



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

Civil Appeal 64 of 2002

MBARI YA KIBUGI SELF HELP GROUP APPELLANTS

versus

GATIMU WOMEN GROUP RESPONDENTS

(Being appeal against the Judgment of L. NYAMBURA,

Resident Magistrate, in the Senior Principal Magistrate's

Civil Case No. 108 of 2000 at Muranga)

JUDGMENT

This is an appeal from the Principal Magistrate's Court Muranga. The Appellant had filed a plaint in that court seeking for orders that it be declared the owner of plot between number 87 and T92 at Kingari Market. It is pleaded in that plaint that on or about 30th September 1998 the Appellant was allocated a plot that lay between the said plots. The allocation was by the Muranga County Council. After that allocation it is pleaded that the Appellant took possession and erected thereon iron sheet structure. Further that the Appellant deposited 5 loads of building stones with an intention of building a permanent building. On 3rd February 1997 the Appellant made payment of Kshs. 1000 to the Council for the purpose of the Council visiting the plot to confirm the allocation. Thereafter Muranga County Council split into two and the plot which had been allocated to the Appellant fell on the area of jurisdiction of Maragwa County Council. The plaintiff further stated that on 23rd March 1999 Maragwa County Council allocate the Appellant with another plot no. T147B. On 31st January 2000 the Appellant pleaded that the defendant entered their original plot between plot No. T87 and T92. In so doing they removed the building stones without the Appellant's consent. It is the result of that removal and subsequent taking possession of their original plot that provoked the suit in the lower court. The respondent in their defence in the lower court denied the Appellant's claim for a declaration. In the defence the Respondent pleaded that the Appellant had earlier been allocated with an un-surveyed plot on temporary basis. That the plaintiff occupied that plot as licensee of the council. That license was revoked by the Council. The Respondent denied removing the building stones of the appellant. Rather the respondent said that the stones belonged to one John Mwangi Njoroge. In their defence the Respondent said that the plot in question was allocated to them by Maragwa County Council. The lower court on hearing the case made a finding that the Appellant had failed to prove its case on a balance of probability. The same was dismissed. It is that dismissal that had led the Appellant to file the present appeal.

The evidence that was tendered before the lower court by the appellant was that the Muranga County Council had allocated them the un-surveyed plot between plot no. T87 and T92. Later that plot was allocated to Respondent. PW 1 was the Chairman of the Appellant group. He described the group as a self-help group registered at the Ministry of Culture and Social Services. He said that the group was given that un-surveyed plot at Kangari village for a temporary charcoal banda. That allocation was on 30.9.1988. On that plot the group constructed temporary structure. Later the group bought building stones which were removed by the respondent. The group paid to the council a visiting fee of Kshs. 1000. The purpose of that visit was for the council to confirm that the plot belonged to the group. Subsequently the group wrote to the Clerk of Maragwa County Council by a letter dated 9th September 1996. And the Council responded to that letter by their letter of allocation dated 7th June 1999 whereby the group was allocated plot No. T147B. PW 1 said that was the wrong plot number. That it did not correspond with the plot allocated to them by Muranga County Council. The Council failed to give them explanation why they had allocated their original plot to the Respondent. PW 2 was the councillor of Kingare Electoral Ward at the time when allocation was done by the Council. PW 2 gave evidence of how the Council normally allocated plots. He said that the process began by application for allocation being received from applicants. The applicants were required to pay the requisite fees and thereafter the application was considered by the county council. Consideration of the application was done after a visit of the site by the County Council. He said that he knew of the Appellants' group and was aware that in 1988 they were allocated an open space between plot no. T87 and T92. He quoted the minute relating to that allocation. The appellant later applied for a permanent allocation. The Council allocated to them plot No. T147B Kingare. The previous open space allocated to the Appellant was for temporary banda. He confirmed that the Appellant had constructed semi permanent structures.

In their defence the Respondents through their Chairlady stated that they too were registered with the Ministry of Culture and Social Services. She stated that they had applied for a plot and were allocated plot no. T87B by Maragwa County Council. That when they were allocated this land the area had been un-surveyed. She denied that there were any stones on that plot. On being allocated they constructed a permanent foundation but were stopped by the court from carrying out any further construction. DW 2 was the clerk to Maragwa County Council. He said that the County Council by virtue of **Section 144** of the Local Government Act had allocated the plot in question to the respondent under a lease of 99 years. The condition of that allocation was that the Appellant would within 12 months develop the plot. He confirmed that the plot belonged to the Respondent. That the previous allocation to the Appellant was under temporary Occupation Licence. In essence that meant that they could use the space for temporary charcoal or timber banda. He said that the Council had no obligation to allocate that plot to the Appellant when they apply for permanent allocation. DW 3 was the Surveyor who confirmed that the plot in question was surveyed and allocated to the Respondent.

The Appellant by their Memorandum of Appeal have raised five grounds.

Ground no. 1: *The learned trial magistrate erred in law and fact in failing to hold that the appellants had all the right to be allocated permanently the plot between No. T.87 and T.92 and the same had been allocated temporarily to them in 1988.*

In this ground the Appellant failed by the evidence tendered to show the law that would compel the County Council to allocate permanently the plot in question to the Appellant. By **section 144(5)** of the **Local Government Act** the local authority can grant any person a license to occupy any land it may possess with the consent of the Minister and where the consent is not obtained not to exceed a period of seven years. That section does not provide that the council is obligated to grant on a permanent basis a plot that had been given under License. From the evidence tendered it is clear that the Appellants were allocated the open space under a License. The nature of a License is such that it is revocable. The definition of a License in the **Black's Law Dictionary** is as follows:-

“License – a permission, usually revocable An agreement (not amounting to a lease or profit).”

Accordingly I do find that there was no legal obligation on the County Council to grant a permanent allocation of the plot to the Appellant. The Appellants' advocate in his submission stated that the period

of occupation by the Plaintiff of the plot was between 1988 and 2000. That is not borne out by the evidence because PW 1 stated that it was 1996 the group wrote to the County Council requesting that they be allocated with the plot permanently. The Council responded by their letter dated 7th June 1999 whereby they allocated the Appellant a plot other than the one they were occupying. However the argument that the Appellant advocate was developing on that submission was that since **Section 144** of the **Local Government Act** provided that temporary allocation with the Minister's permission could only be for seven years, the Appellants occupation being for a period beyond the seven years meant that they were not on the plot under License but rather they had been granted a lease. This argument it ought to be noted was not raised in the lower court. That as it may be I would like to differ with the said advocate. Section 40 RTA provides that a lease for more than 12 months which is not registered is not a valid lease. If then one was to accept the advocate's argument, which I do not, such a lease would be invalid. Whilst still on this ground of appeal the Appellant stated that the lower court failed in fact to find that they had a right to a permanent allocation of the plot. That is far from the correct position for indeed if one was to go by the appellants exhibits the letter from Muranga County Council dated 30th September 1988 clearly indicated that the open space was allocated to the Appellant as a temporary banda. There is nothing else that the Appellant produced before court to show that as a matter of fact they ought to have been allocated on a permanent basis that plot.

Second ground is as follows:-

The learned trial magistrate erred in law and fact in holding Maragua County Council had the power to allocate the said plot to the respondent while the respondent had not specifically applied to be allocated the plot in question.

On this ground from the evidence adduced by personnel of the County Council particularly PW 2 and DW 2 was very clear that the Council had the power in law to allocate the plot to the Respondent. There was no evidence tendered either by the Appellant or the Respondent showing that there was an impediment to that power when there was no application for that specific plot by the respondent. This ground 2 does fail.

Third ground is as follows:-

The learned trial magistrate erred in failing to consider that the Maragua County Council breached the law of natural justice.

In respect of this ground I am in agreement with the Respondent that it was being raised for the first time in this appeal. However having stated in the previous grounds that the county council had the power to allocate to who ever had applied the plot on a permanent basis and bearing in mind that the first allocation to the Appellant was a temporary one there was no breach of nature justice in the allocation to the Respondent. I find that this ground must also fail.

Fourth ground is as follows:-

The learned magistrate erred in law in failing to observe that Maragua County Council was biased in dealing with the Appellants allocation case.

The appellant did not prove by evidence before the lower court that the county council was biased against it. Indeed as correctly stated by the respondent the same was not pleaded in the plaint. Had it been pleaded of necessity they ought to have been particulars of that bias. I am of the view that this ground also must and does fail.

Fifth ground is as follows:-

The learned trial magistrate erred in law and fact in believing the respondents witnesses without any reason.

I have re-examined the evidence of the lower court. In that re-examination and evaluation I find that this ground cannot succeed. I find that I am in agreement with the finding of the learned magistrate in that the appellant failed to prove its case on a balance of probability. The evidence tendered clearly showed that the county council had a right of allocation and had not breached any law in allocating the respondent the plot. This ground fails.

Before concluding on this appeal I wish to deal with issue that were raised in the submission made by advocates. The appellants advocate's was of the view that the appeal should succeed because the county council not being parties in the suit did not bring documents relating to the allocation undertaken. The question that arises from such a submission is which party stands to fail in their case when documents are not presented before court. in my view it is the appellant whose case failed for lack of those documents. ***See Section 107 of the Evidence Act.***

The respondent counsel submitted that the appeal before court is incompetent because the heading of the memo of appeal indicated that the appeal was by Mbari Ya Kibugi Self Help Group. The advocate of the Respondent argued that since this group is not registered either as a cooperation, limited liability company or a firm under business names act it could not bring action in its name. To that extent I am in agreement with the Respondent advocate but I do not agree with his submission that such an error in the title would cause an appeal to be incompetent. The Appellant in making this appeal was not filing fresh action rather the Appellant was appealing against the decision of the lower court where the Chairman of the ground was properly stated as the party in the action.

I am of the view that the failure to put the name of the chairman in this appeal is a mere irregularity which does not go to the root of the appeal.

In the end I find that the appeal cannot succeed and the same is dismissed and the costs of this appeal shall be paid by the original Plaintiff Stephen A. Maina to the Respondent hereof.

DATED AND DELIVERED THIS 25TH DAY OF FEBRUARY, 2008

MARY KASANGO

JUDGE