



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 14 OF 2019

JOSEPH TOBIKO KELEMPU.....APPELLANT

VERSUS

COOPERATIVE MANAGEMENT COMMITTEE OF EMPARNAT FARMERS

DAIRY COOPERATIVE SOCIETY LIMITED.....RESPONDENT

JUDGEMENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Kajiado

delivered by Hon. Susan Shitubi on 27th June, 2019 in Kajiado CMCC No. 89 of 2018)

Introduction

By a Memorandum of Appeal dated the 10th July, 2019, the Appellant appeals against the whole of the Judgment delivered by Hon. Susan Shitubi Chief Magistrate's Court at Kajiado on the 27th June, 2019. The genesis of this appeal is the Judgment of the Chief Magistrate Hon. Susan Shitubi in the Kajiado CMCC No. 89 of 2018 where she dismissed the Appellant's suit. In the said suit the Appellant had sought for the following orders as against the Respondent:

- a. A permanent injunction restraining the Defendant, its agents, servants, members or anybody claiming from them from trespassing, alienating, or damaging plots numbers 1556 and 1557 Business Bissil Trading Centre.**
- b. Eviction of the Defendants, its members or anybody claiming through them from the Plaintiff's plot.**
- c. Costs.**

The appellant being dissatisfied by the whole Judgement filed an appeal at the Environment and Land Court in Kajiado on 10th July, 2019.

The Memorandum of Appeal contained the following grounds;

- 1. THAT the Honourable Magistrate erred in law and fact by failing to hold that the Appellant had indefeasible title.**
- 2. THAT the Honourable Magistrate erred in Law and fact by holding that the Defendant had been allocated the Plaintiff's land.**
- 3. THAT the Honourable Magistrate erred in Law and fact by holding that the Appellant had failed to enjoin the County Government of Kajiado.**
- 4. THAT the Honourable Magistrate erred in Law and fact by holding that the Appellant had not proved his case on a balance of probabilities.**
- 5. THAT the Honourable Magistrate erred in Law and fact by insinuating that the Appellant and Respondent owned the same land.**

6. THAT the Honourable Magistrate erred in Law and fact by failing to consider the Appellant's submissions.

The Appellant prays that the Appeal be allowed.

The Appellant and Respondent filed their respective submissions to canvass the Appeal.

Submissions

The Appellant in his submissions contended that he produced letters of allotment for plots No. 1556 and 1557 IL BISSIL TRADING CENTRE, Searches and receipts showing payment of rates to the County Government of Kajiado. He insisted that the Respondent did not produce any letter of allotment or search or receipts of payment but only presented a map as well as letter to the Minister for Lands. He relied on section 7(a) of the Land Act. Further, that the survey report referred to plot No. 543 whereas the Respondent referred to plot No. 72 which was contradictory. He reiterated that there was no counterclaim and the Learned Magistrate erred in holding that the Plaintiff failed to enjoin the County Government. He explained that it was not necessary to enjoin the County Government as the Respondent only trespassed on the suit plots.

The Respondent in its submissions contend that the Appellant was in total breach of condition No. 2 of the Letter of Allotment which indicated that any plot that remains underdeveloped after two years of allocation would be repossessed. It insists the Kajiado County Government repossessed the Appellant's plot and allocated it to them. To buttress its averments, it relied on the case of **Civil Appeal No. 246 of 2013 Between Arthi Highway Developers Limited Vs West End Butchery Limited & Others**. It averred that the Appellant had not demonstrated to both the trial Court as well as the Appellate Court that the Respondent's allotment of the suit plot was done out of fraud. It reiterated that the Honourable Magistrate did not err in law and fact by holding that the Respondent had been allocated the Appellant's land. It explained that even though the Appellant had been allocated Plots No. 1556 and 1557 Business IL Bissil Trading Centre, he never utilized the same since 2005 in total breach of condition No. 2 of the said Letters of Allotment which allowed the repossession of the plot if it remained undeveloped for two years. It relied on the decision of **Rukaya Ali Mohamed Versus David Gikonyo Nambacha & Another (Kisumu HCCS No. 9 of 2009)** to support its averments. It contended that the Appellant's Appeal lacks merit. It reaffirmed that the Appellant should have enjoined the County Government of Kajiado which was the allocating authority and hence the Learned Magistrate did not err in holding that the said County Government ought to have been made a party to the suit. It claims it was lawfully allocated the suit plot to sell milk and that the Appellant failed to prove his case.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- **Whether the Respondent has trespassed on Plot Nos. 1556 and 1557 Business IL Bissil Trading Centre.**
- **Whether the Appeal is merited**

As to whether the Respondent has trespassed on Plot Nos. 1556 and 1557 Business IL Bissil Trading Centre. Before I proceed to decipher whether the Respondent trespassed on the suit plots, it would be pertinent to confirm the ownership of the suit plots first. The Appellant in the suit before the lower court claimed he is the owner of plot Nos. 1556 and 1557 Business IL Bissil Trading Centre. In his testimony, he produced Letters of Allotment for the two plots, Certificates of official Search from the Kajiado County Government confirming the plots were registered in his name and several receipts to confirm he had been paying land rent. It was his testimony that he had let his sister take care of his plots from 2005 and it is only in the year 2016 when the Respondent uprooted his posts. I wish to reproduce a portion of the proceedings recorded during his cross examination where he stated as follows: **"My plots are 1556 and 1557. Yes, there is a map. I don't have a copy but saw it. It is the same site they are claiming though the numbers are different. It is the County Surveyors who showed me the site in 2005. I did not sue the County. Yes, in your letter they were shown 543. I don't know 48. Yes, I am aware of the ruling of the Judge. Yes, there are conditions to my allotment. I developed. I met the requirements. I look at letter to Defendant. It reads: Allotment of Plot..'. I can avail evidence of development if need be. Yes, the County gave them for projects. However, it is the site that I was shown. Yes, the Defendant demolished my developments. I reported"**.

As per the evidence of DW1 in the lower Court Rebecca Mugie stated that: **"we were given site 543 and plot 48 a sign block. It is on the map that we have filed in court. The letter we were given is dated 12th July, 2016. They gave us to use for our business.....The County Land Ministry said it was a Matatu Terminus. That it did not belong to anybody. "Further, in cross examination she proceeded to explain that:" (shows DMFI'4'). Yes, it does not have the plot number. The survey report is for 543. We were given for it was too small to be a matatu terminus. It's not me that drew the map."**

From the evidence that was produced by the respective parties, it was evident that the Appellant had been allotted the suit plots earlier, held letters of Allotments to that effect and even continued to pay for land rent and rates over the said plots.

The Respondent though contended that it was the County Government that allocated them the land to sell milk, did not hold any letters of allotment nor an indication that they had been paying land rates and rent. To my mind, their evidence on the numbering of the plots as well as the size including the fact that it had been a matatu terminus was contradictory. I note DW1 had even stated in her evidence that the Appellant reported the matter of their occupying the suit plots to the County Land Management Board and County Minister for Lands and they were advised to stop developing it. In their submissions, the Respondent claimed the Appellant had failed to fulfil condition No. 2 in the Letter of Allotment culminating in the plot being repossessed and allocated to them. However, she did produce any evidence that the suit plots were indeed repossessed after which the same had been reallocated to them. I opine that if indeed the suit plots had been repossessed then the County Government of Kajiado could not have still had the Appellant's name in their records and continued to receive the Land Rates and Rent from him. In DW1's evidence she intimated that it is the County Surveyor that showed them the plot but I opine that the said Surveyor could not have been the allotting authority.

In the case of **Rukaya Ali Mohamed Versus David Gikonyo Nambacha & Another (Kisumu HCCS No. 9 of 2009)** Warsame J (as he then was) held that:

“Once (an) 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 (an) 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 outrightly illegal or it was against the public interest.”

Further, in the case of **Caroget Investment Limited V Aster Holdings Limited & 4 others (2019) eKLR**, the Court of Appeal held that:

“With the foregoing and the explicit and obvious admission by the Council that it had no interest in the suit property, the foundation of the appellant’s title dissipated. The suit property was not available for alienation, especially after it had been acquired by the 1st respondent many years before the issuance of the second grant From the evidence on record and what we have said above, this was not a case of double allocation but one of shameless outright typical Kenyan-style land grabbing, where, the appellant, in collusion with some of the officials working for the 2nd to 5th respondents, attempted to alienate private land that already had been alienated.”

While in the case of **Ali Gadaffi & another v Francis Muhia Mutungu & 2 others [2017] eKLR** my brother Justice Olola while dealing with a matter with similar facts as herein held as follows:

“Where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled. There can never be any allocation unless the land is an unalienated land. Consequently, when the Appellant was allocated the land on 27th April 1998, he acquired a legal interest which could not and was not defeated by the purported subsequent allocation to the 2nd Respondent, on 6th May 1998. As at 27th April 1998, there was a commitment made on Plot 96. Kaloneni and it was therefore not available to the 2nd respondent for allotment. As Warsame J (as he then was) observed in Rukiya Ali Mohamed (Supra), the authority who issued the 2nd Respondent’s letter of allotment had no such powers to grant the same. It was an illegal transaction, it amounts to no allotment and in total there was no benefit, no interest, and no legal right which could be derived from an act which amounted to nothing.”

Insofar as the County Government of Kajiado was not a party to the suit but from the Pleint, the Appellant had only sought injunctive reliefs as against the Respondent as he already held documents of title in respect to the suit plot. Further, there was no proof that his Letters of Allotment had been cancelled by the County Government as it was still receiving his rates. As per the Search Certificates which were produced as exhibits in Court, the plots were still in the Appellant’s names. It is my considered view that by virtue of the Appellant holding the Letters of Allotment, this indeed confirmed he held proprietary rights over the suit plots in accordance with the provisions of Section 7 (a) of the Land Act which provides that land can be acquired through allocation. Insofar as the Respondent’s witness claimed the Appellant’s Letters of Allotment had been cancelled as he had failed to meet condition no. 2 of the Letter of Allotment, she never controverted the averments that the Appellant had some developments thereon. There was further no proof that the first allocation was validly and lawfully cancelled. Further, as per the documents the Respondent’s representatives produced in Court, their documents did not bear the same plot numbers as per the suit plots. I find that their production of the map and the letter from the County Government was of no effect as the same did not invalidate the Appellant’s Letters of Allotment. To my mind, the suit plots were not available for allocation to a third party since the Appellant already held Letters of Allotment in respect of the same. Hence, the Respondent’s claim that the same had been allocated to them, was of no effect. In the circumstances and based on the piece of evidence that was before the lower Court while associating myself with the decisions cited above, I find that the Appellant being owner of the suit plots was indeed entitled to protection of the law. Further, the Respondent had indeed trespassed on the suit plots. In line with my findings, I find that the Learned Magistrate indeed erred in law and fact by proceeding to dismiss the Appellant’s case; failing to hold that the Appellant had indefeasible title; holding that the Respondent had been allocated the Appellant’s land; holding that the Appellant had failed to enjoin the County Government of Kajiado and insinuating that the Appellant and Respondent owned the same land.

The upshot of all this is that I find the Appeal merited and will proceed to accordingly allow it. I further proceed to set aside the Chief Magistrate’s Judgement dated the 27th June, 2019 and substitute therewith an order allowing the Plaintiff’s suit in *Kajiado CMCC No. 89 of 2018* with costs.

The Appellant is also awarded the costs of this Appeal.

Dated signed and delivered in Virtually at Kajiado this 20th day of January, 2021.

CHRISTINE OCHIENG

JUDGE