



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Appeal 146 of 2007

GABRIEL NDOLO 1st APPELLANT

BEATRICE ACHIENG' 2nd APPELLANT

VERSUS

JOHN NANDASABA RESPONDENT

(Being the first appeal from the Judgment and Decree of Honourable Mrs. H. I. Ongu'udi, Chief Magistrate delivered on 15th day of November 2007 in the original subordinate court case number Kisumu CMCC No. 50 of 2006)

JUDGMENT

This appeal arises from the Judgment and decree of the Chief Magistrate in **Kisumu CMCC number 50 of 2006** in which the appellants, **Gabriel Ndolo** and **Beatrice Achieng**, were the plaintiff while the respondent **John Nandasaba** was the defendant.

In the said suit, it was alleged in the plaint dated 3rd February 2006 that at all material times the second appellant and another

(now deceased) were registered as the joint proprietors of the leasehold interest in all that property known as **KISUMU MUNICIPLAITY / BLOCK 11/ 212** within Kisumu Municipality measuring approximately 0.1332 hectares.

The lease was for a term of ninety-nine (99) years with effect from 1st January 1999 with a rental payment of Kshs. 8,000/=per annum but on or about the month of December 2002 the appellants upon conducting a survey discovered that the respondent had taken possession of the said parcel of land and houses thereon without their consent, authority, knowledge and/or without any colour of right and had continued being in occupation hence preventing them (appellants) from enjoying quiet and peaceful possession of the property and income arising therefrom by way of rent.

The appellant's contended that as a result of the respondent's act of trespass they suffered loss of income at the rate of Kshs. 15,000/= per month. Consequently, they prayed for judgment against the respondent for special damages, general damages for trespass and an order directing the respondent, his agents/employees and/or servants to vacate the suit premises and in default an order directing their eviction therefrom.

The defendant / respondent filed a defence on 28th March 2008 contending that he was a stranger to the appellants' allegations regarding the proprietorship and the leasehold interest of the suit property. He further contended that he did not take possession of the suit property and that he was the owner of property known as **Plot Number "B" KISUMU MUNICIPALITY** for which he had a lease of ninety-nine (99) years with effect from 1st October 1999. He therefore prayed for the dismissal of the appellants' suit with costs.

After the trial, the learned Chief Magistrate dismissed the appellants' case with costs after finding that it had not been proved on a balance of probabilities.

Being dissatisfied with the decision, the appellants' preferred nine grounds of appeal contained in the memorandum of appeal filed herein on the 17th December 2007. These were argued on behalf of the appellants by **Mr. Ragot** learned Counsel.

The respondent opposed the appeal. His case herein was argued by learned Counsel, **Mr. Khakula**.

A first appeal such as the present one is normally in the nature of a re-hearing. It is therefore the duty of this court to re-evaluate the evidence, analyse it and come to its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. (**See, Selle & Another =vs= Associated Motor Boat Co Ltd & others [1968] E A 123 and Kogo =vs= Nyamogo & Nyamogo Advocates [2004] 1 KLR 367**)

To that effect, the case for the appellants was founded on the facts that follows:-

The first appellant, **George Okombo Ndolo (PW1)** was the administrator of the estate of his late wife Jane Achieng who together with the second appellant are the registered proprietors of the material parcel number Kisumu Municipality Block 11/212 as per a certificate of lease dated 2nd April 2002 (PEX2). A letter of allotment had previously been issued to the first appellant's deceased wife and the second appellant. The letter was dated 7th January 1999. It was for an unsurveyed residential "Plot B" in Kisumu Municipality and had the conditions and a sketch of the plot (P.EX 4 a – c). The sketch showed that the plot was situated at the corner of a road known as Adaga Gotuma Road (sic) and another.

A copy of a letter from the commission of lands dated 21st March 2002 (P. EX 5) instructed the land Registrar to register the lease respecting the plot and in the month of December 2002 the first appellant took possession of the plot but found some people in occupation. With the assistance of the lands Registrar one Mr. Langat and a surveyor called Mr. Opiyo, the first appellant identified the plot. The people occupying the plot were two ladies called Susan Nyongesa and Liz Ndombi. They informed the first appellant and his late wife that they were living there on behalf of the respondent. They had not been given authority to occupy the property by the first appellant and neither had the respondent.

The first appellant consequently confronted the respondent who requested for and was handed the necessary documents and appeared satisfied. However, the respondent and his agents and / or servants did not vacate the property. Instead, a police officer was posted there to guard the property.

The first appellant instructed his lawyers who forwarded a demand letter to the respondent who responded to the effect that the material plot had been allocated to him and that he was in possession of the necessary documents which included a letter of allotment dated 30th September 1999 addressed to one John Masolo Timothy respecting an unsurveyed residential "plot B" Kisumu Municipality (DEX1). The first appellant contended that the sketch contained in that letter of allotment (D. EX 1) did not tally with the one contained in his letter of allotment (P. EX 4 a – c). He also contended that his letter of allotment was issued first as compared to that of the respondent which was issued nine months later. He further contended that he lost occupation of the suit premises and its monthly rent of between Kshs. 15,000/= to Kshs. 20,000/= per month given that it was situated in the Milimani area of Kisumu Municipality.

A surveyor **Joseph Robens Rheins Aganyo** (indicated as PW1 but should be PW2) testified that he owned a firm known as J. R. R. Aganyo & Associate Surveyors based in Nairobi and on instructions from the appellants carried out a survey of a plot indicated in a letter of allotment containing special conditions and a part development plan (P. E X 4 a – c).

The plot was identified by the sketch-plan [P. E. X. 4 (c)] to be that at the junction of Adala Otuko road and Got Ouma road and was a corner plot.

On completion of the survey, the surveyor completed the necessary calculations and computations and forwarded them to the Commissioner of lands. He said that the plot was number 12 and adjacent to plots number 155 and 156. He said that the plot shared a common boundary with plot number 155.

He also said that the plot appears as plot number 212 in the registry index map (P. EX 8) and is along Adala Otuko road and Got Ouma road.

After the testimony of the surveyor, the court moved to the scene so that he (surveyor) could physically identify the plot he surveyed. Thereafter, the appellants closed their case.

The respondent, otherwise known as **John Nandasaba Timothy Masolo (DW1)** stated that he was a public servant and in the year 1999 he received a letter of allotment dated 30th September 1999 offering him a ¼ of acre plot with a house. The exact acreage of the plot was 0.102 hectares. He accepted the offer on the 30th October 2002 (See D. EX 2) and forwarded through a banker's cheque a payment of Kshs. 409,710 on the 5th November 2002. The forwarding letter and a copy of the cheque were tendered in evidence (D. EX 3 a – b) and so was the payment receipt [D. EX 3 (c)].

The respondent went on to state that the allotment was subject to formal acceptance and payment of premium, rent, conveyance fees, registration fees, stamp duty, planning, approval fee and value of the building all totaling Kshs. 409,710/=. He visited the site after the acceptance. He produced a plan of the area marked "plot B" and a sketch (D. EX 1 a – b). He occupied the premises without any interruption until he received a letter of complaint from the first appellant sometime in March 2006. The first appellant was his workmate in the same station. He had not received any objection concerning the houses standing on the plot. He contended that the appellants were allocated a ¼ of an acre and it was only the commissioner of lands who could explain the appellant's allotment letter.

He further contended that there was a double allocation of the plot and that the next document which was to be issued was the lease but with the coming into power of a new Government all land allocations were halted. He was only waiting for his title to the land and could not have caused the appellants to lose rent since the premises belonged to him and was allocated to himself by the Government.

The respondent denied that he was a trespasser and contended that the Government had not asked him to leave the house or surrender it. He contended that the rightful defendant should have been the person responsible for the allotment of the plot.

A Senior Lands Officer **Samuel Muchiri Mwangi (DW2)** and not DW1 as indicated in the record) based in Nairobi stated that he dealt with land administration and preparation of title documents countrywide and that the material plot (i.e. unsurveyed Res. Plot No. B Kisumu Municipality) was allotted in 1999. He also stated that their records showed that the plot was allocated to John Masolo Timothy and measured 0.102 hectares. It had a structure and therefore a payment of Kshs. 409,710/= was expected inclusive of the value of the house on the plot.

The lands officer went on to state that a letter of acceptance was received from the respondent who effected the necessary payment on the 5th November 2002. He (lands officer) further stated that the plot belongs to the respondent who was required to produce some documents to facilitate the preparations of a lease. He implied that the appellants' lease [P. EX 2 (b)] was not properly issued as it was not accompanied by a properly sealed Registry index map (RIM). He contended that the lease could not

come on its own and since the map was not complete the lease could never have been processed. The lands officer's evidence culminated the case for the respondent.

Having considered the entire evidence, the learned trial Magistrate concluded that the appellants had failed to satisfy the court on a balance of probabilities that the plot referred to in P. EX 4 a (appellants' letter of allotment), P.EX 2 (b) (appellants' lease certificate) and D. EX 1 (a) (respondent's letter of allotment) is one and the same plot. As a result, the appellants' case was dismissed with costs. In arriving at the said conclusion, the learned trial magistrate rendered herself thus:-

“Before me are two (2) allotment letters one is P.EX 4 4a – area covers 0.1332 hectares amount to be paid is Kshs. 56,920.00. It has no buildings on it. The second one is – DEX 4 1 (a) area covers 0.102 hectares amount to be paid is Kshs. 409,710/= including 350,000/= for value of buildings. These two allotment letters cannot be referring to one and the same plot. Noo!!

The acreage is totally different and one has buildings while the other one has no buildings. The acreage of one is 0.1332 while the other is 0.102 hectares.

In spite of the parties saying that is their bone of contention I find that the two letters refers to two totally different plots and it's the duty of the Allottees to go back to whoever allotted them the plots to show them where their plots are.

We can only talk of double allotment when all the features on the plot are one and the same i.e. the ground and the documents.

And even if it was admitted to be a case of double allotment the parties would still have to go to the allotting agency to sort out the mess. In this case this would be the Commissioner of lands.

It's true that the plaintiffs have a lease document for the land Kisumu Municipality / Block 11/212 measuring 0.1710 hectares which is also different from the acreage of 0.1332 hectares. There is no letter to explain this disparity; it's again the office of the Commissioner of lands to explain this.

The law under Section 27 and 28 RLA says such title as what the plaintiff has is indefeasible. It is yes, when it is referring to Block 11/212 and not unsurveyed Residential Plot number “B” Kisumu Municipality. The confusion must be cleared. The Commissioner of lands being the issuing authority of both the letters of allotment and the certificate of lease ought to have been joined as a party by the plaintiff in these proceedings. That is the only way these (sic) court would have made orders compelling him or her to do certain things as pertains to this case. We are all aware that the court cannot compel one who is not a party to proceedings to do certain acts”.

It is apparent that the driving force for the foregoing findings was the identification of the actual plot allocated separately to the appellants and the respondent. Each alleged that the plot claimed by one was the same one claimed by the other.

The learned trial Magistrate considered the aspect of double allocation of the same plot but was doubtful due to the fact that the allotted plots did not have similar features both on the ground and the available documents. In any event, the learned trial Magistrate was of the view that any difficulties arising from the suspected double allotment ought to have been sorted out by the Commissioner of lands who was the allotting authority and who ought to have been a party to the suit.

While acknowledging the existence of a certificate of lease issued in favour of the appellants, the learned trial Magistrate nonetheless found that the same related to a plot known as Kisumu Municipality Block 11/212 measuring 0.1710 hectares and not a plot measuring 0.1332 hectares as per the appellants' letter of allotment [PEX 4 (a)].

May it be noted that the respondent's letter of allotment [D. EX 1 (a)] also had a different measurement i.e. 0.102 hectares.

All these were findings of facts which were borne out by the evidence adduced and the documents exhibited during the trial.

The court visited the scene to verify the facts. What became of that visit was that both the appellants and respondent were referring to one and the same plot. Each laid a claim to it on the basis of their respective letters of allotment both of which were issued in the year 1999 although the appellants' letter was the first to be issued.

In the case of **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982 – 88) 1 KLR 278**, it was observed by the Court of Appeal that:-

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it was based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”.

In as much as the identity of the allotted plot or plots remained unestablished by the evidence, it was difficult to state with certainty that the lease certificate issued in favour of the appellants related to the same plot as that indicated in their allotment letter (P. EX 4 (a)). It could also not be stated that the lease related to the plot indicated in the respondent's letter of allotment (ID. EX 1 (a)).

It seems that there was a mix up somewhere and this was occasioned by the commissioner of lands in not identifying the actual plot or plots to the appellants and the respondent.

The first appellant stated in court that he took possession of the plot in December 2002 and found some people already there. He said that he identified the plot allocated to him with the assistance of land Registrar, one Mr. Langat and the surveyor, one Mr. Opiyo. He found two ladies already occupying the house standing on the plot. The said Mr. Langat and Mr. Opiyo were not called as witnesses to show how they identified the plot to the first appellant and whether or not it was the same plot that was also allocated to the respondent. These were vital witnesses who would have resolved the puzzle surrounding the plot.

The respondent stated that he accepted the offer made to him regarding the plot, made the necessary payments and went into occupation of the house standing on the plot sometime in November 2002.

So, the respondent was in occupation of the property prior to the appellants. However, the appellants obtained a certificate of lease dated 2nd April 2002 [PEX 2 (a)] respecting plot number Kisumu Municipality / Block 11/212 which they contended is the plot that was allocated to them vide the letter of allotment [PEX 4 (a)].

The respondent also implied that Kisumu Municipality / Block 11 / 212 is the same that was allocated to him vide another letter of allotment [D. E. X 1 (a)].

It would appear that both the appellants and the respondents took possession or attempted to take possession of one and the same plot after the certificate of lease had been issued. The learned trial Magistrate appreciated the import of Sections 27 and 28 of the Registered Lands Act (RLA) but noted that the provisions could not apply in the present circumstances since Kisumu Municipality Block 11 / 212 was not proved to be that mentioned in the appellants' letter of allotment. Similarly, the plot was not the one mentioned in the respondent's letter of allotment.

Given that both the appellants and the respondent were claiming one and the same plot under cover of separate letters of allotment and that both confirmed as much when the court visited the scene, the big question was whether the plot Kisumu Municipality Block 11/212 was the same plot as that allotted to the appellants and the respondent in the year 1999.

The learned trial Magistrate was of the view that the said plot number Kisumu Municipality Block 11 / 212 was different and separate from that allocated to the appellants and by extension the respondent. As a

result, the appellant's case against the respondent had to fail.

In determining the relationship (if any) between Kisumu Municipality Block 11/212 and the plot or plots allotted to the appellants and the respondent it was imperative that the information contained in the lease document and that contained in the two letters of allotment be closely examined and more so, the description of the property in terms of plot number and measurement as well as its location. Approved maps and/ or plans would have assisted in the determination of the actual location. The description of the plot at the time of the allotment was **“unsurveyed residential Plot “B” Kisumu Municipality”**.

Being unsurveyed, the plot could not have had a parcel number such as that contained in the certificate of lease [P.EX 2 (a)] or the survey map (P.EX 7) or the registry index (P.EX 8). The measurement given in the letters of allotment are different implying that these were different plots. However, the description of the plot in both letters of allotment strongly indicated that the plot was one and the same despite the difference in measurement. This was confirmed without dispute to have been a double allotment of a single plot.

A variation of, measurement would not by itself determine the identification of a plot.

If at all, Kisumu Municipality Block 11/212 was the same as that allotted to both the appellants and the respondent then invariably the issuance of the certificate of lease extinguished any interest or claim that the respondent may have had in the plot but only if the certificate was not obtained by mistake, fraud or misrepresentation. A registered proprietor of land would have the protection granted by Sections 27 and 28 of the Registered Land Act.

After all, the registration of title to land is absolute and indefeasible to the extent that the creation of such title was in accordance with the applicable law and it is demonstrated satisfactorily that such registration was not procured through fraud and / or misrepresentation.

It was the evidence of the surveyor (PW1) and perhaps the lands officer (DW1) which was expected to establish a credible link between the plot allocated to both the appellants and the respondent and the plot described as Kisumu Municipality Block 11/212 for which there exists a lease.

The surveyor (PW1) stated that he was instructed by the appellants to survey the plot indicated in their letter of allotment [P. EX 4 (a)]. He was handed over the said letter containing special conditions ([P. EX 4 (b)] and what was described as a part development plan ([P. EX 4 (c)]).

The so called part development plan disclosed the locality of the plot but it was neither authenticated nor approved.

The surveyor went on to say that he collected the survey data of previous surveys prior to embarking on the actual survey exercise. The data was not availed to the court.

After the survey, the surveyor forwarded the calculations and computations to the Commissioner of lands. He produced a survey plan (P. EX 7) and was categorical that he surveyed a plot with the number 12. He said that the plot shown on the deed plan

[P. EX 4 (c)] appeared in the said survey plan. He also produced the registry index map (P. EX 8) showing that he surveyed a plot number 212. He confirmed that parcel numbers are usually allocated by the Director of survey and remain the property of the Commissioner of lands. He confirmed that the plot surveyed by him consisted of a house. In cross – examination, the surveyor stated that the survey was carried out in the absence of the allottee and that no Government official was involved. He also stated that the survey involved plots number 212 and 213 and was completed on the 29th November 2000. He further said that he was the person who identified the plot to the first appellant. He took the court to the scene and pointed out the plot he surveyed which was the same being claimed by the appellants and the respondent.

The lands officer (DW1) stated that the plot described as “unsurveyed residential plot Number “B” Kisumu Municipality was allotted to the respondent as per the allotment letter [D. EX 1 (a)] and that it measured 0.102 hectares with a structure erected thereon. He said that a payment of Kshs. 409,710/= was effected by the respondent to cover for the land and the house thereon and all that remained was the preparation of the lease in favour of the respondent. He went on to state that the appellants’ letter of allotment did not show the existence of any building and must have been referring to an empty space. He said that the allottee was required to secure a surveyor after the necessary payments had been made after which a title would be prepared upon completion of the survey.

The lands officer further stated that a title would be prepared after the necessary report from the Director of Surveys. He said that no indent was issued concerning the material plot and that the survey plan (P. EX 7) was to be forwarded to the Director of Surveys for his final approval which was not the case herein. The lands officer contended that the survey plan (P. EX 7) was still being processed and as regards the lease [P. EX 2 (b)] he mentioned that it was not accompanied by the Registry Index Map (RIM) properly sealed. He said that any change of acreage (measurement) from 0.1332 hectares [see P. EX 4 (a)] to 0.1710 (See P. EX 2 (a) & (b)] required approval and/or acceptance in order to take care of any encroachment.

In cross – examination, the lands officer confirmed that the survey plan (P. EX 7) was prepared by a licensed private surveyor who was appointed by the allottee and became the agent of the Director of Surveys and refereed the survey plan to the said Director. He stated that all approvals are done by the said Director. He pointed out that the Government did not challenged the issuance of the lease ([P. EX 2 (b)] which was in essence valid. Nonetheless, he contended that the plot belonged to and was vested in the respondent as he had already fully paid for it.

In this court’s opinion, the aforementioned two witnesses (i.e. the surveyor and the lands officer) did not adduce cogent credible evidence which could be relied upon to show and prove that Kisumu Municipality Block 11 / 212 is the actual plot that was allotted to the appellants vide their letter of allotment or even the respondent vide his letter of allotment. They may have been allotted one plot but there was no proper or any identification of the same by the allotting authority i. e. the Commissioner of Lands. It may as well have been a phantom allotment and what was surveyed could have been a different plot. The validity of the documents produced by the surveyor mostly the survey plan (P. EX 7) and the registry index map (P. E X 8) was doubtful.

The actual survey was even not conducted by the surveyor (PW1) but by his assistant one Mr. J. Nyabola who did not testify and say who identified the plot for him.

Further, there was no final approval of the survey plan (P. EX 7) which essentially related to parcels No. 212 – 213. Where did these numbers come from and how were they related to the description of the plots contained in the two letters of allotment???

The registry index (P. EX 8) was said to be an amended map.

The possibility that a wrong plot was identified for the purposes of the survey could not be overruled. It was therefore uncertain whether the appellants’ certificate of lease [P. EX 2 (b)] related to the plot that was allotted to them being the same plot that the respondent also claimed.

Even if a registered proprietor of a parcel of land enjoys an absolute and indefeasible title, there was herein inadequate and non-credible evidence to show that Kisumu Municipality Block 11/212 is the same plot that was allotted to the appellants and by extension the respondent.

The blame for the costly mistake lay with the Commissioner of Lands.

The question of the respondent trespassing into the appellants plot could not in the circumstances arise.

If anything, it is both the appellants and the respondent who are trespassing on public property as what

was allotted to them was not identified by the public authority who made the allotment. The remedy for their predicament lies with the Commissioner of lands.

Otherwise this court would have no good reason to interfere with the decision of the learned trial magistrate.

As to damages, there was no cause for them since the tort of trespass had not been established against the respondent.

If however, trespass had been established, the damages claimed were special damages for loss of rental income at the rate of Kshs. 15,000/= per month from January 1999 to the date of giving vacant possession. These had to be specifically established and proved by necessary documentary evidence or otherwise.

Other than stating that the material property was situated within the Milimani area of Kisumu and would thus fetch a rental income of approximate Kshs. 15,000/= to Kshs. 20,000/= the appellants did not produce tangible evidence to establish the fact. It is a well known fact that rental income does not remain constant and fluctuates nearly all the times. The appellants were not entitled to special damages which had not been proved although specifically pleaded.

The general damages for trespass were claimed independent of the special damages.

The multiplier approach adopted by the appellants' counsel for the award of the general damages was undesirable and was in effect a disguised claim for special damages.

A global approach was more appropriate and in that regard an award of Kshs. 108,000/= reflecting at Kshs. 1,000/= per month for nine (9) years would have been adequate.

All in all, this appeal is dismissed with costs.

Dated, signed and delivered at Kisumu this 6th day of November 2009.

J. R. KARANJA

JUDGE

JRK/aao