REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO.51 OF 2011

ESTHER KATUNDA MBATHA …..…….....APPELLANT

VERSUS

AGNES IRUNGU…….....1ST RESPONDENT

RICHARD MUHIA IRUNGU……2ND RESPONDENT

JANE KANINI MULINGE……..3RD RESPONDENT

(Being an appeal from the original Judgment and Decree in Makindu Principal Magistrate's Court Civil Suit no. 100 of 2009 by Hon B. Ochieng, P.M. on 17/3/2011

JUDGMENT

1. The Respondents herein instituted a suit in the Lower Court seeking an order of a permanent injunction to issue against the appellant; general damages and an order of eviction from **Land Parcel No. B.C.R. UNS 281** situated at **Emali Township** (suit premises). They averred that the appellants had trespassed onto the suit premises and constructed temporary structures.
2. The Appellant in response thereto denied the allegations stating that she was in occupation of plot No. 482 having been allocated the same by the county council. Praying for the dismissal of the suit, she argued that the respondents claim on **Plot No. 281** should be directed elsewhere.
3. The trial court heard the matter and concluded that the plaintiffs had established their claim. Consequently, he granted the injunction order sought, the eviction order and general damages in the sum of Kshs. 50,000/= plus costs and interest.
4. Being dissatisfied with the decision of the court the appellant preferred an appeal on grounds that the learned trial magistrate erred in law and fact in:-

i. Finding that the respondents had proved their case on the required standard;
ii. Assessing the evidence on record in a biased manner in favour of the respondents
iii. Finding that the parties had similar and or competing rights over the suit plot when the evidence on record was that the appellant had a superior right over the suit plot against the respondents;
iv. In holding that the respondents had produced a valid allotment letter when the evidence on record was clear that the said allotment letter was not valid;
v. Finding that the case before him involved a double allocation when the respondent's alleged plot had a different plot number issued by a separate office and government department;
vi. Finding that the appellant's witness No. 2 was a 'Quack Surveyor' when there was no evidence on record;
vii. Failing to hold that the appellant was the valid owner of the suit plot having paid all the rates to the relevant authority;

viii. Finding that the respondents were entitled to damages when there was no evidence or basis on record to support the award of such damages.

5. The appeal was canvassed by way of written submissions whereby the appellant reiterated the grounds as stipulated in the memorandum of appeal.
6. The respondent on the other hand stated that the suit premises were allocated to the 1st respondent's husband (now deceased). The 1st and 2nd respondents are the legal representatives of the estate while the 3rd respondent is a purchaser for value. The issue in the Lower Court was whether the site in issue was Plot **No. 482 Emali Township** or **No. 281** that is owned by the Respondents. Documentary evidence adduced established that the plot in issue belonged to the respondents and the capacity to sue raised by the appellant in submissions was not a ground of appeal.
7. Facts of the case as presented by the 1st respondent were that her deceased husband was allotted **Plot No. 281.** The fees was paid in full. She has continued to pay rates to the tune of **Kshs. 66,826/=.** Beacons on the plot were created and duly identified by the surveyor. Thereafter the land was sold to the 3rd Respondent.
8. **PW3, Nicholas Ouma,** the Surveyor from the **County Council of Makueni** visited Plot No. 281**,** created a beacon and endorsed his sign thereon. In accordance with the **P**hysical Development Plan. It was his evidence that Plot No. 281 was allocated to **Joseph Muia** and the requisite fee of **Kshs. 10,240/=** was received. On cross-examination he confirmed that Plot No. 482 exists and the same was allocated to the appellant. The plot was however not paid for within the required time. The plot was re-allocated to **Joseph Muia.** Thereafter the appellant made payment and was allotted Plot No. 482. He concluded by stating that since the Council was to allocate the land, it could resolve the matter by allocating one of the parties an alternative parcel of land.
9. The appellant's testimony was that she acquired plot no 482 in 1976. She applied to operate a Kiosk thereon and was granted permission. Eventually having applied for allotment in 1982 was allocated the same on 3/5/2001 and she paid land rates. She developed it. On cross-examination she denied having beacon certificates as beacons had not been erected.
10. DW2, **John Musau,** described himself as a mason and farmer and stated that he used to be hired by the council to undertake survey work for them. He testified that he surveyed the plot No. 481 for the appellant although by then the plots had no numbers. On cross-examination he denied being a surveyor.
11. This being a first appeal, I must reconsider the evidence, evaluate it and make my own conclusions, bearing in mind that I neither saw nor heard the witnesses who testified and hence give such an allowance. Failure of the trial court to consider some relevant facts or circumstances would not make this court accept the trial court's finding of fact. (see ***Mariera versus Kenya Bus Services (Msa) Ltd [1987] KLR 440.)***
12. To resolve the quagmire, the trial court ordered the surveyor, Makueni County Council to visit the area in dispute and report the matter to the court. According to the report filed by **Oniare Nicholas** the County Surveyor, the appellant was allocated Plot No. 482 by the County Council of Makueni while the 1st respondent was allocated Plot No. 281 by the Ministry of lands using the Part Development Plan. Both plots fell on the same plot site. Both allotments were genuine subject to payment of rates to the council.
13. The County Council proposed to resolve the matter through compensation of the affected party.
14. The Respondent adduced evidence of correspondences dated 30th November, 2005 from the Ministry of Lands and Housing which is proof that Plot No. 281 was allotted to **Joseph Muhiya** in 1995 though payments were made in 1998. The appellant got allocation of the same plot though with a different registration number on 3rd May, 2001. Her claim that she occupied it in 1976 was not substantiated. It is therefore apparent that proof can only be by way of allotment letters. The first allotee therefore remains **Joseph Muhiya** the husband to the 1st respondent. The error was therefore made by the **Makueni County Council** who are willing to compensate the affected party.
15. In the case of ***M'Ikiara M'Rinkanya and Another versus Gilbert Kabeere M'Mbijiwe[1982 – 1988] 1 KAR 196 (Potter, Kneller JJA and Chesoni Ag, JA)***held that:-

"Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the council had no power to allocate the same property again without following the laid down procedure of re-allocating the property."

This being the case the respondent proved their case on a balance of probability. It is the appellant who should be compensated by the council. From the foregoing it cannot be authoritatively stated that the learned magistrate was biased. It is evidence that he considered evidence adduced into totality prior to reaching the decision.

16. Per the evidence adduced, there were similar and competing rights over the plot but the 1st respondent had superior rights over the same by virtue of the fact of being the 1st alllotee.
17. It is not in doubt that DW2 who purportedly surveyed land for the appellant was not qualified. Indeed he was a "quack surveyor" as put.
18. The learned magistrate has been faulted for reaching a finding that the respondents were entitled to damages. It is established that **Makueni County Council** was to blame for the double allocation having not been diligent enough in their allocations. None of the partners herein occasioned any damage; hence it was erroneous on the part of the magistrate to make an award of damages to be paid by the appellant.
19. The issue of capacity of the 3rd respondent to sue cannot succeed because it did not arise in the Lower Court. However, as provided by **Order 42 rule 4** of the **Civil Procedure Rules** without being confined to the grounds of appeal - there is evidence that PW2 testified on behalf of the 3rd respondent.
20. From the foregoing it is apparent that the appellants appeal partially succeeds in as far as the award of damages is concerned. It is therefore ordered as follows:-

i. Judgment of the Lower Court granting a permanent injunction and eviction order is hereby upheld.
ii. The orders granting general damages in the sum of Kshs. 50,000/= and interest to the respondents be and is hereby quashed and set aside.
iii. The appellant shall pay costs at the Lower Court.

21. Having succeeded partially the appellants will have half the costs of the Appeal.
22. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** THIS **18TH** day of **MARCH, 2015.**

L.N. MUTENDE

JUDGE