



Board of Management Bulla Collage Primary School & another v Dahir (Civil Appeal 7 of 2022) [2023] KEELC 20178 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20178 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
CIVIL APPEAL 7 OF 2022
JM MUTUNGI, J
SEPTEMBER 28, 2023**

BETWEEN

**THE BOARD OF MANAGEMENT BULLA COLLAGE PRIMARY
SCHOOL 1ST APPELLANT**

MOHAMED ADAN ODWA 2ND APPELLANT

AND

ABASS MOHAMED DAHIR RESPONDENT

(Being an Appeal from the Judgment delivered on 23rd of October 2022 of Hon. T. L. Ole Tanchu, Senior Resident Magistrate in Garissa Magistrate's Court ELC No. 11 of 2019)

JUDGMENT

1. This is an Appeal against the Judgment by Hon TL Ole Tanchu, SRM in Garissa Chief Magistrate's Court ELC No 11 of 2019 delivered on November 23, 2022. By the Judgment the Learned Trial Magistrate held that the Plaintiff (now Respondent in the Appeal) had proved his case against the Defendants (appellants in the Appeal) on a balance of probabilities. The Learned Trial Magistrate proceeded to make a declaration that the Respondent was the sole legal proprietor of Plot No 11 Garissa Municipality; an order of permanent injunction against the Appellants and an order of eviction against the Appellants in the event that they failed to vacate from the portion of the Respondent's land that they had occupied as trespassers.
2. The Appellants being aggrieved and dissatisfied by the Judgment have appealed to this Court and have by the Memorandum of Appeal dated December 20, 2022 set out the following grounds of appeal:-
 1. That the Learned Magistrate erred in law and in fact in finding that the Respondent's claim over the suit property was proved on a balance of probabilities despite the failure by the Respondent to adduce sufficient evidence to support their claim.



2. That the Learned Magistrate erred in law and in fact for only relying on the Plaintiff's letter of Allotment as the sole document proving ownership. The trial Court failed to investigate the root of the Plaintiff's title despite the admission by the Plaintiff that he had not paid premium fees requisite in the leasing of Government land.
 3. That the Learned Magistrate erred in law and in fact by ignoring the fact that the Appellants also possess an allotment letter. The trial Court failed to appreciate that the issues before the Court involved double allocation.
 4. That in the alternative and with no prejudice to the above grounds, the learned Magistrate erred in law by finding that the Court lacked the Jurisdiction to award compensation to the Plaintiff. The Court failed to take into consideration public interest and the fate of the Community involved.
 5. That consequently the Learned Magistrate's decision occasioned a miscarriage of justice.
3. The Appellants pray that the Appeal be allowed, the Judgment be set aside and instead be substituted with an order dismissing the suit with costs. In the Alternative, the Appellants urge the Court to consider an order of compensation of the Respondent in accordance with the provisions of the Law.
 4. The Appellants simultaneously with filing the Appeal filed a Notice of Motion dated December 20, 2022 seeking stay of execution of the Judgment pending the hearing and disposal of the Appeal. The Court granted stay of execution of the Judgment and directed the Appeal to be canvassed by way of written submissions. The Appellants filed their written submissions dated April 21, 2023 on April 25, 2023 while the Respondent filed his submissions dated May 5, 2023 on the same date.
 5. Bearing in mind that this is a first Appeal and that I am required to reconsider and re-evaluate the evidence before the Lower Court to determine whether the trial Court's decision was justified, it is essential that I review, albeit in brief, the case before the Lower Court, the evidence and the basis of the trial Magistrate's determination. This Court would not necessarily be bound by the findings of fact and/or conclusions reached by the Lower Court and would be free to make its own conclusions and/or findings upon a re-evaluation of the evidence. The principle that guides the Court on Appeal was enunciated by the Court of Appeal in the Case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court stated thus:-

“---- this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
 6. The brief facts in the present appeal are that the Respondent in the Lower Court filed a suit by way of Plaint dated August 6, 2019. He claimed that he had been allocated by the defunct Garissa Municipal Council Plot No 11 Garissa Municipality measuring 200 ft by 200ft on January 7, 1997. He averred that the Defendants subsequently without any colour of right entered into the plot and appropriated the same for their use to the prejudice of the Respondent and have ignored the Respondent's appeals for them to vacate. The Respondent thus instituted the suit praying for a declaration that he was the lawful proprietor of Plot No 11 Garissa Municipality, injunction, eviction and general damages.
 7. The Appellants filed a statement of defence dated June 23, 2021. The Appellants denied the Respondent was the legal owner of Plot No 11 Garissa Municipal Municipality and denied having unlawfully entered onto the plot. The Appellants contended that the suit property constituted public



land and the same was allocated by the Government in 1998 and that Bulla College Primary School is located on the plot. The Appellants stated that the school started at the site as a feeding centre in 1990 before the Community established the school for the benefit of the children of the Local Community. The Appellants further averred the Respondent had in February 2018 renounced any further claim to the suit property and was therefore estopped from making the claim.

8. The Respondent testified as the sole witness in support of his case before the Lower Court. While the Respondent adopted his witness statement as his evidence, he that testified he was issued with an allotment letter for the Plot in 1997 which he tendered in evidence. He stated Bulla College Primary School started as a Nursery School behind his plot in 1998 where they built 2 classes. He stated the Government took over the School in 2013. He explained there had been efforts to resolve the dispute with the management of the school but no resolution had been reached. He stated he wished to be compensated either in monetary terms or by way of being allocated an alternative plot or parcel of land.
9. In cross examination he affirmed the School was in occupation of his land. He denied he ever agreed to give his plot to the School. He stated he continues to pay rent for the plot.
10. The Head Teacher Bulla College Primary School, Mohamed Adan Odwa testified on behalf of the Appellants before the Lower Court. He adopted his witness statement as his evidence and the documents exhibited in the Defendants bundle of documents in support of the Appellants case. He testified that the school started in 1994 as an ECD Centre run by a group known as Womankind and initially operated as a feeding centre for Medicine San Frontiers (*MSF*) from 1990 but they handed the site over to Womankind after they woundup their work.
11. The witness stated the school was made a fully pledged Primary School in 2007. He stated he joined the school in 2010 as the Head teacher. He maintained the land belonged to the school as Womankind handed over the school to the Community and the land was consequently allocated to the school.
12. In Cross-examination the witness stated Womankind was a CBO –NGO. He affirmed there were no documents to show Womankind gave Bulla College the land. He stated the school had 400 students and that the land was insufficient for the school. He stated it was Womankind who applied for the ECD Centre to become a Primary School and a certificate of registration for the school was issued in 2013.

Submissions of the parties.

13. The Appellants in their submissions contended that the Learned Trial Magistrate erred in holding that the Respondent was the legal owner of the suit property and that the Appellants had encroached onto the Respondent's plot. The Appellants submitted that the issuance of an allotment letter to the Respondent, could not constitute conclusive proof of ownership. It was the Appellants position that there must be proof of acceptance of the offer of allotment and the terms thereof must be shown to have been satisfied by the allottee. The Appellants relied on the Cases of *Joseph Arap Ng'ok v Moiyo Ole Keiyua* (1997) Eklr, *Anne Nakweya v Attorney General (2020) Eklr*, and *Philma Farm produce & Suppliers & 4 Others v The AG & 6 Others* (2021)eKLR to support their submission. The Appellants contended a letter of allotment of itself could not confer a proprietary interest over land and that the intended allottee must demonstrate acceptance of the offer and compliance with the terms of the allotment.
14. The Appellants further relied on the Case of *Dr Syedna Mohammed Burhannuddin Saheb & 2 Others v Benja properties & 2 Others* (2007) eKLR , *Joseph Kamau Muhoro v Attorney General & Another*(2021)eKLR , *Bubaki Investment Company Ltd v National Land Commission & 2 Others*(2015) eKLR to support their submission that where a letter of



allotment is not accepted within the stipulated period and the requisite charges made, it lapses and becomes void and cannot confer any proprietary interest on the holder.

15. Finally, the Appellants submitted that the Learned Trial Magistrate fell in error when he failed to appreciate that the Appellants were issued with a letter of allotment for the suit property after the letter of allotment/offer issued to the Respondent lapsed for failure to accept the same and meet the terms of the allotment.
16. The Respondent in his submissions maintained that the documents he had tendered in evidence showed that he had been allocated the suit land and that the 1st Respondent had encroached on the land. The Respondent contended that the school encroached onto his land when they decided to expand from the ECD to Primary school without giving regard to the extent of the land available to them. The Respondent submitted that various Government Agencies including Garissa County Government have affirmed there was encroachment onto his plot. The Respondent additionally submitted he had been paying rates for his plot to the County Government which according to him was clear acknowledgment that they recognised him as the owner of the suit property.

Analysis and Determination

17. Having reviewed the pleadings and the evidence adduced before the Lower Court and having considered the submissions made before this Court on behalf of the parties, the issues that arise for determination on this Appeal are as follows:-
 - i. Whether the Respondent proved that he had been lawfully allocated the suit property and therefore entitled to be declared as the legal owner of the same.
 - ii. Whether the Respondent had complied with the terms of allotment and if not what the effect was?
18. The foundation of the suit by the Respondent in the Lower Court was that he had been allocated Plot No 11 Garissa Municipality vide a letter of allotment dated January 7, 1997. The Letter of allotment was made to the Respondent by the Commissioner of Lands and was subject to the provisions of the Government Lands Act, Cap 280 Laws of Kenya (now repealed). Under the said Act pursuant to Section 9 thereof, before any portion of land within a Township could be allocated to members of the public such land had to be set aside, be appropriately subdivided into plots and disposed off in accordance with Sections 11, 12 and 13 of the Act. Section 9 of the Government Lands Act provides as follows: -
 - “9. The Commissioner may cause any portion of a Township which is not required for public purposes to be divided into plots suitable for erection of buildings, for business or residential purposes, and such plot may from time to time be disposed of in the prescribed manner”.
19. Under Section 12 of the Government Lands Act, leases of Town plots were required, unless the President otherwise ordered, to be sold by Public Auction.
20. The Respondent in his evidence before the Lower Court did not demonstrate how he became aware that there were plots available for allocation in Garissa. No evidence was adduced that there were plots that were available in Garissa for allocation to members of the public. The Respondent hence in my view did not demonstrate that there was compliance with the provisions of the Government Lands Act relating to allocation of plots before he was allocated the plot which is the subject of the instant



Appeal. As the allotment was under challenge by the Appellants, it was incumbent on the Respondent to prove that he had been validly allocated the plot and that he had complied with the terms of the allotment. Cheron, J in the Case of Ali Mohamed Dagane v Hakar Abshir & Others (supra) while considering validity of the letter of allotment put it succinctly thus:-

“Once the Defendants attacked the allotment letter, the question of the process of acquisition of the allotment letter came into play. The question of acquisition behooves the Court to trace the legal prescriptions for the issuance of an allotment letter and to adjudge the Plaintiffs acquisition from the light of the Law.”

21. The Government Lands Act (repealed) set out an elaborate procedure and process through which land notably within Township as in the present case could be allocated (see Sections 3 and 9 to 18 of the Act). The Learned Trial Magistrate appears not to have inquired into the validity of the letter of allotment. In their defence the Appellants had denied the Respondent was the legal owner of the suit property and had alleged the property constituted public land and that the same had been allocated to the school by the Government. The propriety of the letter of allotment was thus put to question and there was necessity for its validity to be established.
22. The Appellants have further submitted that even if the letter of allotment was validly issued, the Respondent never accepted the same within the prescribed period of 30 days and consequently the same lapsed and/or expired and could not therefore confer any proprietary interest in favour of the Respondent. The Respondent in his evidence did not show that he accepted the offer of allotment and made payment of the requisite charges. In his evidence under cross examination the Respondent stated;-

“I got an allotment letter. I was supposed to pay the Government some money. I did not pay the same. I was given the allotment letter from Ardhi House. There is no gazette Notice showing the Government was giving out land.”

In the Case of Dr Joseph Arap Ng'ok v Moiyo Ole Keiwa & 4 Others (supra) the Court of Appeal held thus:-

“It has been held severally that a letter of allotment perse is nothing but invitation to treat. It does not constitute a contract between the offeror and the oferee and does not confer interest in land at all –“.

23. A letter of allotment is indeed an offer to allocate the allottee a defined parcel of land subject to the allottee accepting and fulfilling the terms contained in the letter of allotment. If the offer is not accepted and the terms fulfilled no contract would arise and definitely no interest can be conferred on the allottee in regard to the identified parcel of land.

Oguttu Mboya, J in the Case of Joseph Kamau Muhoro v Attorney General & Another (2021) eKLR took the view that where a letter of allotment is not formally accepted, the same is rendered void and non-existent. He stated at paragraphs 34 and 35 of his Ruling as follows:-

“34. Besides, I also hold the humble opinion that having not formally accepted the letter of allotment (in writing as required) the letter of Allotment, on which the Plaintiff premised his claim, was rendered void and non-existent.

35. In support of the foregoing holdings, it is important to take cognizance of the decision in the Case of Dr Sydna Mohamed Bulhannuddin Saheb & 2 Others v Benja properties & 2 Others (2007) eKLR:



“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. There was nothing to revive”.

24. This Court sitting at Nairobi in the Case of Bubaki Investment Company Ltd v National Land Commission & 2 Others (2015) eKLR had occasion to consider the validity or otherwise of a Letter of Allotment where acceptance had not been made within the prescribed period and compliance with the terms equally made outside the prescribed period. I expressed myself as follows in the Judgment:-

“ —Thus in my view the Petitioner did not comply with the terms and conditions of the letter of allotment dated 30th May 1997 and that as at the time the Petitioner made payment of the charges stipulated under the letter of allotment the offer had lapsed and was therefore in effectual. Having held that the Petitioner did not comply with the terms and conditions of the Letter of Allotment it follows that the Petitioner could not and did not acquire any proprietary interest in the suit property notwithstanding the payment it made. The offer extended through the letter of allotment having lapsed by effluxion of time, there was no offer to accept at the time the Petitioner made the payment.

--- The Commissioner of Lands in my view was entitled after the expiry of 30 days from the date of the letter of allotment and provided there was no acceptance of the offer from the Petitioner to treat the allotment as having lapsed and could re-allocate the property to any other person. Payment of the charges alone cannot connote acceptance of the terms of the allotment as a written acceptance was required under the letter of allotment.”

25. In the Letter of Allotment issued to the Plaintiff clause 2 inter alia provided as follows:-

“2. I should be glad to receive your acceptance of the attached conditions together with the banker’s cheque for the amount as set out below within Thirty (30) days of the postmark.”

26. The outlined charges were Kshs 14,520/- being inclusive of stand premium of Kshs 10,000/-, ground rent of Kshs 500/- and conveyancing fees of Kshs 1,250/-. The acceptance of the offer together with all the charges were required to be received within 30 days of the posting of the Letter of Allotment. The Respondent in his evidence clearly admitted he did not make any payment of the charges. There was no evidence of acceptance of the offer of allotment and the implication is that no acceptance of the offer was made. The offer of allotment in my view lapsed after the expiry of 30 days from the date the Letter of allotment was issued to the Respondent. At the time the 1st Respondent was issued its letter of allotment on October 29, 1998 the Letter of Allotment issued to the Respondent had at any rate lapsed as the Respondent had neither accepted the same nor paid the requisite charges.

27. It is noteworthy that the letter of allotment carried a proviso in the following terms:-

“If acceptance and payment respectively are not received within the said Thirty (30) days from the date hereof the offer herein contained will be considered to have lapsed.”

28. Indeed, had the Learned Trial Magistrate properly analysed and evaluated the evidence presented before him he ought to have come to the conclusion that no valid allotment had been made to the Respondent and/or that the offer that had been made had lapsed through effluxion of time as there was no acceptance and compliance with the terms of the allotment within the prescribed period.



29. The upshot is that I find the Appeal has merit. I allow the Appeal and set aside the Judgment of the Hon TL Ole Tanchu dated November 23, 2022 and in place thereof substitute the same with an order dismissing the suit. The parties shall meet their own costs before this Court and before the Court below.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 28TH DAY OF SEPTEMBER 2023.

J. M. MUTUNGI

ELC - JUDGE

