



**Wanjao v Oyugi & another (Environment and Land Appeal
56 of 2017) [2022] KEELC 3360 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 3360 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 56 OF 2017
LC KOMINGOI, J
APRIL 28, 2022**

BETWEEN

REV. JOSEPH MWANIKI WANJAO APPELLANT

AND

JESSE OCHILO OYUGI 1ST RESPONDENT

ELIZABETH OCHILO 2ND RESPONDENT

*(Being an appeal from the judgement and decree of the Hon. Mrs. G.A Mmasi Senior
Principal Magistrate delivered on 13th February 2017 in Milimani CMCC No.1773 of 2011)*

JUDGMENT

1. The appellant herein who was the plaintiff in the court below instituted this matter at the Subordinate courts vide the amended plaint dated November 1, 2011. He sought orders that the Respondents be restrained from entering, constructing or remaining on plot No.385 Embakasi Njiru United Self-help group Komarock. On December 13, 2017, the court entered judgment dismissing the plaintiff's claim. Dissatisfied with the decision of the subordinate court, the Appellant filed the memorandum of appeal dated December 18, 2017 seeking judgment against the respondent for orders;
 - a. That this appeal be allowed.
 - b. That the judgement of the lower court be set aside and the same be substituted with a judgment in favour of the appellant.
 - c. Costs of this appeal and in the court below be met by the respondent.
 - d. Such further or other reliefs as may meet ends of justice.



2. The appeal is based on grounds raised in paragraph 1 to 7 of the memorandum of appeal and the appellants condensed them into three (3) grounds in his written submissions as follows:-
 - a. That the learned trial magistrate failed to properly analyze the evidence before her and particularly failed to note the inconsistencies therein.
 - b. The learned trial magistrate erred in law and in fact in accepting as evidence documents that were not authentic and which were clearly manufactured for the purpose of this case.
 - c. The learned trial magistrate erred in failing to appreciate that the suit was not defended and that the plaintiff's evidence was not rebutted and accordingly the plaintiff's evidence stood unchallenged.
3. On October 28, 2021, the court directed that the appeal be canvassed by way of written submissions.

The Appellant's submissions

4. They are dated January 10, 2022. For ease of reference, 'Council' refers to Nairobi City council while 'self-help group' refers to Embakasi Njiru United Self Help Group. Counsel for the Appellant submitted that it emerged from the evidence of DW1 and DW3 that once a member of the self-help Group has obtained a plot ownership certificate together with a beacon certificate from the self-help group, the group officials would then submit his name to the City Council Housing department which in turn would facilitate issuance of a letter of Allotment from the council and the council would follow the list of allottees as submitted by the self-help group. He added that if the procedure was followed, the suit plot could not have been allocated to the 2nd respondent since the plot was first allocated to the appellant on December 20, 2000.
5. He also submitted that the respondent's documents were marred with inconsistencies and they raised serious issues of inconsistencies. He pointed out that the plot ownership certificate is altered from the year 2000 to 2006, the sale agreement cannot stand since the seller who is also the chairman and patron of the Self Help group had already allocated the plot to the appellant, thus he had nothing to sell. He added that the allotment letter from the council could only be issued after the self-help group had submitted the list of plot owners and by January 2002, when the allotment letter was issued, the plot belonged to the appellant not the 2nd respondent who could not have got it because she purchased it four (4) years later. He also submitted that the certificate issued to the 2nd respondent had no plot number and the power of Attorney authorizing the 1st respondent to represent the 2nd respondent had not been registered by the time it was presented to court and that the plot card was altered and payment receipts obtained when this matter was subsisting.
6. It was his submission that the suit against the 2nd respondent was not defended for the reason that the power of Attorney used by the 1st respondent to represent her was not registered thus it was in contravention of order 9 rule 2(a) as well as section 4 of the Registration of Titles Act. He put forward the case of *Euton Njuki Mukungo v Republic & 2 others* Civil Appeal No.35 of 2013[2014]e KLR and the case of *Michael Otieno Nyanguti v Phylis Eunice Anyango & 2 others* ELC Case No 38 of 2018(OS).

The Respondents' submissions.

7. They are dated February 17, 2022. Counsel for the respondent submitted that in paragraph 3 of the appellant's reply to defence dated December 7, 2011 filed at the subordinate court, the appellant contended, "The plaintiff avers that whatever document of allotment the 2nd respondent claims to have



in respect of the suit the same are forgeries and manufactured for that purpose and will crave leave to have the same authenticated.” He pointed out that it was incumbent upon the appellant to plead the particulars of fraud as provided under order 2 Rule 10(a) of the Civil procedure Rules and to also prove his case as required under section 107 of the Evidence Act but he failed to do so.

8. He added that the respondents called the authors of the documents alleged to be forgeries who authenticated them therefore the learned trial magistrate reached a correct finding. He relied on the case of M’ikiara M’Mukunya and another v Gilbert Kabere M, Mbijiwe, Civil Appeal No 13 of 1990 to submit that one cannot be an allottee without the payment of rent and since the 2nd respondent pays rates, she is the beneficial owner.
9. He also submitted that the power of Attorney was not in issue at the trial and in any case, it was rendered inconsequential when the 2nd respondent was incorporated and she elected not to give evidence as the same was adequately covered by the 1st respondent.
10. I have considered the grounds of appeal and the oral submissions together with the authorities cited. the issue for determination are:-
 - i. Whether the Learned Trial Magistrate erred in law and in fact by failing to properly analyse and appreciate the evidence presented before her and accordingly arrived at a wrong decision.
 - ii. Whether the Learned Trial Magistrate erred in awarding the subject land to the Respondents.
 - iii. Who should bear costs of this Appeal?
11. In the case of The Chairman, Secretary and Treasurer (Suing as the officials on behalf of House of Hope vs Wolta House Ltd [2018] e KLR it was held thus:-

“The general principles applicable, when the appellate court is called upon to interfere with the exercise of discretion of the trial court is well settled and was stated as follows in Mbogo & another vs Shah [1968] EA 93, 96

“An appellate court will interfere if the exercise of discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to taken into consideration matters which he should have take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice”.
12. There is a preliminary issue that arose concerning registration of the power of Attorney granted to the 1st respondent to represent the 2nd respondent in the suit. The appellant argued that the said power of Attorney was registered after this suit was commenced, therefore the suit was not defended. The said power of attorney is dated December 3, 2011. It was registered on August 13, 2012. The respondents filed their joint defence dated November 24, 2011. They are represented by the same firm of advocates in this suit. Further, the 1st respondent testified on May 9, 2017. At the time, he had authority to represent the 2nd respondent. In light of article 159, the matter had to be heard and determined to finality.



13. Determining the issue of ownership in a case where the land is not registered requires the court to examine documents and hear oral evidence. In this case, the appellant argues that the subordinate court did not analyze the documents presented in evidence, therefore it reached a wrong finding.
14. This being a first appeal, this court has a duty to evaluate afresh the evidence adduced before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither saw nor heard the witnesses testify, and make allowance for that. In *Selle & another vs. Associated Motor Boat Co Ltd & others* [1968] EA 123, cited in *Barnabas Biwott v Thomas Kipkorir Bundotich* [2018] eKLR this principle was enunciated 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..."
15. In *Peters v Sunday Post Ltd* [1958] EA 424, cited by the Court of Appeal in *Aroni Sure & 9 others v Gesare Nyamaiko* [1988] eKLR O'Connor P stated; "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand". The court has relooked at the evidence presented at the subordinate court and which is contained in the Appellant's record of appeal."
16. DW2 Meshack Ambuka Secretary to the Embakasi/Njiru Self Help Group confirmed that the 2nd respondent was allocated the suit plot as per the Beacon Certificate, plot ownership certificate and the receipts. He told the court that the plaintiff had been allocated plot No 209.
17. DW1 Simon Kinyua from the Nairobi City County confirmed that the documents held by the county show that the 2nd Respondent was allocated the suit plot. In fact the Plaintiff on cross examination admitted that the records of the City Council did not show that he is the owner of the suit plot.
18. The appellant stated that he bought a share from one Mary Njeri Kago and he was allocated the Plot No 385. He did not exhibit any sale agreement between herself and Mary Njeri Kago. What the appellant had was he plot ownership certificate and the beacon certificate. It appears no other step was taken to ensure that the records at the Nairobi City Council reflected his name as the owner. He produced no evidence of any payments in respect of the said plot.
19. I find that the Learned Trial Magistrate correctly considered all the evidence presented before her in reaching the decision made. I find no reason to fault her decision in awarding the suit plot to the Respondents herein.
20. In this case, the suit land would be allocated at two levels by two different allocating entities being Embakasi Njiru United Self Help Group and City Council of Nairobi, Housing Development department. It emerged in DW2's testimony that for one to be allocated land at City Council of Nairobi Housing Development department level, you had to first have cleared with Embakasi Njiru United Self Help Group. At the self-help group level, one would acquire land either by being a shareholder or buying from a shareholder who had balloted. The appellant's testimony was that he bought the suit land for Kshs 105, 000 as a share from one Mary Njeri Kago and he was then issued with an ownership certificate, a beacon certificate and a map showing his plot. During cross-examination, DW2 admitted that he signed the ownership certificate and the beacon certificate issued to the Plaintiff in his capacity as secretary to the self-help group.
21. On the other hand, the 2nd respondent also led evidence to prove her claim to the suit land. The 1st respondent's testimony was that the 2nd respondent who is his mother was allocated the land in



2002 by Nairobi City Council, but the sale was formalized on August 25, 2006. It emerged that the vendor was chairman of the self-help group and he was selling the suit plot belonging to one Mwendwa Andrew as indicated in the sale agreement. There is nothing to prove that Mwendwa Andrew was the previous owner and no signed authority from the said Mwendwa authorizing the sale. However, the sale agreement is witnessed by two persons confirming that Mwendwa Andrew authorized the sale. Clause 8 of the sale agreement indicates that the entire purchase price of KShs 180,000 was paid on the date of the agreement. There is no clause to state that the parties were formalizing the allotment letter dated January 17, 2002 issued to the 2nd respondent. According to the sale agreement, the suit plot was bought by the 2nd respondent on August 5, 2006. DW4 admitted that the purchase price was paid on that day.

22. The 1st respondent also produced an ownership certificate dated August 25, 2006. DW2 produced the register of plots dated May 19, 2011 that was used to be used by the council to issue certificates after persons had been cleared by self-help group. The 2nd respondent's name appears as the allottee for plot 385. However, the allotment letter issued to her by the City council's urban planning department is dated 2002. DW3 told the court that the allotment letter was amended so that the council does not lose rates but from their records, he can tell that it was issued on August 25, 2006. I note that August 25, 2006 is the date the sale agreement was drawn. I also note the inconsistencies in DW3 and DW4's testimony in that while DW3 told the court that the allotment letter was backdated, DW4 told the court that the 2nd respondent was allocated the land vide the allotment letter dated January 7, 2002 then it culminated to the sale agreement. These inconsistencies in my view do not go to the root of the 2nd respondent's title.
23. In the case of the case of *Rukaya Ali Mohamed v David Gikonyo Nambachia & another Kisumu HCCA 9/2004* cited in *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR where Warsame J held that, "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 or proprietorship 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".
24. The appellant in this appeal failed to demonstrate at the trial court that he met the conditions in the letter of allotment. The said allotment has been challenged by the Embakasi Njiri Self Help Group and Nairobi City County.
25. In conclusion, I find that the appellant failed to produce documents to confirm he had been allocated the suit plot. The Respondents on the other hand produced documents which DW1-DW3 stated were not fraudulently obtained.
26. The appellant was unable to prove that the documents on the respondents' possession had been fraudulently obtained.
27. I find that the learned trial magistrate did not err in finding that the appellant had not proved his case on a balance of probabilities hence its dismissal.
28. I find no merit in this appeal and the same is dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF APRIL 2022.

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L. KOMINGOI



JUDGE

In the presence of:-

Mr. Kiarie Njuguna for the Appellant

Ms Wanyama for Mr. Mwati for the Respondents

Steve - Court Assistant

