



REPUBLIC OF KENYA



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**Lesampaine v Terewan (Environment and Land Appeal 3 of 2019)
[2022] KEELC 3480 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL 3 OF 2019**

**YM ANGIMA, J
MAY 19, 2022**

BETWEEN

JAMES KITAMOI LESAMPAINÉ APPELLANT

AND

LEKALJA JULIUS TEREWAN RESPONDENT

(Being an appeal against the judgment and decree of Hon Momanyi Ocharo (SRM) dated April 4, 2019 in Nyahururu CM ELC No 285 of 2017 – Lekalja Julius Terewan v James Kitamoi Lesampaine & another.)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon Momanyi Ocharo (SRM) dated April 4, 2019 in Nyahururu CM ELC No 285 of 2017 – Lekalja Julius Terewan v James Kitamoi Lesampaine and another. By the said judgment, the trial court allowed the respondent’s claim for ownership of the suit property and dismissed the appellant’s counterclaim for the same property. The respondent was also awarded the costs of the suit.

B. Background

2. The record shows that *vide* a plaint dated October 31, 2016 the respondent sued the appellant before the trial court seeking a declaration that he was the owner of plot No 63 (the suit property) located in Kisima Trading Centre in Samburu Central Sub-County and a permanent injunction restraining the appellant from evicting him, alienating, selling, transferring or dealing with the suit property. The respondent also sought costs of the suit. The basis of the respondent’s suit was that he had bought the suit property in 2014 for valuable consideration from an earlier allottee. It was further pleaded that the



appellant and the County Government of Samburu had colluded to deprive the respondent of the suit property by purporting to allocate the same to the appellant.

3. The appellant filed a defence and counterclaim dated October 18, 2017 in which he denied liability for the respondent's claim. The appellant pleaded that he was allocated the suit property by the defunct County Council of Samburu way back in 1989 and that the allocation was confirmed by a letter of allotment dated April 20, 2014. The appellant further pleaded that when the respondent took possession of the suit property he filed Maralal PMCC No 9 of 2015 against the respondent but the suit was later withdrawn and the dispute referred to the Samburu County Land Management Board (the Board) for resolution. It was contended that although the board determined that the suit property belonged to the appellant, the respondent had failed to abide by that decision.
4. By his counterclaim, the appellant reiterated the contents of the defence and prayed for a declaration that he was the lawful owner of the suit property; an eviction order against the respondent; mesne profits at the rate of Kshs 10,000/= per month with effect from June, 2014; and a permanent injunction restraining the respondent from entering, trespassing, using, remaining upon or dealing with the suit property.
5. By a judgment dated and delivered on April 4, 2019 the trial court held that the respondent had proved his claim of ownership of the suit property and entered judgment in his favour as prayed in the plaint. The trial court was of the opinion that the respondent had proved that he had lawfully acquired the suit property from a previous allottee whose letter of allotment was dated 2006.
6. On the appellant's claim, the trial court held that the appellant had either abandoned or failed to prosecute the same at the trial hence it was a non-starter. The trial court further held that the appellant's payment receipt did not bear details of the suit property hence it was irrelevant to the proceedings. The trial court was further of the opinion that in the event there was double allocation then the allotment letter of 2006 took precedence over the appellant's letter of 2012. The appellant's counterclaim was consequently dismissed.

C. The Grounds of Appeal

7. Being aggrieved by the said judgment the appellant filed a memorandum of appeal dated April 9, 2019 raising the following 9 grounds of appeal:
 - (a) The learned trial magistrate erred in law and fact by failing to find that Alex Lesketeti has never had any interest over plot No 63 Kisima Trading Centre in Samburu County, and as such he lacked any transferable interest over it capable of being transferred to the respondent.
 - (b) The learned trial magistrate erred both in law and fact by failing to make a determination that the respondent had not at any given time, acquired any legally recognizable interests and rights over plot No 63 Kisima Trading Centre in Samburu County capable of any legal upholding, recognition, protection and preservation.
 - (c) The learned trial magistrate erred both in law and fact by failing to make a finding that the contract between the respondent and Alex Lesketeti was null and void and could not legally confer any interest whatsoever over plot No 63 Kisima Trading Centre in Samburu County.
 - (d) The learned trial magistrate erred both in law and fact by failing to make a determination that the respondent's purported plot allocation letter over plot No 63 Kisima Trading Centre in Samburu County was null and void, and as such incapable of conferring any legally recognizable statutory rights and interests.



- (e) The learned trial magistrate erred both in law and fact by making a finding that the respondent was the legal owner of plot No 63 Kisima Trading Centre in Samburu County and as such entitled to the prayers sought in the plaint.
 - (f) The learned trial magistrate erred both in law and fact by failing to find that plot No 63 Kisma Trading Centre in Samburu County was a public land, and as such Samburu County Land Management Board was the only institution that would determine the ownership issue over plot No 63 Kisima Trading Centre in Samburu County.
 - (g) The learned trial magistrate erred both in law and fact by dismissing the counterclaim.
 - (h) The learned trial magistrate erred both in law and fact by failing to find that the appellant was the legal allottee of plot No 63 Kisima Trading Centre in Samburu County, and as such entitled to exclusively enjoy its proprietary rights.
 - (i) The learned trial magistrate erred both in law and fact by finding that the respondent had proved his case and as such entitled to the prayers sought in the plaint with costs.
8. As a result, the appellant sought the following reliefs:
- (a) That the appeal be allowed and the decree of the trial court in Nyahururu CMELC No 285 of 2017 be set aside.
 - (b) That the respondent's claim before the trial court be dismissed and the appellant's counterclaim be allowed as prayed.
 - (c) That the appellant be awarded costs of the appeal and the suit before the trial court.

D. Directions On Submissions

9. When the appeal was listed for directions, it was directed that it shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their written submissions. The record shows that the appellant filed his submissions on November 15, 2021 whereas the respondent filed his on November 23, 2021.

E. The Issues For Determination

10. Although the appellant raised 9 grounds of appeal in his memorandum of appeal, the court is of the opinion that the appeal may be effectively determined by resolution of the following 3 issues:
- (a) Whether the trial court erred in law and fact in dismissing the appellant's counterclaim.
 - (b) Whether the trial court erred in law and fact in allowing the respondent's suit.
 - (c) Who shall bear the costs of the appeal.

F. The Applicable Legal Principles

11. As a first appellate court, the court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 at page 126 as follows:

“...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 that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O'Connor, P rendered the applicable principles as follows:

"...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

13. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, LC in *Watt v Thomas* [1947] AC 424 at page 429 - 430 as follows:

"My lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

G. Analysis And Determination

(a) Whether The Trial Court Erred In Law And In Fact In Dismissing The Appellant's Counterclaim

14. The court has considered the material and submissions on record on this issue. The appellant contended that the trial court erred in holding that the appellant had abandoned his counterclaim or failed to prosecute it. The record of proceedings shows that both parties adopted their respective witness statements at the trial. It is evident from the material on record that both parties were claiming ownership of the suit property. They filed their respective statements setting out the basis of their claims which were adopted by the trial court as their evidence in-chief.



15. The court is thus of the opinion that the trial court erred in law and fact in holding that the appellant had failed to prosecute his counterclaim. The court is satisfied that on the basis of the material on record the appellant prosecuted his counterclaim and even produced documentary evidence in support thereof.
16. The court is further of the opinion that even if the trial court had considered the appellant's documentary evidence, it would still have arrived at the conclusion that the appellant had failed to prove his counter-claim. The appellant's contention that he was allocated the suit property by the defunct County Council of Samburu in 1989 is not supported by the documents on record. The appellant's letter of allotment was dated 2012 and not 1989. The copy of the payment receipt dated 1988 did not bear any connection to the suit property at all. On the other hand, the respondent's claim was hinged upon a letter of allotment issued to Alex Lesketeti in 2006 who later on sold the suit property to the respondent. The court agrees with the trial court's opinion that even if there was double allocation of the suit property by the allocating authorities, then the earlier allocation shall supersede the later one.
17. The court is unable to agree with the appellant's submission that since the Board had heard and determined the property dispute in his favour, then the trial court was bound to follow that decision. The court has perused the provisions of section 18(9) of the [National Land Commission Act, 2012](#) which established the board. Its functions were stipulated as follows:

“ The Board shall –

 - (a) subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases; and
 - (b) perform any other functions assigned by the commission or by any other law.”
18. It is thus evident that the board's functions related to the management of public land and it had no jurisdiction to resolve property disputes amongst allottees of public or community land. There was no material before the trial court to demonstrate that 'any other written law' had conferred upon the Board any judicial or adjudicatory functions on allotments undertaken by the defunct County Councils or County Governments. The report of the Board could not therefore be valid evidence of the appellant's ownership of the suit property. The court is thus of the opinion that although the trial court erred in holding that the appellant had failed to prosecute his counterclaim, the ultimate decision was right in the sense that the appellant had failed to prove his counterclaim to the required standard.

(b) Whether The Trial Court Erred In Law And Fact In Allowing The Respondent's Suit

19. Whereas the respondent supported the trial court's finding that he had proved his ownership of the suit property, the appellant contended otherwise. The appellant faulted the trial court for finding that the respondent had proved his case on a balance of probabilities. The appellant submitted that his allocation came earlier in time as he was allocated the suit property way back in 1989 whereas the vendor who sold it to the respondent was allocated the same in 2006. As indicated earlier, there is no evidence on record of the alleged allocation of 1989. The appellant's letter is dated April 20, 2012 which indicates the allotment fee as nil and the land rent as Kshs 500 per annum. The payment receipt of Kshs 200/= dated 1988 does not appear to have any connection with the suit property, that is, plot No 63.
20. The court is thus satisfied that on the basis of the material on record that the allotment letter of 2006 to Alex Lesketeti not having been revoked, there was no basis for the County Council of Samburu to



issue the letter of allotment dated April 20, 2012 to the appellant. Accordingly, the trial court did not err in law in upholding the earlier letter of allocation as opposed to the later one.

Who Shall Bear Costs Of The Appeal

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the appeal. Accordingly, the Respondent shall be awarded costs of the appeal.

H. Conclusion And Disposal

22. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the appellant's appeal is hereby dismissed in its entirety with costs to the respondent.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 19TH DAY OF MAY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr Nderitu Komu for the appellant.

Mr Mwalimu for the respondent (muted).

CA- Carol

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YM ANGIMA

JUDGE

