



REPUBLIC OF KENYA



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**Lewarani v Jitahidi Women Group through Agnes Muthoni (Environment and Land Appeal E027 of 2022) [2024] KEELC 473 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 473 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL E027 OF 2022**

**YM ANGIMA, J**

**FEBRUARY 1, 2024**

**BETWEEN**

**JONATHAN LEPARLEEN LEWARANI ..... APPELLANT**

**AND**

**JITAHIDI WOMEN GROUP THROUGH AGNES MUTHONI .... RESPONDENT**

*(Appeal from the judgment and decree of Hon. James H.S. Wanyanga Senior Resident Magistrate Maralal dated 01/11/2022 in Maralal S.p.m.c.e.l.c. No. E010 Of 2021 Jitahidi Women Group Through Agnes Muthoni -vs- Jonathan Leparleem Lewarani)*

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the judgment and decree of Hon. H.S. Wanyanga (SRM) dated 01.11.2022 in Maralal SPMCC ELC No. E010 of 2021 – Jitahidi Women Group suing through Agnes Muthoni vs Jonathan Leparleen Lewani. By the said judgment, the trial court allowed the Respondent’s claim for Plot No. 144P – Yare area and entered judgment against the Appellant as prayed in the plaint save that the prayer for general damages for trespass which was disallowed.

**B. Background**

2. The material on record shows that vide a plaint dated 13.07.2021 the Respondent sued the Appellant before the trial court seeking the following reliefs:
  - a. A declaration that the Defendant is a trespasser on the Jitahidi Women Group’s parcel of land known as plot number 144P Yare area.
  - b. The Defendant be ordered to vacate the suit land within seven (7) days.



- c. A permanent injunction restraining the Defendant from remaining on, cultivating, interfering with or doing any other act which is prejudicial to the Jitahidi Women Group's quiet enjoyment and occupation of plot number 144P in Yare area of Samburu County.
  - d. General damages for trespass.
  - e. Costs of the suit.
  - f. Any other relief this Honourable Court deems fit to grant.
3. The Respondent pleaded that all the material times it was the legitimate owner or allottee of Plot No. 144P (Yare Area) measuring 100ft by 100ft having been issued with a letter of allocated dated 19/05/2011 by the defunct Town Council of Maralal (the Council). It was pleaded that sometimes in 2020 and 2021 the Appellant and his sons had invaded the said plot and erected a fence on the plot without any lawful justification or excuse.
  4. The Respondent further pleaded that upon reporting the Appellant's said actions to the Kenya Police Service the dispute was referred to the County Government of Samburu for resolution. It was contended that the Appellant was summoned by the County Government whereupon he was notified that Plot 144P Yare area belonged to the Respondent. It was further pleaded that in spite of the foregoing the Appellant had continued with his acts of trespass and had threatened members of the Respondent with violence and physical harm.
  5. The record shows that the Appellant filed a statement of defence dated 14.09.2021 denying the Respondent's claim in its entirety. It was denied that the Respondent was the owner of Plot 144P – Yare area. The Appellant pleaded that he was the original allottee of a plot known as 31P – Yare area in Maralal which measured about one acre. He further pleaded that he subsequently sub-divided the same into several plots (6 No) some of which he sold to willing buyers and that he was surprized that on of the sub-divisions being Plot No. 77P/B was purportedly allocated to the Respondent as Plot No. 144P. He, therefore, contended that he was the rightful owner of Plot 144P which he considered to be a sub-division of his own Plot No. 77P/B.
  6. The Appellant denied that he was ever summoned by the County Government over the suit property or that it was determined that the land belonged to the Respondent. He denied the allegations of trespass, invasion and threats of violence as alleged by the Respondent and put it to strict proof thereof. The Appellant pleaded that the suit property was actually is own Plot No. 77P/B and that it was the Respondent which was guilty of trespass and interference with his property rights. Although, the Appellant did not file a counterclaim in the suit he sought a declaration that he was the rightful owner of the suit property and that an eviction order be issued against the Respondent.

### **C. Trial Court's Decision**

7. Upon a full hearing of the suit at which the Respondent called 2 witnesses and the Appellant called 4, the trial court found for the Respondent. In its judgment, the trial court relied heavily upon an advisory report by the Ag. Chief Officer of Lands, Housing and Physical Planning of the County Government of Samburu which stated that there was no relationship between Plot 31P and Plot 77P/B and that Plot 144P was not a sub-division of the plot the Appellant claimed to be his. The trial court was satisfied that the Respondent was the legitimate allottee of Plot 144P. As a result, the trial court entered judgment for the Respondent against the Appellant on all the prayers sought in the plaint save for general damages for trespass.



## D. Grounds Of Appeal

8. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 30.11.2022 raising the following grounds of appeal:
  - a. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent's suit as filed was fatally defective, an abuse of the court process and it failed to comply with mandatory provisions of the law noting that the Plaintiff was said to be a Women group.
  - b. That the learned trial Magistrate erred in law and in fact in finding that Plot. No. 144P was allocated to Jitahidi Women Group and the group was the rightful owner of the plot.
  - c. That the learned trial Magistrate erred in law and in fact in finding that Plot No. 31P and Plot No.77P were distinct with no corelation contrary to the documentary evidence on record.
  - d. That the learned trial Magistrate erred in law and in fact in failing to find that the Appellant was allocated Plot No. 31P of 1 acre in the year 2008 and he later subdivided it into Plot No. 31P sold to John Mwangi Nguyo and he retained Plot No. 77P which he later subdivided into Plot No. 76P sold to Dorcas Lolonki and he retained Plot No. 77P which he later subdivided into Plot No. 146P sold to Kampaki Lalaiklian and he retained Plot No. 77P which he later subdivided into Plot No. 77A and 77PB of 50x100ft each the former sold to Elizabeth Wanjiku and latter 77B belonging to Appellant.
  - e. That the learned trial Magistrate erred in law and in fact in failing to find that the Appellant was the rightful owner to Plot No. 77PB and that what was referred to as Plot No. 144P lay on the same ground as the Appellant's Plot No. 77PB and Plot No. 77PA belonging to on Elizabeth Wanjiku who was not enjoined as a party in the suit.
  - f. That the learned trial Magistrate erred in law and in fact in failing to determine whether the dispute was one of double allocation and if yes, whose title ranked in priority.
  - g. That the learned trial Magistrate erred in law and in fact in relying on a report dated 23/05/2022 prepared by Moses Omondi Ag. Chief Officer Department of Lands which report was biased, incorrect, misleading and it contradicted the documentary evidence on record and it misrepresented known facts.
  - h. That the learned trial Magistrate erred in law and in fact in finding that Plot No. 31P was allocated to Joseph Mwangi Nguyo contrary to the evidence on record that the plot was purchased from and transferred by the Appellant.
  - i. That the learned trial Magistrate erred in law and in fact in completely disregarding the evidence by the Appellant and his witnesses and in allowing the Respondent's suit with costs.
9. As a result, the Appellant sought the following reliefs in the appeal:
  - a. That the appeal be allowed and the judgment and decree of the trial court dated 01.11.2022 be set aside.
  - b. That the Appellant's suit before the trial court be dismissed with costs.
  - c. That the Appellant be awarded costs of the appeal.



## E. Directions On Submissions

10. When the appeal was listed for directions, it was directed that the appeal shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 22.09.2023 whereas the Respondent's submissions were filed not on record by the time of preparation of the judgment.

## F. Issues For Determination

11. Although the Appellant raised 9 grounds of appeal in his memorandum the court is of the opinion that the appeal may be effectively determined by resolution of the following 3 issues:
  - a. Whether or not the Respondent's suit before the trial court was fatally defective.
  - b. Whether the trial court erred in law and fact in holding that the Respondent had proved its claim to the required standard.
  - c. Who shall bear costs of the appeal.

## G. Applicable Legal Principles

12. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at P.126 as follows:

“...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 witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

14. In the same case, Sir Kenneth O' Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases



in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

15. In the case of *Kapsiran Clan -vs- Kasagur Clan [2018] eKLR* Obwayo J summarized the applicable principles as follows:
  - a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

## **H. Analysis And Determination**

- a. Whether or not the Respondent’s suit before the trial court was fatally defective
16. The court has considered the material and submissions on record on this issue. The Appellant submitted that the Respondent’s claim before the trial court was bad in law and fatally defective because the claimant of Plot 144P was Jitahidi Women Grup which could only have sued through its officials. It was further submitted that the Respondent had not sued through its officials or all its officials as required by law hence the suit before the trial court was incompetent from inception.
  17. The Respondent, on its part, did not directly address this issue in its written submissions and did not cite any authorities in opposition to the Appellant’s contention.
  18. The court has noted that the Respondent is not an incorporated body or legal entity capable of suing or being sued in its name. The court agrees with the Appellant’s submission that it could only sue through its officials. The court has noted that vide its plaint dated 13.07.2021 the Respondent described itself as a self-help group registered under the Ministry of Labour, Social Security and Services. The Respondent further indicated that it was suing through Agnes Muthoni Githumbi in her capacity as the Chairlady of the group.
  19. The court is of the opinion that there is nothing wrong with the manner in which the Respondent filed suit. It is clear from the plaint that the Respondent filed the suit through one of its officials being



the Chairlady. There is no legal requirement that all the officials of an unincorporated body must be made parties to a suit. The court is aware of the general legal practice whereby such bodies would sue or be sued through the chairperson, secretary and treasurer. But it must be borne in mind that these three may not be the only officials of such a body. Some groups may have up to a dozen officials in various cadres. As long as there is no dissent amongst the members or officials of a self-help group the court is of the opinion that any authorized official can properly file or defend legal proceedings on behalf of the group. It is not necessary that all existing officials must be made party to the proceedings. As a result, the court finds no basis for holding that the Respondent's suit was incompetent, bad in law or fatally defective.

b. Whether the trial court erred in law and fact in holding that the Respondent had proved its claim to the required standard

20. The court has considered the material and submissions on record on this issue. The Appellant faulted the trial court for finding and holding that the Respondent had proved its claim to the required standard contrary to the evidence on record. The court was faulted for failing to find that Plot 144P was a sub-division of Plot 77P/B which belonged to the Appellant and for failing to find that there was double or overlapping allocation. The Appellant further faulted the trial court for relying upon the report of the Ag. Chief Officer – Lands of the County Government of Samburu which was said to be biased, incorrect and misleading.
  21. The court has reconsidered the entire evidence on record on this issue. It is evident that the Respondent's claim was for Plot 144P – Yare area which the Appellant claimed was part and parcel of his plot No. 77P/B which was a sub-division of his original Plot No. 31P – Yare area. It was the Appellant's contention that the Respondent was wrongfully allocated plot 144P which formed part of his land. It is also evident from the material on record that the allocations were done by the Council which was succeeded by the County Government of Samburu. It would, therefore, be logical to expect the latter to be custodian of all the relevant allocation records. The court finds absolutely no fault in the trial court's decision to rely on the report of the Chief Officer, Lands, Housing and Physical Planning dated 23.05.2022.
  22. There is no evidence on record to demonstrate that the said report was biased, incorrect or misleading. There is no evidence on record to show that the Chief Officer had a personal interest in the matter or that he had a personal grudge against the Appellant. There is no credible evidence on record to show that there was any double allocation of the disputed plots. There was no credible evidence to show that Plot 144P was a sub-division of Plot 77P/B which the Appellant claimed to be his. The court is thus of the opinion that the most reliable and credible evidence could only have come from the County Government of Samburu and the trial court was right in placing reliance upon the report.
  23. It is evident from the judgment of the trial court that the court duly considered the Appellant's evidence on his claim for the suit property but found it to be incredible and fraught with inconsistencies. The trial court was convinced by the evidence of the Respondent's witnesses and chose to believe it. The court finds no reason to interfere with the trial court's findings since it saw, heard and observed the witnesses at the trial. In the circumstances of the case the trial court was entitled to believe the Respondent's case and to hold that it had proved its claim on a balance of probabilities.
- b. Who shall bear costs of the appeal
24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967]



EA 287. The court finds no good reason why the successful party should not be awarded costs of the appeal. Consequently, the Respondent shall be awarded costs of the appeal.

**I. Conclusion And Disposal Orders**

25. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. As a consequence, the court make the following orders for disposal thereof:
- a. The appeal be and is hereby dismissed.
  - b. The judgment and decree of the trial court dated 01.11.2022 in Maralal SPMCC ELC No. E010 of 2021 be and is hereby affirmed.
  - c. The Respondent is hereby awarded costs of the appeal.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024.**

**Y. ANGIMA**

.....

**JUDGE**

I certify that this is a true copy of the original

SIGNED

**DEPUTY REGISTRAR**

**In the presence of:**

Ms. Wanjiru Muriithi for the Appellant

Mr. Kihoro Kimani for the Respondent

C/A - Vanessa

