REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 125 OF 2010

HENRY KURIA NDETHI.....APPELLANT

VERSUS

1. **PAUL K. MUGAMBI.....1ST DEFENDANT**

2. **MOLO TOWN COUNCIL.....2ND RESPONDENT**

(An Appeal from the judgment of the Principal Magistrate's Court at Molo, Hon. Soita PM) delivered on 4th May 2010 in Molo RMCC No. 86 of 2000).

JUDGMENT

1. This appeal arises from the judgment of the trial court in **PMCC No.86 of 2000** at Molo delivered on the 4th May 2010.

The background to the appeal is that the appellant alleges to have been allocated a **Plot No.12 within Kibunja Trading Centre** by the Molo Town Council in the year 1974. However in 2000, the said plot was repossessed by the council and re-allocated to one Paul K. Mugambi the 1st Respondent by the said council. In June 2000 the appellant moved to court and stopped by an order of temporary injunction, the 1st respondent from developing the said plot pending hearing of the suit, where she sought a declaration that the said **Plot No 12 Kibunja** belongs to him and a permanent injunction to restrain the 1st Respondent from interfering with his quiet possession of the said **Plot No.12 within Kibunja Township** and also sought damages for trespass and annoyance. upon hearing of the suit, the trial court made a finding that the plaintiff did not prove his case on a balance of probabilities and dismissed the suit with costs.

2. The appellant stated three grounds of appeal:

1. That the Learned trial Magistrate erred in law and fact by not considering the evidence before him and therefore arrived at a wrong factual finding/conclusion.

2. That the Learned trial Magistrate erred in law and fact by failing to apply the relevant laws, consequently dismissed the case.

3. That the learned Magistrate erred in law in failing to consider the Plaintiff

submissions and therefore arrived at wrong judgment.

It is proposed that the trial courts judgment be set aside and a finding be reached that the **Plot No 12 Kibunja** belongs to the appellants.

3. As a first appellate court, this court is mandated to re-evaluate the evidence tendered in the trial court and come up with its own independent findings and conclusion. See the case **Selle and Another -VS- Associated Motor Boat Limited (EA) 123.**

The Court of Appeal in **Mwanasokini -vs- Kenya Bus Services Ltd** and **Others (1982-1988) I KAR 278** held that a court on appeal will not normally interfere with a Judges finding of fact unless it is based on no evidence, or on a misapprehension of the evidence, or it is shown demonstrably to have acted on the wrong principles in reaching that finding.

4. **The Appellants case before the trial court**

The appellant who was the plaintiff in the trial court presented a power of attorney donated to him by the allotee of the plot in dispute one Ndithi Muiruri who is his father giving him a right to lodge and prosecute the case. It was his evidence that the 2nd Respondent, Molo Town Council allocated the Plot to G**. Gitau Nduati in 1974** who transferred the same to his father and made all payments to the council. He testified that around June 2000, he found the 1st respondent developing the plot had been repossesed and re-allocated to the 1st Respondent. It was his testimony that neither a notice to repossess the plot was sent to his father nor a demand notice to pay the rates from the council.

The appellant through his advocates stated that there was no dispute of the allocation of the plot to Nelson Muiruri who was allocated the same in 1974. It was also not in dispute that the 2nd Respondent re possessed the plot and re allocated it to the 1st Respondent. He addressed two issues, the legality of the repossession of the plot by the 2nd Respondent and the legality of the reallocation of the plot to the 1st Respondent. He relied on **Section 17 of the Rating Act chapter 267** where a demand ought to be issued if there is default in rates payment, and only after, if the rates are not paid would the council institute recovery proceedings.

It was his submission that none of the above was done making the whole repossession process irregular and thus null and void.

On whether the re-allocation was legal, the appellant submitted that it was premised on an assumption that the repossession was lawful, and as his submission that it was unlawful, then the reallocation was illegal.

5**. The Appellants submissions**

The appellant reiterated his submissions before the trial court that he faulted the said court for failing to consider the same thus arrived at a wrong decision. It was his submission that the 2nd Respondent, Molo Town Council never called any evidence to support its allegation that it repossessed the plot from the plaintiff's father due to none payment of rates. He stated that the trial court failed to consider provisions of the **Rating Act** and the constitutional provisions on the right of ownership of private-land . He stated that the trial court failed in its duty to analyse the evidence tendered in court and thus made a wrong decision.

6. **The 1st Respondents submissions**

It was submitted that the only payments made to the council by the appellant were made in the 1970's and another in October 2000. He submitted that it was not him who ought to have given the requisite notices to the appellant and that the plot was repossessed for none payment of

rates from 1974 to 2000.

It was further stated that the appellant failed to prove that the plot was allocated to the appellants father and insisted that it belonged to him as was legally allocated to him by the 2nd Respondent, and since the appellant failed to take possession of the plot nor developed it since 1974 it was justified to repossession. He urged the court to dismiss the appeal as the appellant had lost nothing.

7. **2nd Respondents Submissions**

The 2nd Respondent admitted that the suit plot was first allocated to Francis Gitau Nduati in the 1970's who then transferred it to Ndethi Muiruri on 9th May 1974. It was its statement that the said Ndethi Muiruri never paid the requisite transfer fees not the annual rates from 1974 to October 2000, nor did any development and as a result the plot was repossessed and reallocated to the 1st Respondent. It was submitted that the appellant made the requisite payment to the council in 2000.

It was further submitted that the appellant had no *locus standi* to institute the suit in the lower court nor the appeal hereof stating that the power of attorney donated to the appellant was a nullity as it was not registered under the **Registration of Documents Act, Chapter 285** and thus he was a stranger in the trial court and in this court. It was further submitted that the allotment letter did not confer absolute ownership rights and privileges as it was only an expression of an intention to offer proprietory rights to the recipient and has conditions including repossession under the **Rating Act and the Local Authorities Act.** It was urged that the appeal lacked merit and ought to be dismissed.

8. This court has considered the evidence tendered before the trial court and submissions by counsel; together with the trial courts judgment.

It was not disputed that the subject plot was originally allocated to one Francis Gitau Nduati who transferred the same to the plaintiff"s father, that by a power of attorney donated to the plaintiff, the appellant brought the case in the lower court and now this appeal. I have seen the power of attorney dated 23rd July 2004. It is duly registered thus giving it legal validity. The appellant therefore had *locus standi* to bring the suit in the trial court and this appeal.

That having been settled, then the issues that arise for the court's determination, and as framed by the appellant are two fold:

1. The legality of the Repossession of **Plot No 12 at Kibunja Trading Centre** from **Ndethi Muiruri in October 2000**.

2. The legality of the Re-allocation of the said plot to the 1st Respondent.

9. In their statement of defence dated 27th November 2000, the defendants made mere denials of the appellants allegations. During the hearing of the suit, the 2nd Respondent failed to call any evidence to prove how the plot in dispute was allocated, repossessed and reallocated. The 1st Respondent purported to justify why the 2nd respondent repossessed the plot and re allocated the same to him. I find his attempt to speak for the County Council misplaced save that it was allocated to him in October 2000. He was not an official of the council, and if he was, that was not disclosed to the court.

He therefore had no legal rights or basis to justify the action taken by the council.

10. On the submissions tendered by the 2nd Respondent through its **Advocates M/S Orina & Co. Advocates**, the court reiterates its findings above that the said 2nd respondent made mere denials that

were not proved as it failed to offer any evidence in support of the repossession and reallocation of the plot in dispute.

> To that extent, the appellant's testimony touching on the above acts by the 2nd respondent stand unchallenged. The court finds it naive of the 2nd Respondent to invite the trial court to consider documents and statements that were not brought to the trial courts attention during the trial. This would be asking the court to reopen the case and admit documentary evidence being sneaked in these proceedings unprocedurally. This court declines to do. See **Order 2 Rule 11** of the Civil Procedure Rules.

11. I have considered the submissions tendered by the appellant in the trial court. It is clear from the Judgment of the trial court that the magistrate failed to give due consideration to the said submissions. He failed to address his mind on the legal provisions that govern re-allotment, and repossession of plots due by County Governments(County Councils and Municipalities).

> I have indicated earlier that no evidence of the non payment of rates to the council was proved as the said council failed to tender any evidence, was it supported by any documentary evidence. The trial court took the 1st Respondents testimony at face value, that the council repossessed the plot for an alleged non payment of rates. It is trite that he who alleges must prove, and if prove is lucking, then, an allegation remains as such. It has no evidential value.
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> **Section 17 of the Rating Act, Chapter 267 Laws of Kenya** states:
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> > ***17 (1) " If after the time fixed for payment of any rate, any person fails to pay any such rate due from him and any interest on such unpaid as provided under Section 16, the rating authority may cause a written demand to be made upon such person to pay within 14 days after service on him -----***
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> **17 (2)** ***If any such person who has had demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate so due and demanded and of any interest payable.***

12 The appellant testified that no demand for payment of the rates was ever served upon his father or himself and in any event, he paid the rates, a fact acknowledged in the trial magistrate's judgment though the rates were paid in October 2000.

> In my considered view, there having been no notice served upon the appellant to pay the unpaid rates as mandated under the above legal provisions,then the 2nd Respondents repossession of the plot was unprocedural, unlawful and illegal.
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> And even if such demand was issued and default persisted after the mandatory 14 days, the only redress authorised by the law as provided vide **Section 17(2) of the Act** would have been taking legal proceedings for its recovery in a subordinate court and not repossession.
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> It is the court's finding that the correct procedure applied by the 2nd Respondent was unprocedural and unlawful. That answers the 1st issue.

13. Having held that the repossession of the subject plot by the 2nd Respondent was illegal, it therefore follows that the subsequent reallocation of the plot to the 1st Respondent follows suit, that it was likewise illegal. The 2nd Respondent had no legal right to take the plot from the appellant and reallocate it to a 3rd party without following the proper procedure provided under the Act. Due process ought to have been followed.

14. The 1st Respondent stated that he had no notice that the plot had been repossessed from another

allotee. He proceeded to pay all the necessary payments as demanded by the Molo Town Council. He stated that he was stopped by a court order from developing the plot. His recourse then lies with the 2nd Respondent as failures and omissions by the council ought not be visited upon the Appellant.

> Having come to the above findings, it is the court's conclusion that the trial court erred both in law and fact by not considering and analysis the evidence tendered before him, and more importantly failed to apply the applicable legal provisions in respect of land allocations and rating by town or Municipal Councils and thus arrived at the decision he did which is not supported by either the facts or the law.

15. The upshot of the above is that the trial court's judgment is set aside. The 1st Respondent is ordered to give vacant possession of **Plot No.12 Kibunja** township to the appellant forthwith.

> An order of permanent injunction is also issued directed to both the 1st and 2nd Respondents restraining them, their agents or servants from interfering with the appellants quiet possession and enjoyment of **Plot No.12 Kibunja Trading Centre.**
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> Costs of the appeal shall be borne by the 2nd Respondent.

Dated, signed and delivered in open court this 30th day of November 2015.

JANET MULWA

JUDGE