



REPUBLIC OF KENYA



KENYA LAW
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**Kinyati & another v Kamau & another (Civil Appeal 67 of 2015)
[2022] KEELC 2702 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2702 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL 67 OF 2015**

LC KOMINGOI, J

MAY 12, 2022

BETWEEN

SIMON MBOCHA KINYATI 1ST APPELLANT

ELIZABETH NJANGO 2ND APPELLANT

AND

PHOEBE NJERI KAMAU 1ST RESPONDENT

CITY COUNCIL OF NAIROBI 2ND RESPONDENT

(Being An Appeal From the entire Judgement & Decree delivered by the Honourable Mr. C. Obulutsa(S.P.M) and read on his behalf by the Hon. L. K. Kassan on 6th August 2015 at Nairobi in Milimani CMCC No.7352 of 2008)

JUDGMENT

1. In the subordinate court, the 1st Respondent herein had vide CMMCC 7352 of 2008 sued the 1st Appellant herein and City Council of Nairobi seeking a declaration that she is the lawful owner of Plot Number 66 of L.R No.209/7260.The suit was consolidated with CMCC No.1856 of 2009 where the Appellants had sued the 1st Respondent herein seeking similar orders. The learned Magistrate entered judgment in favour of the 1st Respondent herein.
2. Being aggrieved by the said judgement, the Appellants filed the memorandum of appeal dated 11th August 2015, they sought orders that:-
 - a. The whole judgement of the Honourable Mr. C Obulutsa (SPM) delivered by the Honourable L. Kassan on 6th August 2015 be set aside and the Plaintiffs suit against the Appellants be dismissed with costs and judgment in place be entered for the Appellants in terms of prayers in CMCC No.1856 of 2009.



- b. That the costs of this Appeal and those of the lower court be awarded to the Appellants.
 - c. Such further orders may be made as the Honourable court may deem fit.
3. The Appellants raised 32 grounds of appeal. However, in their submissions dated 27th May 2021, Counsel for the Appellants summarised the 32 grounds of Appeal into the following issues;
- a. Whether the Magistrate erred in disregarding the fact that the Appellant's title was first in time.
 - b. When stand premium and other requisite payments were made by the Appellants and the original allottee.
 - c. Failure to consider issue of possession.
 - d. Reliance on discredited evidence.
 - e. Failing to find that the Appellants had already furnished adequate proof.
 - f. The 1st Respondent had not demonstrated ownership on a balance of probabilities.
 - g. Whether the Magistrate misapplied the provisions of Section 3(3) of the Law of Contract.
 - h. Whether the 1st Respondent had proved fraud as alleged.
 - i. Disregarding evidence challenging authenticity of title documents of first Respondents.

The Appellants' Case

4. Counsel for the Appellants submitted that the Appellants have demonstrated that their allotments were prior to the 1st Respondent's. He pointed out that the original allotment was issued to one Hesbon Nganyi on 13th December 1995 and the Allotment letter issued to the Appellants after they purchased the suit plot from the original allottee was dated 16th November 1998. He added that Ann Muthoni Thuku whom the 1st Respondent claimed to have purchased from on 27th January 2005 was allocated the plot on 6th November 2002.
5. He relied on *Gitway Investment Ltd & 3 others v Commissioner of Lands and on Kamau James Njendu v Serah Wanjiru & Another* [2018] e KLR to submit that where there are two competing titles issued by the same entity and where there is no fraud in acquisition of any of them, then the court in determining the competing interests is bound to favour the one that is first in time. He also submitted that the Appellant's allotment was not demonstrated to have been acquired through fraud. He cited *Samuel Maina Gichohi v City Council of Nairobi & another* [2011] e KLR.
6. He submitted that the Learned Magistrate presumed that the conditions given to the original allottee Hesbon Nganyi had not been met and hence the Appellants whom he had sold the plot had not acquired proprietorship. He further submitted that the learned trial Magistrate's presumption was wrong since there was evidence showing that the necessary payment had been made on time and it is to be found at the bottom of the first page of the allotment letter typed "...paid vide receipt No. Misc 100 TC42644 dated 21st March 1997." He added that there is also a receipt dated 23rd May 1996 in favour of Hesbon Nganyi showing that stand premium together with ground rent amounting to Kshs.40, 166/= had been paid and it is the specific amount indicated on the second page of the allotment to Hesbon Nganyi dated 13th December 1995. He also submitted that there's also a receipt dated 1st September 2005 issued to Hesbon Nganyi in respect of ground rent.
7. He further submitted that failure by the learned trial Magistrate to consider that the Appellants were in possession of the suit plot since 1998 was a travesty of justice for which the judgement ought to



be set aside. It was his submission that in his judgement, the learned trial Magistrate acknowledges being in receipt of a letter dated 30th March 2011 from the Nairobi County Attorney seeking to have any evidence given by their staff against them disregarded yet the learned trial Magistrate relied on the evidence of PW5 and PW6. He added that since the then City Council of Nairobi was a Defendant and it did not enter appearance, it was improper for the 1st Respondent to purport to summon handpicked officials of the 2nd Respondent and purport to make them her witnesses.

8. Counsel further submitted that the Appellants were only required to demonstrate the allotment and compliance with the conditions which they did and produced the letters of allotment, receipts of payment of premium, receipts showing payment of ground rent and a letter showing that the 2nd Respondent had no objection in title being issued to the Appellants. He urged the court to consider the case of *Douglas Kariuki v Francis Iregi Mwangi* [2018] e KLR and find that the Appellants had uncontroverted documents.
9. It was counsel's further submission that the 1st Respondent had not demonstrated ownership on a balance of probabilities. He pointed out that while she claimed having purchased the suit plot from one Anne Muthoni Thuku who was said to be an original allottee, she did not establish that the said Anne had paid the requisite stand premium and rent in accordance with the purported letter of allotment. He further submitted that the 1st Respondent produced receipts dated 27th May 2008 and 8th September 2009 for payment of stand premium which was belated as it was paid after this suit had commenced. He added that the 1st Respondent's lease executed on 17th November 2009 was belated and goes to show that it was made for purposes of the suit and could not upset the Appellant's position.
10. On whether the Magistrate misapplied provisions of Section 3 (3) of the Law of Contract, he submitted that the said provision is not applicable in this case as neither the Appellant's case nor that of the 1st Respondent's was based on contract as both were founded on tort of trespass.
11. He further submitted that the 1st Respondent's case was based on fraud as she asserted that the allotment of the suit land to the Appellants was fraudulent, irregular, improper and unlawful. He added that she needed to demonstrate at a degree higher than the standard of a balance of probabilities but lower than reasonable doubt. He relied on the case of *Peter Kiriga & 3 Others v Ada Transporters Limited & Another* [2021] e KLR. It was his submission that there is no misconduct demonstrated against the City Council of Nairobi or the Appellants. It was also his submission that the 1st Respondent's suggestion that being a second allotment, the Appellants could not be issued with an allotment letter greatly influenced the Magistrate to reach that finding yet there is no standard procedure or law to show that it could not be the case. He also submitted that the top right hand corner of the allotment letter carried the word; 'transferred from Hesbon Nganyi Ref C.V 103/5/25/016 dated 13th December 1995' which shows that the right hand corner could be used to make reference to previous or subsequent allotments.
12. Counsel for the Appellants also submitted that the learned trial Magistrate disregarded evidence challenging the 1st Respondents documents. He pointed out that there was no indication of a transfer to the 1st Respondent of the allotment letter issued to Ann Muthoni Thuku. He also pointed out that the 1st Respondent was unable to prove that she had paid for the beacon certificate or had a receipt for the same. He added that the 1st Respondent's building approval dated 30th October 2009 was obtained while the parties were in court and contrary to its own condition (q) which stated, "The plot not constituting part of any disputed private or public utility land /allocations".



The 1st Respondent's Written Submissions

13. They are dated 1st December 2021. Counsel for the 1st Defendant raised the following issues for determination: -
 - a. Letters of allotment, their authenticity and validity.
 - b. Validity of contract Vis a Vis the requirements of Section 3(3) of the Law off Contract Act, Cap 23 of the Laws of Kenya.
 - c. Possession and whether it gives/passes good title.
 - d. Seeking requisite approvals from the Nairobi City Council (i.e lessor) Respective/consecutive stages to be taken thereof and ultimate payment of the requisite charges/fees and being issued with the approval/correct approval documents and/or title document;
 - e. Omnibus issues arising out of abnormal and /or suspicious circumstantial evidence and the contradictions by the Appellant thereby tilting the scale of justice in favour of the 1st Respondent.
14. Counsel further submitted that the possible explanation for the presence of three allotment letters issued over the suit property is forgery and not double allocation as contended by the Appellants for reason that PW5 and PW6's testimonies point to a finding that the Appellant's letter of allotment which contains a reference No.CP & ARCH/06451 is a forgery as it doesn't conform to the norm of allotment letters issued by City Planning Department which are referenced 'CPD/.../...'. He added that it was the City Planning Department's norm to endorse a transfer on the allotment letter as opposed to issuing a new allotment letter to a transferee, thus the fact that the Appellants are in possession of two allotment letters is questionable. He also submitted that the Appellants' letter of allotment issued on 16th November 1998 should have had the sitting Town Clerks signature at the time who was Mrs. Zipporah Wandera. He Pointed out that the Appellant's allotment letter was instead signed by one H. Oluoch who was not the sitting Town Clerk at the time, therefore it could not have been genuine.
15. On the issue of validity of a contract, he submitted that for a contract to be valid, the three basic elements of offer, acceptance, and consideration must be met. He further submitted that there was no evidence of acceptance of the allotment letter issued to Mr. Hesbon Nganyi on or about 13th December, 1995 and hence the suit plot was available for allocation to the 1st Respondent. He added that for a contract to be valid, there must also be proper execution in terms of Section 3(3) of the Law of Contract Act. It was his submission that the learned trial Magistrate found the sale agreement with respect to the Appellants lacking in that they were not signed by the 1st Appellant and the signature of the 2nd Appellant and that of the said Hesbon Nganyi is not attested by an independent witness therefore offending section 3(3) of the Law of Contract Act. He also submitted that the suit land was vacant when the 1st Respondent bought it and she acquired all the requisite approvals from Nairobi city Council.
16. The Appellants also filed submissions in response to the 1st Respondents submissions. They are dated 11th April 2022.
17. 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 witness testify and make allowance for that. In *Sell & Another vs Associated Motor boat Co. Ltd*



§ *Others* [1968] EA 123 cited in *Barnabas Biwott vs Thomas Kipkorir Bundotich* [2018] eKLR this principle was evaluated thus:-

“This court is not bound necessarily 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 witness and should make due allowance on this respect.....”

18. Similarly, in *Peter v Sunday Post Ltd* [1958] EA 424 cited by the Court of Appeal in *Aroni Sure v Gesare Nyamaiko* [1988] e KLR; O’Conmor 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 Appellants record of appeal”.

19. It is the Appellants’ case that they bought the plot from councilor Hesborn Nganyi who by then had not paid rates which rates were cleared together with transfer fees in 2008. It is their case that they had taken possession in 1998, cleared the bush and did excavation before putting up a container as a site office. The 1st Appellant in the lower court told the court that the letter of allotment was issued to Hesbon Nganyi; that he and the 2nd Appellant were also issued with a letter of allotment dated 16th November 1998. I have gone through the letter of allotment dated 13th December 1995 on page 61 of the Record of Appeal, issued to Hesbon Nganyi. From the writings on it by various officers of the then Nairobi City Council, the payments were assessed/made on 26th November 2007. This means that payments were made more than 12 years after the letter of allotment was issued to him.

20. I have also gone through the letter of allotment issued to the Appellants. The same is dated 16th November 1998 on the top right hand, it is written.

“Transferred from Hesbon Nganyi. Letter Ref CV1013/S/26/016 dated 13th December 1995”.

PW5 Benson Gichoni told the court this was an anomaly since a transfer would not necessitate an issuance of another letter of allotment. There are two receipts on pages 49 and 50 of the Record of Appeal which show that payments were made in 1997 yet the assessment on the first letter of allotment to Hesbon Nganyi was done in 2007.

21. Even if the Appellants sought to rely on the second letter of allotment dated 16th November 1998 still the receipts read 1997 a year before the letter of allotment was issued.

22. PW5 also stated that the letter of allotment dated 16th November 1998 was not genuine or complete since it is signed by H. Oluoch Town Clerk yet the Town Clerk at that time was one Mrs. Zipporah Wandera. I find that the learned trial Magistrate did not err in finding that the letter of allotment ought not to have been issued in the names of the Appellants if indeed it was a transfer from the said Hesbon Nganyi.

23. Another issue that was considered by the learned trial Magistrate was that the two documents presented by the Appellants as evidence that they had bought the plot from Hesbon Nganyi were not in compliance with Section 3(3) of the *Law of Contract Act*. This was the basis of CMCC 1856 of 2019. The two letters dated 19th November 1998 and 26th November 1998 were not witnessed though



- Hesbon Nganyi confirms receipt of the purchase price for the Plot. I find that the learned trial Magistrate did not err in finding that the said agreement was not witnessed. This was in contravention of the section 3(3) of the Law of Contract Act. The two letters were signed by the 2nd Appellant only.
24. I am also of the view that the 1st Appellant confirmed at the trial that he did not have a beacon certificate for the said plot. The 1st Respondent on the other hand traces her title to a letter of allotment dated 6th November 2002 issued to Ann Muthoni. She exhibited a sale agreement between herself and the said Ann Muthoni (original allottee). The beacon certificate was signed on 4th January 2007 and a certificate of lease issued to her on 17th November 2009.
25. According to PW5 the lawful owner of the suit plot is the 1st Respondent as per the records held at the City Council of Nairobi. The 1st Respondent presented various receipts confirming payment, building plans and application for approval.
26. The Appellants contended that they bought the suit land from Hesbon Nganyi who was allotted the suit plot in 1995. The 1st Respondent contended that she bought her suit plot from one Ann Muthoni Thuku who was the allottee of the suit plot vide the allotment letter dated 6th November 2002. There is an allotment letter on record issued to Hesbon Nganyi. It is dated 13th December 1995. In Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR, the Court of Appeal, while deciding between competing interests in respect to two letters of allotment stated, "It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held."
27. From the above stated authority, the Appellants and the 1st Respondent were obliged to prove that indeed the vendor who sold them the suit land complied with the conditions contained in their respective allotment letters dated 13th December 1995 and 6th November 2002. As per the allotment letter issued to Hesbon Nganyi, charges of Kshs. 40,166/= were payable to Nairobi County Council within 30 days of the issuance of the letter. There is a receipt showing the 2nd Respondent received kshs.40, 166/= from Hesbon Nganyi on 23rd May 1996. The money was received for stand premium and ground rent. The money was paid outside the conditional period and PW6 stated that it was paid without the said allottee first seeking clearance from the 2nd Respondent. There are entries on the allotment letter issued to Hesbon Nganyi indicating payments were made in 2007. I have considered the evidence in totality and I find that, Hesbon Nganyi did not comply with conditions on the allotment letter regarding payments. The entries made on his allotment letter in 2007 are also questionable.
28. The courts have held that once land is allocated and there is compliance with conditions contained in the allotment letter, it cannot be available for allocation. In Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004 cited in Lucy Njeri v Isaac Wangoya Mwangi & another [2018] eKLR, the court stated, "...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. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled."
29. The 2nd allotment letter issued to the Appellants herein is dated 16th November 1998, It has an entry stating; "transferred from Hesbon Nganyi...dated 13th December 1995". At the bottom left, it is endorsed with the writing, "Paid vide receipt No. Misc.100 TC42644 dated 21st March 1997".



The Appellants contended that the learned trial Magistrate erred when he found that being a second allotment, the Appellant's could not be issued with another allotment letter. I'm inclined to agree with the learned trial Magistrate's finding. I'm guided by the finding in Rukaya Ali Mohamed (Supra) which stated that once allotted, the land would not be available for allocation. The allotment letter issued to the Appellants has entries connoting that it was a transfer yet they were required to meet conditions including paying stand premium and ground rent. It would not be possible to allocate the suit land twice. Had the allocation to Hesbon Nganyi been regular then the 2nd Respondent would have received payments and therefore relinquished its interest over the land.

30. Hesbon Nganyi could not transfer his interest to the Appellants since he had no interest pursuant to his failure to comply with the conditions in his letter of allotment. The law of contract is therefore inapplicable. The allotment letter held by the Appellants is irregular thus the issue of double allocation does not arise. The 1st Respondent was able to trace how she acquired the lease as it is pegged on transfer of Ann Muthoni's interest in her allotment letter.
31. In conclusion, I find that the learned trial Magistrate correctly considered all the evidence presented before him in reaching the decision made. I find no reason to fault his decision in awarding the suit plot to the 1st Respondent herein.
32. I note that the 1st Appellant at the trial sought to discredit the evidence of PW5, Benson Gichohi since he was a City Council employee hence he could not testify against the employer. It is on record that the author of the said letter was never called to testify. PW5's testimony was therefore not challenged. He confirmed that as per the records on the then City Council of Nairobi the owner of the suit plot was the 1st Respondent.
33. I find that the Appellants were unable to prove the documents held by the 1st Respondent had been fraudulently obtained.
34. The upshot of the matter is that I find that the learned trial Magistrate did not err in finding that the 1st Respondent was the lawful owner of the suit plot.
35. I find no merit in this Appeal and the same is dismissed with costs to the 1st Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 12TH DAY OF MAY 2022.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Thuita for the Appellants

Mr. Orlando for the 1st Respondent

No appearance for the 2nd Respondent

Steve - Court Assistant

