



**Lerinkon v Mugangasia (Environment and Land Appeal 15 of 2019)
[2022] KEELC 13768 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13768 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 15 OF 2019
MN GICHERU, J
OCTOBER 25, 2022**

BETWEEN

GODFREY TAUTA OLE LERINKON APPELLANT

AND

WALTER JUMBA MUGANGASIA RESPONDENT

JUDGMENT

1. This judgment arises out of an appeal by Godfrey Tauta Ole Lerinkon in which he challenges the Judgment and decree in Kajiado Senior Principal Magistrates Case No. 287 of 2005.

The said judgment was delivered on March 3, 2016.

2. In the said suit before the Lower Court, the learned trial Magistrate dismissed the Appellant's suit. In the said suit, the Appellant had sought for orders restraining the Respondent, Walter Jumba Mugangasia, from interfering with, trespassing, occupying, using and wasting L.R. UNS Residential Plot No. 190 Ngong.

He also sought for an order that the Respondent removes all the building and construction materials placed on the suit land.

3. In dismissing the suit, the learned trial Magistrate found that the letter of allotment issued to the Appellant was just part of the process leading to the issue of a title deed. It did not confer title to the suit land. He also found that a certificate of lease should take precedence over a letter of allotment.

According to the evidence adduced at the trial, the Appellant had a letter of allotment while the Respondent had a certificate of lease.

4. Aggrieved by the decision of the Lower Court, the Appellant, through counsel on record filed a memorandum dated April 7, 2016. It contained the following ten (10) grounds.

The learned Magistrate erred in law and in fact in:-



- i. Deciding the suit without taking serious and profound consideration on the fundamental principles of law, the pleadings, Appellant's submissions, the evidence adduced by the Appellant and the bundle of authorities tendered by the Appellant.
- ii. Finding that the land parcel known as UNS Residential Plot Number 190 Ngong was duly and legally registered in the names of the Respondent instead of the Appellant.
- iii. In failing to distinguish nor explain in which of the land in particular was actually the suit land between UNS Residential Plot No. 190 Ngong, Ngong Township Block 11/467, Ngong Township Block/21467 and Ngong Township Block 111467.
- iv. Failing to recognize that in 1992, the Appellant applied at the defunct Olkejuado County Council who were the then custodians of the suit plots and was accordingly issued with a letter of allotment and the transaction to the said property was documented in minutes accordingly.
- v. Failing to recognize that the Appellant was in the process of obtaining the certificate of lease to the suit land from the commissioner of lands.
- vi. Failing to appreciate from all the evidence adduced that the Respondent was never allocated the plot by Olekejuado County Council but instead, obtained from the Commissioner of Lands in a fraudulent manner.
- vii. Making a general inference that the letter of allotment issued by Olkejuado County Council was inferior to a certificate of lease issued by the Ministry of Lands.
- viii. Holding that there was ever a site visit by the court in company of a Government Land Surveyor when this was not the case.
- ix. Insisting that it is the Appellant who should have summoned the officials from the Commissioner of Lands to prove the authenticity of the documents relied upon by the Respondent.
- x. Failing to recognize that the Appellant had been in occupation of the suit land for 23 years and hence entitled to the suit land.

For the above reasons, the Appellant sought the following orders.

- a. That the award on general damages be set aside and the same be reviewed or varied.
 - b. That the court issues its own orders in respect of the evidence on record.
 - c. Costs and interests of the Appeal.
5. Counsel for the Appellant filed written submissions on June 16, 2022 in which the following issues were identified in the determination of the appeal.
 - a. Whether the appeal should be allowed?
 - b. Who should bear the costs?
 6. On the other hand, the Respondents counsel, in submissions filed in Court on 27/7/2021, identified two (2) issues for determination.
 - a. Whether the Respondents acquired his title through fraudulent means?
 - b. Who should bear the costs of this Appeal?



7. This being a first appeal, it is the duty of the court to review the evidence before the Lower Court and satisfy itself that the decision was well founded.

In *Selle and another –versus- Associated Motor Boat Co. Limited and others* (1968) EA 123 this principle was announced 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 consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect...”

8. It is with above in mind that I have considered the record of the Lower Court, the grounds of appeal, the submissions by both sides, the issues raised therein and the case law cited.
9. Looking at the ten grounds of appeal vis-à-vis the Appellant’s three (3) issues raised in the submissions, I do not find much correlation. That notwithstanding, I will deal with all the ten grounds as well as the three issues.
10. I find the first ground of appeal to be too general. I do not understand which fundamental principles of law are referred to in this ground. Which fundamental principles are these? Are they of international law, constitutional law or which law? The learned counsel should have been precise and concise.
11. On the second ground, I find that the trial Magistrate did not err at All. This is because the appellant was not able to prove that he owned plot no. unserved 190 Ngong. This is why.
12. The only evidence that the Plaintiff had to prove he owned the suit land was the allotment letter dated 27/5/1992 and signed by F.K. Orioki and three (3) receipts dated May 24, 2005, 7/4/2004 and 25/8/2003.
13. The said letter of allotment is disowned by the said F.K. Orioki as a forgery in a letter dated 14/4/2005.
14. Secondly, even if the letter had been valid, it has a condition in paragraph 2 where it says;
 2. I should be glad to receive your acceptance of the attached conditions together with bankers cheque for the amount as set out below within thirty (30) days of the postmark.”
15. There was no evidence by the Plaintiff to prove that he complied with the above conditions.
16. On the third ground, I find that the trial Magistrate did not err because the burden was always on the Plaintiff to prove which was his plot. The plot he claimed to be his, did not exist.
17. This is because after survey, land parcel No. Unsurveyed 190 Ngong ceased to exist. Yet the Plaintiff / Appellant made it appear like nothing had changed.
18. The trial Magistrate did not err because he dealt with the issue of the Plaintiff’s letter of allotment. This covers the fourth ground.
19. On the fifth ground of appeal, I find that the trial Magistrate did not err because the lease to the suit plot had already been awarded to the Defendant. The Plaintiff could no therefore have been in the process of obtaining the same leave that had been issued to the Defendant on March 30, 2001.
20. On the sixth ground, there is credible evidence on record to prove that Olekejuado County Council would recommend to the Commissioner of Lands on who to issue the lease to.



21. The sixth ground does not therefore hold any water and the trial Magistrate did not err.
22. Regarding the seventh ground, the trial Magistrate was right that the main document that Plaintiff/Appellant relied upon was not only doubtful but also inferior to the documents relied upon by the Defendant/Respondent.
23. When it comes to the eighth ground about the visit to the site, I find that same is captured very clearly in the proceedings of July 11, 2013. The details of the visit are not captured on record including the findings.
24. There was to be a report to be filed by the surveyor within a week of the site visit. I did not see the report on record. The trial Magistrate however, observed whatever he did and it is part of his observation in his judicial capacity within the meaning of Section 3 (1) of the *Evidence Act*.
25. On the penultimate ground, I find that the trial Magistrate did not err because the burden of proof was always on the Plaintiff/ Appellant to establish his claim on a balance of probabilities. Failure to prove the averments meant failure of the Plaintiffs case.
26. Finally, on occupation, the Plaintiff/Appellant is on record as saying this on November 12, 2009 when he testified;
...After that I fenced the plot, dug a pit latrine and deposited building stones ready for construction. But before I could start construction, the Defendant appeared and claimed the plot was his.
27. This was in the year 2003. He showed me his letter of allotment...”
28. When the Plaintiff fenced the land in 2003, the Defendant already had the certificate of lease issued to him. It is not therefore correct to say that the Plaintiff had occupied the land for 23 years. He did so when the land was already registered in the name of the Defendant. The trial Magistrate did not err.
29. I now come to the issues raised by the counsel for the parties.
30. On the Appellant’s first issue, I find that the Appellant is not legally entitled to the suit land as the registered proprietor for the reasons already given. The Appellant letter of allotment was disowned by F.K. Orioki and the Respondent has a lawfully issued certificate of lease.
31. On the second issue, the appeal should not be allowed as it has no merit at all.
32. On the Respondent’s first issue, I find that he acquired title to the suit land lawfully and there was no fraud.
33. Before I conclude, I find that prayer (a) of the memorandum of appeal seeks to set aside the award on general damages.
34. I do not find any such award in the judgment dated 3/3/2016.
35. For the above stated reasons, I find no merit in the appeal and I dismiss it with costs to the Respondents.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF OCTOBER, 2022.

M.N. GICHERU

JUDGE

