written submissions dated 2nd February 2023 through Eno & Associates Advocates. The 1st Respondent outlined the following issues for consideration by the court:

    i. Whether the Appellant proved his case on a balance of probability.

    ii. Whether the repossession of the Appellant's land was lawful.

    iii. Whether the 1st Respondent had a genuine title capable of being transferred to the 2nd Respondent.

    iv. Whether the Appellant is entitled to the orders sought.

17. Counsel submitted that the suit property was reallocated to a 3rd party after it had been repossessed when the Appellant failed to honour the terms and conditions laid out in the allotment letter. The burden of proving that the Appellant abided by the terms and conditions of the allotment letter lies on the Appellant a burden that the Appellant has failed to proof. It was submitted that the 1st Respondent made available the records of the suit plot and it is from the said records that the Appellant was able to note that the plot was currently under the name of the 2nd Respondent and that the 1st Respondent is not privy to any agreements made between Mr. Habiba Huko Gedo and the 2nd Respondent. Reliance was made to the following cases to the effect that the burden of proof lies on the one who alleges whether or not the Defendant calls in a witness to rebut the allegations or not; Netah Njoki Kamau & Another v Eliud Mburu Mwaniki [2021] eKLR, EWO (suing as the next of friend of a minor) v Agoro Yombe Secondary School [2018] EKLR.

18. On whether the repossession of the Appellant's land was lawful, the 1st Respondent submitted that the act of repossessing the suit plot was lawful and in accordance with the law. The Appellant did not comply with the terms and conditions of the allotment. The plot was repossessed in 2012 and the Appellant was yet to construct a one room house 35 years later.

19. It was also contended that once the suit plot reverted back to the 1st Respondent after it was repossessed, the 1st Respondent had the legal right to deal with it whichever way it deemed fit. Hence therefore, the 1st Respondent had a genuine title capable of transferring it to Habiba Huko Gedo as the ownership of the suit plot had reverted back to it.

20. The 1st Respondent also objected to the grant of the reliefs sought to the Appellant for the reasons that, he is neither the owner or has any legal interest on the suit plot. They urged the court to dismiss the appeal with costs.

The submissions by the 2nd Respondent

21. The 2nd Respondent did not file any written submissions neither did he participate in this appeal.

Analysis and Determination

22. I have considered the entire record of the trial court, I have also considered the parties respective submissions in this appeal.

23. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal as set out in the case of China Zhingxing Construction Company Ltd –Vs- Ann Akuru Sophia (2020) eKLR.

24. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion.

25. In my humble view, the following issues stand out as key issues for determination which can dispose the Appeal. These are: -

    i. Whether the repossession of the suit plot was lawful.

    ii. Whether the 1st Respondent had a genuine title to transfer the same to the 2nd Respondent.

    iii. Whether the Appellant had proved his case before the trial court to the required standard.

    iv. Whether the Appellant is entitled to the reliefs sought herein.

26. I will proceed to analyze the said issues sequentially.

27. The appellant submitted that the 1st Respondent despite filing a statement of defence and pleading that they had repossessed the suit plot and reallocated the same to Habiba Huko Gedo, did not call any witness neither did they adduce any evidence to support the said averment.

28. The 1st Respondent on the other hand submitted on the said issue by stating that the 1st Respondent repossessed the said plot when the Appellant failed to honour the terms of the allotment letter.

29. The terms and conditions of the allotment letter in that appears at page 12 of the record of appeal, clearly stated at clause 2(a) as follows: -

> " TENURE; As you are expected to construct your house with permanent materials, you will be given 18 months in which to complete the construction one room (s). If the progress of construction is not satisfactory the offer will be withdrawn by the Council and the plot allocated to another person."

30. From the evidence that was adduced by the Appellant who testified as PW2 in the subordinate court, it was evident that he had not complied with the conditions of the allotment letter as at the year 2012 when the plot was repossed. In respect of the instant matter, there is evidence that the Appellant neither met nor complied with the terms and conditions of the letter of allotment. For clarity, the Plaintiff neither accepted the terms of the letter of offer nor made the requisite payments within the stipulated period.

31. Having failed to comply with and or abide by the terms and conditions of the letter of offer, either within the stipulated duration or at all, it is obvious and beyond debate, that the terms of the impugned letter of allotment lapsed and stood extinguished, for all intents and purposes.

32. To the extent, that the terms of the impugned letter of allotment lapsed and stood extinguished, there is therefore no valid Contract existing to and in favor of the Plaintiff that is capable of being acted upon or enforced, either vide Court process or otherwise.

33. In the case of H.H. Dr. Syedna Mohammed Burhannuddin Saheb & 2 Others v Benja Properties Ltd & 2 Others [2007] eKLR, where the Court observed as hereunder;"

> " In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant's argument, that

the expired letter, when acted upon, had been "revived" through conduct. The letter had expired. It was dead. There was nothing to "revive".

34. Allotment letter it is imperative to take cognizance of the holding of the Court of Appeal in the case of Dr Joseph N.K Arap Ngok v Justice Moijo Ole Keiwua & 5 Others CA No. 60 of 1997 where the court stated and observed as hereunder;

> "It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held".

35. Additionally, the implication of a letter of allotment whose terms are not timeously complied with was also discussed in the case of Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR.

36. For coherence, the Honourable court stated and observed as hereunder; I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Wallance Kinuthia Kangu the Appellant herein in 1977 had a condition to accept out up a one roomed house within 18 months. He did not do so and thereafter the offer lapsed and therefore had no interest to transfer in the plot. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and compliance with the conditions view, In the circumstances and having addressed myself on the said issue, I agree with the submissions made by the 1st Respondent that the repossession of the property was regular and lawful.

37. On the second issue on whether the 1st Respondent had a genuine title capable of being transferred, it was evident that from the terms and conditions of the allotment letter that was issued to the Appellant, upon noncompliance with the said terms, the property would revert back to the 1st Respondent and the same would be allocated to another party. That was clearly the position that was taken herein and upon the said repossession, the 1st Respondent became the owner of the said property and on that basis, it allotted the same to a third party rightfully and within the law.

38. On whether the appellant proved his case to the required standard before the lower court, it was submitted that the burden of proving that the Appellant abided by the terms and conditions of the allotment letter lies on the Appellant a burden that the Appellant has failed to proof. It was submitted that the 1st Respondent made available the records of the suit plot and it is from the said records that the Appellant was able to note that the plot was currently under the name of the 2nd Respondent and that the 1st Respondent is not privy to any agreements made between Mr. Habiba Huko Gedo and the 2nd Respondent. Reliance was made to the following cases to the effect that the burden of proof lies on the one who alleges whether or not the Defendant calls in a witness to rebut the allegations or not; Netah Njoki Kamau & Another v Eliud Mburu Mwaniki [2021] eKLR, EWO (suing as the next of friend of a minor v Agoro Yombe Secondary School [2018] EKLR.

39. 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."

40. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in Mumbi M'Nabea v 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.
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> ...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:
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> "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."

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

> " Denning J, in Miller v Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -
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> "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 loose because the requisite standard will not have been attained."

42. Having carefully considered the evidence that was adduced at the trial court it is the finding of this court that the Appellant failed to prove his case to the required standard. The Learned Magistrate properly arrived at the decision that the Appellant had not proven his case to the required standard.

43. On the reliefs sought in the appeal, having made a finding that the Learned Magistrate properly arrived at the decision that the Appellant had not proven his case to the required standard, I see no basis in interfering with the same.

44. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, I find no fault with the decision of the trial magistrate. Consequently, the appeal herein is not merited and the same is for dismissal.

45. On the issue of costs, costs are in the discretion of the court and considering the circumstances of this appeal, I order that each party do bear their own costs of the appeal.

Final orders

46. For the foregoing reasons, I make the following disposal orders: -

a) That the Appeal is hereby dismissed.

b) Each party to bear own costs of the Appeal.

Dated, Signed and Delivered virtually at Nairobi this 13th day of April 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Ms Kiragu for Mr. Mutuku for the Appellant.

Ms. Katila for the 1st Respondent.

No appearance for 2nd Respondent.

Court Assistant – Caroline Nafuna.