REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

APPEAL NO. 8 OF 2018

JULIUS KERIKA .....APPELLANT

VERSUS

WILSON KAATA .....RESPONDENT

JUDGEMENT

1. This is an appeal from the judgement of the learned Principal Magistrate in Makindu PMCC No. 51 of 2011 delivered on the 25th May, 2018.

2. In his plaint dated 03rd May, 2011 and filed in court on 04th May, 2011, the Respondent who was the Plaintiff in the aforementioned case sought the following orders: -

> **i. A permanent injunction commanding the defendant to remove his fence and cease from working on the unsurveyed public plot at Sultan Hamud Township and to remove all his works fence and materials therefrom.**
>
> **ii. Eviction orders do issue against the defendant.**
>
> **iii. Costs of this suit.**

3. The Appellant filed his defence on 19th May, 2011 the same being dated 17th May, 2011 in which he denied the Respondent's claim.

4. On the 20th January, 2016, the Respondent amended his pleadings by filing the amended plaint dated 11th November, 2015 in which he sought the following orders: -

> **i. A permanent injunction restraining the defendant to remove his fence and cease from working on the unsurveyed public plot at Sultan Hamud Township and to remove all his works fence and materials therefrom.**
>
> **ii. Eviction orders do issue against the defendant.**
>
> **iii. Costs of this suit.**

5. On his part, the Appellant filed his amended defence on the 17th March, 2016 the same being dated 07th March, 2016. He denied the Respondent's claim and sought to have the same dismissed with costs.

6. Upon conclusion of the trial at the Subordinate Court, the Learned Principal Magistrate in his judgement found in favour of the Respondent and proceeded to award the prayers sought.

7. Aggrieved by the judgement of the learned Principal Magistrate, the Appellant filed this appeal where he raised the following grounds: -

> **1. The learned Magistrate erred in law and in fact by not considering section 7 of the Land Act No.6 of 2012, which provides that one can, acquired land through allocation, which was the case by the Appellant.**
>
> **2. The learned Magistrate erred in law and in fact by failing to consider that the current search showed that the Appellant is the current allottee of the suit property and has been paying land rent.**

3. The learned Magistrate erred in law and in fact by not failing to consider the issues raised and submitted by the Appellant in the trial court.

4. The learned Magistrate erred in law and in fact by not considering the fact that the Appellant had been in the suit property for a number of years without interruption.

5. The learned Magistrate erred in law and in fact by failing to consider the evidence in form of exhibits provided by the Appellant in the trial court.

6. The learned Magistrate erred in law and in fact by failing to consider the notable Appellant's written submissions tendered.

7. The learned Magistrate erred in law and in fact by failing to award the Appellant's prayers sought in his defense in the trial court.

8. That the judgement of the trial Magistrate is against the law and the weight of evidence on record.

8. He prays for: -

a. The appeal herein be allowed.

b. The lower Court's judgement dated 25th May, 2018 be reversed.

c. The costs of this appeal be borne by the Respondent.

9. This being a first appeal, 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 (see **Seller vs. Associated Motor Board Co. Ltd. [1968] EA 123** at page 126 letter H and **Williamson Diamond Ltd vs. Brown [1970] EA 1** at pages 15 and 16 leters i to c)

10. In his evidence before the trial court, the Respondent told the court that he and others founded Macharia Mutau Home group a long time ago. He went on to say that they planted trees in a public utility land which they had been given by the County Council of Kajiado. That in 2005 the Appellant who is known to him started to claim the one-acre public utility land as his. The Respondent went on to state that vide a letter dated 22nd December, 2003 (P.Exhibit No.2), the Chief of Nkama location ordered the Appellant to stop from cutting down trees which the Appellant ignored forcing the group to complain to the County Council of Kajiado.

11. The Respondent proceeded to produce the following documents as exhibits: -

1. Letter from Olkejuado County Council N0 P.Exhibit No.4.

2. Letter dated 01st November, 2010 from the office of the Deputy Prime Minister – P.Exhibit No.5.

3. Letter dated 05th May, 2010 from County Council of Kajiado – P.Exhibit No.6.

4. Two (2) copies of minutes from County Council of Kajiado – P.Exhibit No.7.

5. A letter dated 02nd May, 2012 from NEMA – P.Exhibit No.8.

6. A letter dated 28th October, 2017 from Governor Kajiado – P.Exhibit No.9.

12. The Respondent concluded his evidence by stating that the Appellant was still in occupation of the land and prayed for judgement against the Appellant together with costs and eviction orders.

13. Upon being cross-examined by the Counsel for the Appellant, the Respondent told the trial court that he was representing 18 people and that one Martin Ole Lipatis had signed the authority. He went on to say that the allotment letter was not genuine. On being referred to a letter marked as DMFI-2 by the trial court, the Respondent told the court that the minute of 01st December, 2003 (P.Exhibit No.7) indicates that the land is a recreational facility and thus a public utility land.

14. In his evidence in re-examination, the Respondent reiterated that the land in question was public utility land.

15. The Respondent thereafter rested his case.

16. The case for the Appellant was that the land was sold to him by Nelpa Farm and that he had a map (D.Exhibit No.1). He went on to say that he got a rate clearance certificate and that he later applied for change of user (D.Exhibit No.6). It was also his evidence that the application for change of user was allowed vide the letter of allotment dated 22nd May, 2003 (D.Exhibit No.7). That he continued carrying out developments until when he received the letter dated 22nd December, 2003 (D.Exhibit No.8) from Olkejuado County Council to indicate

that they would visit the site. He went on to say that the Respondent is a busy body and was not in charge of any group. He urged the trial court to dismiss the Respondent's case.

17. The Appellant's evidence in cross-examination was that he bought the plot from Nelpa Farm through the director, one Mr. Leina. He went on to say that he did not have the sale agreement. He further said that the letter from NEMA (P.Exhibit No.8) was titled "encroachment of public utility land."

18. In his evidence in re-examination, the Appellant denied having encroached onto public property.

19. In summary, that was the evidence that was adduced before the trial court.

20. In his brief written submissions, the Respondent's Counsel summarized the Respondent's and the Appellant's evidence before the trial court and urged the court to enter judgement for the Respondent.

21. On the other hand, the Appellant's Counsel framed eight issues for determination in his submissions. These were: -

1. Whether the Magistrate erred in law and in fact by not considering section 7 of the Land Act No.6 of 2012.

2. Whether the Magistrate erred in fact and in law failed to consider that the current search is in the name of the Appellant.

3. Whether the Magistrate erred in fact and in law by failing to consider the issues raised and submitted by the Appellant in the trial court.

4. Whether the learned Magistrate erred in law and in fact by failing to consider that the Appellant had been in peaceful occupation of the land without interruption.

5. The learned Magistrate erred in law and in fact by failing to consider the evidence in form of exhibits provided by the Appellant.

6. Whether the Magistrate erred in law both in fact and in law by failing to consider the Appellants written submissions.

7. Whether the Magistrate erred both in fact and in law by failing to consider the Appellants written submissions.

8. Whether the learned Magistrate erred in law and in fact by failing to award the Appellant prayers sought in the trial court.

9. Whether the judgement of the trial Magistrate is against the law and the weight of evidence on record.

22. In his judgement, the learned Principal Magistrate stated thus: -

> " …. Nelpa Farm had no ownership to transfer to the Defendant. It could therefore not confirm (sic) good title to the Defendant. I, therefore find and hold that the suit property is a public recreational ground to be held by the Kajiado County Government in trust for the people in Sultan Hamud. It is therefore a public utility."

23. In ground one (1) of the appeal, the Appellant's Counsel submitted that the trial Magistrate erred in fact and in law by holding that the allotment letter which allotted the suit property to Nelber Farm Ltd. and later transferred to Appellant, could not prevail in the circumstances thereby completely disregarding the Respondent's right to own property. The Counsel went on to submit that the trial Magistrate erred both in law and in fact by failing to consider that Nelber Farm Ltd. was the original allotee of plot No.369 Sultan Hamud and allotment is a legal way of obtaining interest in land in Kenya.

24. In support of his submissions, the Appellant's Counsel cited **section 7(a) of the Land Act No.6 of 2012** which provides that: -

> "Title of land may be acquired through –
>
> (a) allocation;

The Counsel went on to cite **section 2** of the same Act which defines allocation of land as: -

> **"allocation of land"**

Means the legal process of granting rights to land"

25. Further in ground 2 of the appeal, the Appellant's Counsel submitted that the trial Magistrate erred in fact and in law by failing to consider that the current search is in the name of the Appellant by failing to address himself to the same. The Counsel went on to submit that even though the Respondent claimed that plot No.369 is a public property earmarked for recreational activities, he did not supply to the court any documentation to support his claim and in any event, he placed his reliance on the copies of letters stopping the Appellant from

occupying his land. The Counsel pointed out that there being no evidence of any title search or letter of allotment to show the Respondent were the legal owners of the plot 369, the trial Magistrate ought to have found that the Appellant is the legal owner of the plot in question.

26. In ground 3 of the appeal, the Appellant's Counsel submitted that the Appellant raised two key issues at the trial court being whether the Appellant herein is the legal proprietor of the suit property and whether the Appellant encroached on a public land, that the trial Magistrate in arriving at his decision relied on the letters from the chief Nkama Location, the letter from the Governor Kajiado County Government addressed to the Appellant as well as a letter from National Environment Management Authority addressed to the Appellant. The said letters amounted to averments and did not shed light or contradict the Appellant's claim of the suit property and therefore they are not persuasive to warrant court to grant orders against the Appellant, that secondly, the Respondent did not put forward any letter of allotment from Kajiado County Council or any other documentation to prove that indeed the County Council of Ol Kejuado had decided that the suit property was a public property allocated as public recreation, that the onus to prove that plot 369 Sultan Hamud had been allotted as a public recreation park was on the person alleging. Therefore, having failed to prove the alleged allotment, the Respondents case ought to have been dismissed by the learned trial Magistrate., that **Section 107 of Evidence Act** states that; *(1) 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, (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,* that the Appellant relied on the case of **Kipkebe Limited vs. Peterson Ondieki Tai [2016] eKLR** where the court cited the case of **Susan Mumbi vs. Kefala Grebedhin (Nairobi HCCC No.332 of 1993)** where Justice Juma stated; "*The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial",* that the Appellant therefore submits that the trial Magistrate misdirected himself on facts before himself by holding the suit property is a public land allotted for public recreation was not proved by the Respondent and thus ought to be dismissed by this court.

27. In ground 6, the Appellant's Counsel submitted that the Appellant's submissions raised two main issues namely; whether the Appellant encroached onto a public land and whether or not plot 369 Sultan Hamud belongs to the Appellant. The Counsel went on to submit that the Appellant relied on the material documents and evidence presented before the trial court that the Respondent had failed to avail evidence to prove that plot 369 reverted to Olkejuado County Council and the same was to be utilized as a public recreational park. The Counsel was of the view that the trial Magistrate misdirected himself on the two issues by holding that plot 369 Sultan Hamud was a public recreation plot and the Respondent did not prove this point to the trial court. The Counsel went on to submit that the trial Magistrate failed to appreciate the evidence tendered by the Appellant and which evidence was never controverted by the Respondent.

28. In grounds 7 and 8, the Counsel submitted that the trial Magistrate overlooked the Appellant's evidence including the minutes of the meeting held by the Works, Town and Planning Committee which resolved to maintain status quo.

29. Having read the rival submissions and evidence that was adduced before the trial court, I do note that even though the Appellant hinges his claim to the suitland on the basis of an allotment letter (D.Exhibit No.7) dated 22nd May, 2003 and issued to him by Olkejuado County Council, The other documents that he produced before the trial court and which documents tally with those produced by the Respondent show that the Appellant had been directed to stop further development on the suitland as the same was said to be a public land. Even though the Appellant claimed to have bought the suit property from Nelber Farm Ltd. in 1994, he admitted that he had no sale agreement between himself and the said Nelber Farm Ltd. The Appellant did not produce any document or record from Olkejuado County Council to show how the suit property was transferred to him upon purchase from the vendor. In any case, there was evidence that suggested that the initial allotment to Nelber Farm Ltd. had been cancelled and subsequently thereafter issued to the Appellant. In my view, the trial Magistrate cannot be faulted for arriving at the decision he arrived at in his judgement. In the circumstances, my finding is that the appeal lacks merit and same is dismissed with costs to the Respondent.

Signed, Dated and Delivered at Makueni via email this 23rd day of December, 2020.

MBOGO C. G.,

JUDGE.

Mr. Muchuku – Court Assistant