



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC APPEAL NO. 19 OF 2020**

**PAUL VICTONE OTIENO.....APPELLANT**

**-VERSUS-**

**GEORGE ASUKE.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU.....2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

**(Appeal from Judgment and decree of the Honourable Mr. J.K. NG'ARNG'AR,**

**Chief Magistrate in Kisumu CMC ELC No. 17 of 2017 delivered on 11<sup>th</sup> May**

**2020 by Honourable Mr. P. NGANE GESORE Chief Magistrate)**

**JUDGMENT**

The Appellant herein approached court by way of a Plaintiff filed a suit on 5<sup>th</sup> March 2014 where he averred that at all material times to this suit he was the bonafide and equitable owner of plot No. Migosi /SSS/1-123 and now known as Migosi S.S.S/Phase 1/96 which was a market plot was allotted to him by the then Municipal Council of Kisumu .The Appellant in his Plaintiff further stated that he paid the requisite fees and took possession of the suit property and later on he discovered that the 2<sup>nd</sup> Respondent had repossessed the suit property and allotted it to the 1<sup>st</sup> Respondent. The Appellant therefore prayed for the following orders:

- a) A declaration that the Plaintiff is the lawful allottee of Plot No. Migosi/SSS/1-123 and now known as Migosi SSS/Phase 2/96.
- b) An order of permanent injunction restraining the 1<sup>st</sup> Defendant, his servants and/or agents from carrying out any construction works on the Plaintiff's plot or committing any acts of trespass thereon.
- c) Damages for trespass.
- d) Costs of the suit plus interest.

The 1<sup>st</sup> Respondent filed a Defence to the claim in which he denied the claim and put the Appellant to strict proof and prayed that the suit be struck out and/or dismissed with costs. The 2<sup>nd</sup> Respondent too filed a Defence and put the Appellant to strict proof. The 2<sup>nd</sup> Respondent in its Defended averred that in the repossessing and re-allocation of the land /plot the Council was discharging its land use control mandate as per the Physical Planning Act and prayed that the suit be dismissed with costs. The suit against the 3<sup>rd</sup> Respondent was withdrawn.

**Grounds of Appeal**

Aggrieved by the decision of the lower court, the Appellant herein filed a Memorandum of Appeal which was based on the grounds that the Learned Trial Magistrate erred in both fact and law by:

1. Dismissing the Appellant's suit despite the fact that the Appellant had demonstrated sufficient evidence to be entitled to the prayers sought in his Plaintiff.
2. Failing to appreciate that the 2<sup>nd</sup> Respondent violated the law governing repossession of land.

3. Failing to take into consideration the decision that had been taken by the 3<sup>rd</sup> Respondent in Kenya Gazette Notice Number 6862 and official communications from the then Commissioner of Lands and the 2<sup>nd</sup> Respondent's accounting officers that their purported repossession was illegal.
4. Misapprehending evidence and determining the suit on no evidence.
5. Failing to consider the Appellant's submissions before arriving at his decision.
6. The Judgment was entered against the weight of evidence.

The Appellant prayed for the following orders:

- a) The Appeal be allowed.
- b) The Judgement of the Honourable Mr. J.K Ng'arng'ar, Chief Magistrate in Kisumu CMC ELC No. 17 of 2017 delivered on 11<sup>th</sup> May 2020 by Honourable Mr. P. Ngane Gesore Chief Magistrate be set aside in its entirety and the same be substituted with a judgment allowing all the Appellant's suit as prayed for in the Appellant's Plaint dated 3<sup>rd</sup> March 2014.
- c) The Appellant be awarded the costs in the subordinate court.

The matter came up for Hearing on 5<sup>th</sup> October 2021 and the court ordered that the Appellant to file and serve a Record of Appeal with submissions within 30 days, that the Respondents to file a response within 30 days of service and the status quo to be maintained.

I have perused the court file and I do confirm that the Appellant failed to comply with the court order. The 1<sup>st</sup> Respondent too failed to file his submissions.

#### **2<sup>nd</sup> Respondent's Submissions.**

The 2<sup>nd</sup> Respondent filed its Submissions on 17<sup>th</sup> December 2021 where the following issues were raised for determination:

- i. Whether repossession of the suit property by the council was lawful.
- ii. Whether the 1<sup>st</sup> Respondent is the lawful allottee of the suit property.

On the 1<sup>st</sup> issue, the 2<sup>nd</sup> Respondent relied on the provision of section 7 and 12 of the Land Act 2012 and submitted that the Council is the custodian of public land within its jurisdiction which empowers it to sell, let or otherwise dispose of as per the law and has power to allocate land to members of the public.

It was submitted that the 1<sup>st</sup> Respondent became the proprietor of the suit property when he successfully bid for it and was allocated by the Council who are the custodians of the suit property on behalf of the public. That pursuant to a meeting held at Town Hall Kisumu on 19<sup>th</sup> February 2010, the Housing Development Committee discussed repossession cases of undeveloped and partially developed plots within Migosi and Block 5. The meeting conducted were open to the public and the Appellant failed to attend to make a case for himself or defend his interests over the suit property.

That the Council resolved that all undeveloped plots within Migosi and Block 5 be repossessed and be re-allocated to other willing developers and the Council informed members of the public vide gazette Notice No. 12559 to apply for residential plots. The 2<sup>nd</sup> Respondent placed reliance in the case of **Rukaya Ali Mohamed vs David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004**.

It was the 2<sup>nd</sup> Respondent's submission that the key condition for the allotment of the suit property was to develop the same within 24 months of allotment. That the Appellant failed to develop the suit property from the date of allotment and therefore the Council retained the power to repossess the plot as the terms and conditions of the allotment were breached.

On the issue of whether the 1<sup>st</sup> Respondent is the lawful allottee of the suit property; it was stated that the Appellant's ownership over the suit property is premised on the letter of offer issued to him on 20<sup>th</sup> June 1986 and he was required to accept the letter of offer in writing which he did not write. The 2<sup>nd</sup> Respondent placed reliance in the case of **Joseph Arap Ng'ok vs Justice Moijo Ole Keiwua Nrb Civil Application No. 60 of 1997** and the case of **Lillian Waithera Gachuhi v David Shikuku Mzee (2005) eKLR**.

It was further submitted that the failure of the Appellant to meet the terms and conditions of the allotment letter issued to him led to the repossession of the suit property by the 2<sup>nd</sup> Respondent who allocated it to the 1<sup>st</sup> Respondent who successfully applied. The 2<sup>nd</sup> Respondent prayed that the Appeal be dismissed with costs.

#### **Analysis and Determination**

It is not in dispute that the Appellant was allotted Plot No. Migosi/SSS/1-123 and now known as Migosi SSS/Phase 2/96. I have perused the letter of offer dated 20<sup>th</sup> June 1986 to the Appellant from the Municipal Council of Kisumu which indicates that the acceptance of the offer

was to be in writing within 30 days from the date thereof and failure of which the offer shall be treated as cancelled. The offer letter also indicated that no construction work was to commence before the Appellant signing an Agreement with the Municipal Council providing him with building plans and other conditions.

Section 12 (1) of the Land Act 2012 provides as follows:

**The Commission may, on behalf of the National or county governments, allocate public land by way of—**

- (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;**
- (b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;**
- (c) public notice of tenders as it may prescribe;**
- (d) public drawing of lots as may be prescribed;**
- (e) public request for proposals as may be prescribed; or**
- (f) public exchanges of equal value as may be prescribed**

In the case of **Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR** it was stated as follows:

**“I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity**

In the case of **Republic versus City Council of Nairobi & 3 Others (2014) eKLR**, Odunga, J. had this to say about land that has already been allotted:

**“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”**

section 38 of the *Physical Planning Act*, Cap 286 Laws of Kenya provided as follows:

***(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.***

***(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.***

***(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.***

***(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice the may within the period specified in the notice appeal to the relevant liaison committee under section 13.***

The Appellant was required to accept the letter of offer in writing as per the conditions set therein which he failed to do so. From the evidence on record, it is clear that the Appellant failed to prove to court that he met the conditions in the letter of offer. In a letter dated 8<sup>th</sup> August 2012, the defunct Municipal Council of Kisumu had written a letter to the Appellant reminding him to remove the illegal structures that he had erected on the suit property.

Pursuant to the Minutes of 19<sup>th</sup> February 2010 it was noted that there was a stipulated period to develop the allocated plots within the Council and members felt that the Council had a right to repossess the undeveloped plots and it was suggested that all undeveloped plots be repossessed for reallocation to potential developers and it was resolved that all undeveloped plots within Migosi and Block V be repossessed and be reallocated to other willing developers as to be advertised, a position that was further adopted in the minutes of 25<sup>th</sup> February 2010.

The defunct Municipal Council of Kisumu vide Gazette Notice No. 101 of 2010 indicated that members of the public were to apply for residential plots earlier on repossessed for failure to develop contrary to allocation provisions and regulations of the offers within her area of jurisdiction and plots in Migosi were one of them. The Notice further stated that the aspiring developers should send their application forms within 14 days and all applicants were to appear for balloting at Town Hall Chambers within 7 days after the 14 days period and the successful applicant shall be notified accordingly. From the 1<sup>st</sup> Respondent's evidence, it is clear that he successfully applied and was issued with a letter of offer dated 19<sup>th</sup> November 2010 and he complied with all the conditions in the letter of offer and has been paying rates to the 2<sup>nd</sup> Respondent. This court has found that the 1<sup>st</sup> Respondent lawfully acquired the suit property from the 2<sup>nd</sup> Respondent and this Appeal is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 11<sup>th</sup> DAY OF MARCH, 2022**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*