



**Municipal Council of Kisumu v Kwaka & another (Environment and Land Appeal 9 of 2020) [2024] KEELC 1706 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1706 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 9 OF 2020**

**E ASATI, J**

**APRIL 4, 2024**

**BETWEEN**

**MUNICIPAL COUNCIL OF KISUMU ..... APPELLANT**

**AND**

**AGNES TERESA KWAKA ..... 1<sup>ST</sup> RESPONDENT**

**JAMES B. TOLO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the ruling and order of Honourable Senior Principal Magistrate Robinson Ondieki delivered on 16<sup>th</sup> December, 2019 from Kisumu CMCC ELC Case No.47 of 2017)*

**JUDGMENT**

1. The appeal herein and Kisumu ELC Appeal No.4 of 2020 arise from the judgement dated 16<sup>th</sup> December, 2019 in the Original Kisumu CMC ELC Case No.47 of 2017 (Formerly Kisumu CMCC NO.164 OF 2010).
2. The Appellant in this appeal is Municipal Council of Kisumu. According to the amended plaint dated 16<sup>th</sup> August, 2012, it was the 2<sup>nd</sup> Defendant in the suit which was filed by Agnes Teresa Kwaka the 1<sup>st</sup> Respondent herein against Benjamin Okang'o Tolo and the appellant. The record shows that Benjamin Okang'o Tolo was, vide court order dated 16/8/2012 substituted with James B. Tolo and the plaint amended accordingly.
3. The 1<sup>st</sup> Respondent's claim in the suit was for orders of injunction restraining the Appellant and the 2<sup>nd</sup> Respondent (the Defendants in the suit) from interfering with the suit land parcel No. Residential Plot Number 11 in the Migosi site and Service Scheme within Kisumu town, an order compelling the Defendant to demolish all the structures and buildings on the suit land failing which demolition and removal to be undertaken by the court, damages for trespass, mesne profits and costs.



4. The record further shows that the appellant herein filed the 2<sup>nd</sup> Defendant's statement of defence dated 9<sup>th</sup> June, 2010 denying the claim in the plaint.
5. The record shows further that the suit was heard before the trial court which, vide its judgement dated 16<sup>th</sup> December, 2019, found in favour of the 1<sup>st</sup> Respondent and granted all the prayers sought in the plaint. The court further assessed the general damages for trespass at Kshs.5,000,000/=.
6. Being aggrieved by the Judgement dated 16<sup>th</sup> December, 2019, the Municipal Council of Kisumu preferred the present appeal vide the Memorandum of Appeal dated 5<sup>th</sup> February, 2020. The Appellant sought for orders that the appeal be allowed, the judgement of the trial court be set aside and the suit in the lower court be dismissed with costs to the Appellant.
7. The grounds of appeal as contained in the Memorandum of Appeal are that;
  - a. That the Learned Magistrate misunderstood the principles behind an award of nominal damages to a party by awarding a sum that was manifestly high to warrant an interference from this court.
  - b. That the Learned Magistrate wrong exercised his discretion in awarding the 1<sup>st</sup> Respondent the sum of Kshs.5,000,000 as nominal damages yet by their very nature, nominal damages are minimal and are awarded where there is no actual financial loss as was the case herein.
  - c. That the Learned Magistrate proceeded on the wrong principles when he took into consideration the years the 2<sup>nd</sup> Respondent had been in occupation of the land in awarding the sum of Kshs.5,000,000 as an award for nominal damages.
  - d. That the Learned Magistrate contracted himself when on the one hand, acknowledged that there had been no evidence of economic activities and proceeded to award the exorbitant sum of Kshs.5,000,000 as nominal damages.
  - e. That the Learned Magistrate erred in law and in fact in finding that the Appellant knew as early as 1998 who the lawful allottee of Plot Number 1-50 was thus holding it responsible for mistakes caused by third parties.
  - f. That the Learned Magistrate erred in law and in fact in finding that no evidence was led by the Appellant to show that the 1<sup>st</sup> Respondent had been given an alternative parcel of land, being Plot No.USAID Estate (Block 4).
  - g. That the Learned Magistrate erred in law and in fact in shifting the burden of proof in civil cases from the 1<sup>st</sup> Respondent to the Appellant.
  - h. That the Learned Magistrate erred in law and in fact in finding that the 1<sup>st</sup> Respondent had made payments to the Appellant in line with the conditions set out in the letter of allotment and further that in any event, the doctrine of estoppel would apply as the Appellant had continued to receive payments from the 1<sup>st</sup> Respondent yet the same was never raised by the 1<sup>st</sup> Respondent in her pleadings, testimony or submissions.
  - i. That the Learned Magistrate erred in law and in fact in issuing an order against the Appellant to demolish at its own cost all structures or buildings on the suit property failing which the same would be done by the Court bailiffs at the Appellant's cost yet the Appellant never w2 set up any structure on the suit land.



- j. That the Learned Magistrate erred in law and in fact in issuing an order for the payment of costs of the 1<sup>st</sup> Respondent's counsel when the same is not covered in the spectrum of costs as contemplated in Section 27 of the Civil Procedure Act thus wrongly exercise his discretion.
  - k. That the Learned Magistrate was totally wrong on his analysis and evaluation of the facts, law and conclusion he made; hence he totally fell into error.
  - l. That the judgement of the Learned Magistrate is against the law and weight of the evidence on record.
8. Directions were taken by consent of the parties on 15<sup>th</sup> May, 2023 that the two appeals be consolidated for purposes of hearing only, that each of the appeals to have a separate judgement and that the appeals be canvassed by way of written submissions.
  9. Written submissions dated 27<sup>th</sup> October, 2023 were filed by the firm of Owiti, Otieno & Ragot Advocates on behalf of the Appellant. Counsel framed the issues for determination in the appeal as;
    - a. Whether allotment of UNS Residential Plot NO.11 – Kisumu Municipality (Formerly Market Sales Plot 1-50) to the 1<sup>st</sup> Respondent was regular.
    - b. Whether the 1<sup>st</sup> Respondent was sufficiently compensated by an alternative plot marked A in Block 4 USAID Estate.
    - c. Whether the 1<sup>st</sup> Respondent was entitled to the nominal damages awarded by subordinate court and;
    - d. Whether the 1<sup>st</sup> Respondent was entitled to the costs awarded by the subordinate court.
  10. On whether the allotment of Uns Residential Plot No.11 – Kisumu Municipality (Formerly Market Sales Plot 1-50) to the 1<sup>st</sup> Respondent was regular, Counsel reiterated the submissions made on behalf of the Appellant in the lower court that though it was not disputed that the suit parcel of land had initially been offered to the 1<sup>st</sup> Respondent through letter of allotment dated 17<sup>th</sup> December, 1997, the Appellant did not receive an acceptance of the conditions attached or the required payment of Kshs.11,558.00 within 30 days failing which the offer would automatically lapse. That the 1<sup>st</sup> Respondent's own testimony was that the acceptance of the offer was communicated through her letter dated 18<sup>th</sup> October, 1999, two years after the date of Letter of Allotment. That it was an acceptance communicated two years after the lapse of the offer it purported to be made in relation to and that the 1<sup>st</sup> Respondent's claim being solely premised on the Letter of Allotment and compliance with the terms contained therein was therefore not valid.
  11. Counsel submitted further that the question of title to the suit property could only be raised by the 1<sup>st</sup> Respondent upon strict compliance with the conditions stated in the Letter of Allotment.

That having failed to comply with the terms of the Letter of Allotment, the 1<sup>st</sup> Respondent did not acquire any interest in the suit property. That the fact that she proceeded to make payment after the offer had lapsed did not regularize or otherwise renew the offer. That it was upon the 1<sup>st</sup> Respondent to present evidence of the fact that she complied with the terms of the offer made to her by the National Land Commission and did so in good time. That in the absence of such proof, the Appellant or the National Land Commission for that matter cannot be said to be bound by the terms of a contract that was never finalized. That an offer, acceptance or the offer in the terms presented and payment of consideration as required are basic requirements of a valid contract.



12. Counsel urged the court to find that in the absence of any proof by the 1<sup>st</sup> Respondent that she complied with the terms of the offer within the stipulated timelines, she did not have a valid claim to any interest in the suit parcel of land. In support of this submission, Counsel relied on the case of *Bubaki Investment Company Ltd -vs- National Land Commission and 2 others* [2015] eKLR where the courts held that the offer having lapsed, the allottee could not claim any interest in the subject land.
13. On the issue of whether or not the 1<sup>st</sup> Respondent was sufficiently compensated by an alternative plot marked “A” in Block 4 Usaid Estate, Counsel submitted that the Appellant through the testimony of its witness brought to the attention of the court the fact that despite the irregularity, the 1<sup>st</sup> Respondent has been adequately compensated by being allocated another plot being Usaid BLOC 4 parcel No.880 measuring 0.0429Ha and that throughout the trial of the case, the 1<sup>st</sup> Respondent did not challenge the compensation or address it at all. That the 1<sup>st</sup> Respondent could not lay claim to the suit land which belongs to the 2<sup>nd</sup> Respondent or claim to have suffered any loss.
14. That the trial court erred in reaching a conclusion that no evidence had been led by the Appellant to show that the 1<sup>st</sup> Respondent had been given an alternative parcel of land when the same had been sufficiently proved and the Appellant expressed its willingness to hand over the same to the 1<sup>st</sup> Respondent.  
  
That the Appellant demonstrated that the issue between the Appellant and the Respondents had been settled and each party assigned a parcel of land hence there was no basis for the 1<sup>st</sup> Respondent’s claim against the 2<sup>nd</sup> Respondent or the Appellant.
15. On the issue of whether or not the 1<sup>st</sup> Respondent was entitled to the nominal damages awarded by the trial court, Counsel submitted that the trial court rightly pointed out in the judgement that there was no evidence adduced on the economic activities that were being carried out on the suit land or what was the income from the property representing the opportunity costs. But that however the court went on to award the sum of Kshs.5,000,000/- as nominal award of general damages taking into account the years the 2<sup>nd</sup> Respondent Defendant had been in occupation. Counsel relied on the case of *Kanji Naran Patel -vs- Noor Essa and Another* (1965)EA 484 on the definition of nominal damages. That it was clearly demonstrated before the trial court that if at all the 1<sup>st</sup> Respondent suffered any loss in the circumstances of the case, then she would be sufficiently compensated and recovered in the alternative parcel of land offered to her. That the award of Kshs.5,000,000 was excessive. That trespass having not proved against the Appellant, it was erroneous to condemn the Appellant to pay damages for trespass.
16. On whether or not the 1<sup>st</sup> Respondent was entitled to an award of damages, Counsel submitted that the trial court erred in issuing an order for payment of costs of the 1<sup>st</sup> Respondent’s Counsel when the same is not covered in the spectrum of costs as contemplated in section 27 of the *Civil Procedure Act*. That the trial court exercised its discretion wrongly. That Advocate and client costs are ordinarily based on the retainer of the Counsel by the client and are to be paid by the client to the Advocate. That there was no reason given in the judgement why the court awarded Advocate-client costs to be recovered from opposing parties. That this was beyond the spectrum of section 27 of the *Civil Procedure Act*. Counsel prayed that the appeal be allowed and judgement be set aside.
17. On behalf of the 1<sup>st</sup> Respondent, it was submitted that that the Appellant having received from the Respondent the allotment fees for the suit property, is estopped from claiming at the appeal stage that the allotment was not valid.
18. That the offer of an alternative plot made by the Appellant was never communicated to the 1<sup>st</sup> Respondent. That this cannot be construed to have cured the trespass.



19. Counsel submitted further that the trespass by the 2<sup>nd</sup> Respondent having been established, the 1<sup>st</sup> Respondent became entitled to damages for trespass for which she needed not have proved actual loss.
20. That the court is empowered under O.42 Rule 31 of the *Civil Procedure Rules* 2010 to confirm the judgement of the trial court and to vary the decree so as to describe the word of Kshs.5 million as general rather than nominal damages so as to meet the interest of justice in this case.

### **Issues for Determination**

21. Reading the entire record of appeal and specifically the grounds of appeal in the Memorandum of Appeal filed by the Appellant and the submissions made, I find that the issues for determination as framed by the Appellant are exhaustive of the issue that arise in this appeal. I adopt the same as the issues for determination herein as follows: -
  - a. whether allotment of UNS Residential Plot NO.11 – Kisumu Municipality (Formerly Market Sales Plot 1-50) to the 1<sup>st</sup> Respondent was regular.
  - b. whether the 1<sup>st</sup> Respondent was sufficiently compensated by an alternative plot marked A in Block 4 USAID Estate.
  - c. whether the 1<sup>st</sup> Respondent was entitled to the nominal damages awarded by subordinate court and;
  - d. whether the 1<sup>st</sup> Respondent was entitled to the costs awarded by the subordinate court.

### **Analysis and Determination**

22. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. In *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court. The court stated; -

“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 reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”
23. On the first issue of whether or not the allotment of Uns. Residential Plot No.11 – Kisumu Municipality (Formerly Market Sales Plot 1-50) to the 1<sup>st</sup> Respondent was regular, the evidence on record shows that acceptance of the offer was done outside the timelines stipulated in the Letter of Allotment by which time the offer had lapsed. Any subsequent transactions based on the Letter of Allotment were therefore invalid and could therefore not confer title or any rights in respect of the suit land upon the 1<sup>st</sup> Respondent. I find that the Respondent having failed to comply with the conditions of the allotment had no basis for claiming the suit land.
24. On the 2<sup>nd</sup> issue of whether the 1<sup>st</sup> Respondent was sufficiently compensated by allocation of an alternative plot; the Appellant’s case was that it allocated the 1<sup>st</sup> Respondent an alternative plot after it realized in allocating the suit land to both the Respondents and as a way of compensating the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent’s response was that the allocation of alternative plot was not communicated to her. It was not her evidence that she was opposed to being allocated an alternative



plot. The appellant both in its evidence before the trial court and its submissions in this appeal insisted on and confirmed the allocation. There was however no documentary evidence placed before court in the form of a letter of offer or Letter of allocation. A sketch map was produced by the appellant's witness to show the position of the alternative plot.

25. I find that the 2<sup>nd</sup> Respondent offered an alternative plot to the Respondent in lieu of the suit land which had been taken up and occupied and developed by the 1<sup>st</sup> Appellant who was also allocated the same but that the appellant did not complete the process of allocation. On the basis of the appellant's admission both in its evidence in the lower court and the submissions herein, it is just that the appellant completes the process of allocation and hands over the alternative plot to the 1<sup>st</sup> Respondent.
26. On whether the Respondent was entitled to damages; the trial court's award of damages to the 1<sup>st</sup> Respondent was based on its finding that the suit land belonged to the plaintiff and that the Defendants in the suit had trespassed onto the same. But having found herein that the 1<sup>st</sup> Respondent had no title or rights over the suit land and that hence there was no trespass proved, the award of damages is not justified.
27. On the ward of Advocate – client costs, I find that the award was not only unexplained but also erroneous as Advocate – client costs emanate from the fees agreed upon between the Advocate and client and is distinct from the costs covered under Section 27 of the Civil Procedure Act. The trial court was therefore wrong in awarding advocate client costs to be paid by the Defendants in the suit.
28. On costs of the appeal I find that the appellant herein is the cause of the litigation that led to the present appeal by allocating the same piece of land to the Respondents and by failing to communicate allocation of alternative land to the 1<sup>st</sup> Respondent.
29. For the foregoing reasons the court finds that the appeal has merit and is allows it as follows: -
  - a. The judgement dated 16th December 2019 in Kisumu CMC EL Case No 47 of 2017 is set aside and replaced with a judgement in the following terms;
    - i. The 1<sup>st</sup> Respondent's suit against the Appellant is dismissed with no orders to costs.
    - ii. The appellant is hereby ordered to process and allocate the alternative plot namely; plot marked "A" in Block 4 USAID estate Kisumu Municipality or a plot of similar size in the same estate to the 1<sup>st</sup> Respondent.
  - a. Costs of the appeal are awarded to the 1<sup>st</sup> Respondent to be paid by the appellant.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 4<sup>TH</sup> DAY OF APRIL, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

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**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Ndolo for the Appellant.

Okero for the 1<sup>st</sup> Respondent.



No appearance for the 2<sup>nd</sup> Respondent.

