



REPUBLIC OF KENYA



**Tolo v Kwaka & another (Environment and Land Appeal
4 of 2020) [2024] KEELC 3416 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 4 OF 2020**

E ASATI, J

APRIL 4, 2024

BETWEEN

JAMES B TOLO APPELLANT

AND

AGNES TERESA KWAKA 1ST RESPONDENT

MUNICIPAL COUNCIL OF KISUMU 2ND RESPONDENT

(Being an appeal arising from the decision and judgement of the Learned Senior Principal Magistrate at Kisumu (the Honourable Mr. R.K. Ondieki) dated 16th December, 2019)

RULING

1. Appeal No.4 of 2020 and Appeal NO.9 of 2020 arise from the judgement dated 16th December. 2019 in the Original Kisumu CMC ELC Case No.47 Of 2017 (Formerly Kisumu CMCC No.164 of 2010), herein the suit.
2. The Appellant in appeal No.4 of 2020 is James B. Tolo. According to the amended plaint dated 16th August, 2012, he was the 1st Defendant in the suit which was filed by Agnes Teresa Kwaka, the 1st Respondent herein, against Benjamin Okang'o Tolo and the Municipal Council of Kisumu. The record shows that Benjamin Okang'o Tolo passed on and was substituted with James B. Tolo, the present appellant.
3. The 1st Respondent's claim in the suit was for orders of injunction restraining the Appellant and the 2nd 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 shows that the Appellant in response to the plaint filed 1st Defendant's written Defence dated 12th July, 2017 denying the Plaintiff's claim and claiming that the suit land was lawfully allotted to him.
5. The record shows that the suit was heard before the trial court which, vide its judgement dated 16th December, 2019, found in favour of the 1st 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. Dissatisfied with the judgement, the Appellant filed the present appeal seeking that the appeal be allowed, the orders of the trial court dated 16th December, 2019 be set aside, the 1st Respondent's suit in the lower court be dismissed and the costs of the appeal and costs of the suit be awarded to the Appellant.
7. The grounds of appeal as contained in the Memorandum of Appeal dated 15th January, 2020 are that;
 - a. The Learned Magistrate gravely erred in law in finding and holding that the Appellant was guilty of trespass when it was clear from the totality of the evidence on record that the Appellant purchased the plot from the 2nd Respondent, and was put in possession by the 2nd Respondent who showed him the disputed site as his plot.
 - b. Having found as a fact that (a) the 2nd Respondent had acknowledged their mistake in allocating the same plot to the Appellant which had already been allocated to the 1st Respondent and (b) that upon re-numbering both the 1st Respondent's plot No.1-50 and the Appellant's Plot No.1-51 now both share the same number as Uns. Residential Plot No.11 Migosi, Kisumu Municipality, the Learned Magistrate erred in law in failing to find and hold that the 1st Respondent did not hold a better title than the Appellant.
 - c. The Learned Magistrate gravely erred in law in failing to find and hold that the Appellant was in the same position as innocent purchaser for value without notice who had legally and procedurally acquired a good title to Market Sales Plot No.1-51 at Migosi, later re-numbered as Uns. Residential Plot No.11 Migosi, Kisumu Municipality.
 - d. The Learned Magistrate gravely erred in law by validating the 1st Respondent's Market Sales Plot No.1-50 at Migosi, later re-numbered as Uns. Residential Plot No.11 Migosi, Kisumu Municipality, and thereby invalidating the Appellant's Market Sales Plot No.1-51 at Migosi, later also re-numbered as Uns. Residential Plot No.11 Migosi, Kisumu Municipality, without giving any reasons for confirming one title and not the other, and in the process he arbitrarily deprived the Appellant of his right to property in the said Plot No.11 contrary to the express provisions of Article 40(1)(a) of the Constitution of Kenya 2010.
 - e. The Learned Magistrate erred in law and in fact in finding and holding that the 1st Respondent had not been compensated with an alternative plot and ignored or failed to consider the evidence on record that the 1st Respondent had been relocated from Migosi and allocated Plot marked "A" in Block 4, USAID Estate, as shown clearly in the map produced by the 2nd Respondent.
 - f. The Learned Magistrate erred in law in finding and holding that the 1st Respondent had complied with the conditions contained in her Letter of Offer and/or Letter of Allotment dated 17th February, 1997 and/or that the 2nd Respondent was estopped from denying the 1st Respondent title to Unsurveyed Residential Plot 11 Migosi, Kisumu Municipality.



- g. The Learned Magistrate erred in law in failing to find and hold that the 1st Respondent had failed to comply with the conditions contained in her Letter of Allotment dated 17th February, 1997 and that the same had therefore become null and void and does not confer on her any valid and legally enforceable claim to ownership of and title to the said un-surveyed Residential Plot 11 Migosi, Kisumu Municipality.
 - h. The Learned Magistrate erred in law in finding and holding that the question of the 1st Respondent's compliance with the conditions contained in her Letter of Offer and/or Letter of Allotment dated 17th February, 1997 was not pleaded in the defence and therefore did not fall for determination in this suit, since the issue of compliance arose not only from paragraph 5 of the Complaint, but also from the Letter of Allotment itself.
 - i. There was no sound legal basis for the award of Kshs.5,000,000/- made to the 1st Respondent as general damages.
 - j. The decision and judgement was severely imbalanced in the light of the fact that the court was called upon to adjudicate between two competing interests in land, and the Learned Magistrate failed to consider the Appellant's case that he was also lawfully allocated the same plot and shown the site by the 2nd Respondent and the fact that the interests of both the Appellant and the 1st Respondent were equal.
 - k. The decision was against the weight of the evidence.
8. Directions were taken by consent of the parties on 15th 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.

Submissions for the Appellant

- 9. Written submissions dated 5th September, 2023 were filed on behalf of the Appellant by Moses J.A. Orenge Advocates. Counsel submitted that the gist of the submissions was that the trial Magistrate was wrong in concluding that the Appellant had committed trespass and secondly that even if the court was not satisfied on the basis of the evidence before court that the 1st Respondent (Agnes Teresa Kwaka) had been compensated with another plot, the court should have ordered the 2nd Respondent (the Municipal Council of Kisumu) to do so immediately.
- 10. That the 1st Appellant's suit was based on alleged trespass of the appellant onto plot No Uns. Residential plot No.11 Migosi Kisumu Municipality. Counsel submitted that the trial court found as a fact that the 2nd Respondent had acknowledged its mistake in allocating the same plot to the Appellant which plot had already been allocated to the 1st Respondent. That the court also found as a fact that upon renumbering both parcels bear the same number, namely Uns. Residential plot No.11 Migosi Kisumu Municipality but still went ahead to hold that the Appellant was guilty of trespass.
- 11. Counsel submitted further that it was not in dispute that after allocating the suit land to the Appellant, it was the 2nd Respondent who identified the land to the Appellant and put him in possession and that, that is why the suit in the lower court was also against the municipal Council of Kisumu.
- 12. Counsel submitted further that every definition of trespass to land always carries with it some element of illegal or unlawful or wrongful or unauthorized entry or intrusion into another person's land. Counsel relied on the definition of trespass to land in *Halsbury's Law of England* 3rd Edition at page 739 and Section 3(1) of the *Trespass Act* Cap 294 to demonstrate the point. Counsel submitted that the Appellant had reasonable excuse to enter into and take possession of the disputed land. That



the entry of the Appellant onto the disputed land was therefore not wrongful or unlawful. That the Appellant entered the land because he had been allocated the same by the 2nd Respondent. That both the Appellant and the 1st Respondent were allottees of the disputed land and that if there was anyone to blame, then it was the 2nd Respondent (the Municipal Council of Kisumu).

13. Relying on *Halsbury's Laws of England* 3rd edition at page 749 where it is stated that a Defendant may plead and prove that he had a right to possession of the land at the time of the alleged trespass or that he acted under the authority of some person having such a right, Counsel submitted that the Appellant had a right to the possession of the land by reason of the Letter of Allotment dated 28th November, 2002 issued by 2nd Respondent. That the Appellant took possession of the suit land under the authority of the 2nd Respondent. That as such the Appellant had a good defence to the 1st Respondent's claim which should not have been ignored by the trial magistrate.
14. Counsel submitted further that the Appellant was in the same position with an innocent purchaser for value without notice, who had legally and procedurally acquired a good title to the disputed land, and for which he had been issued with documents of title by the 2nd Respondent.
15. That by validating the 1st Respondent's documents of title and thereby invalidating the appellant's documents issued by the same authority without providing any remedy for the Appellant, the trial court arbitrarily deprived the Appellant of his right to the suit property in violation of the express provisions of article 40(1)(a) of the *Constitution* of Kenya 2010.
16. That there was evidence that the 1st Respondent had been compensated with another plot identified as the plot marked "A" in Block 4, USAID Estate but that the trial Magistrate rejected the evidence. Counsel submitted that the trial court erred in finding that the 1st Respondent had not been compensated with an alternative plot. That even if the evidence was not sufficient, the court should have ordered for compensation. That the decision of the Magistrate was therefore severely imbalanced.
17. Counsel further submitted that in the circumstances of the case, it was extremely harsh, oppressive and unconscionable to issue an order for the demolition of the Appellant's home on the suit property and order him (Appellant) to pay general damages of Kshs.5,000,000 plus costs.
18. Counsel urged the court to review the evidence, allow the appeal and direct that the 2nd Respondent (now County Government of Kisumu) do provide another alternative plot within Kisumu City to be allocated to the 1st Respondent.

Submissions for the 1st Respondent

19. Counsel for the Respondent submitted that it was common ground to the parties in the consolidated appeal and also to the parties as litigants before the trial court that the 1st Respondent was the ostensible owner of a plot variously described as "residential plot No.11" and more particularly as plot 1 - 50 and that the Appellant was also a beneficiary of an offer of allotment within the same scheme being plot 1 - 51 which was adjacent to the suit property.
20. Counsel submitted further that the 2nd Respondent having received from the 1st Respondent, the allotment fees for the suit property and affirmed her as the owner thereof, is estoppel from claiming at the appeal stage that the allotment was not valid. To expound on the doctrine of estoppel, Counsel relied on the decision in the cases of *Chase International Investment Corporation & Another -vs- Laxman Keshra and 3 Other* [1978]eKLR where it was held that estoppel should be looked upon in itself as an instrument of justice. That if the circumstances are such as to raise an equity in favour of the Plaintiff and the extent of the equity is known and in what way it should be satisfied, the Plaintiff



is entitled to succeed. Reliance was also placed on the case of *Serah Njeri Mwobi –vs- John Kimani Njoroge* [2013]eKLR and *Mary Wanjiru Ndegwa –vs- Wandemi Developers Limited* [2018]eKLR.

21. That it was the evidence of DW2 the Director of Housing of the 2nd Respondent that the 1st Respondent had been allotted plot 1 – 50 and that the Appellant trespassed upon the suit property having constructed on land well beyond the boundaries of his plot No.1 – 51 despite having been shown that plot No.1 – 50 had been allotted to the 1st Respondent.
22. That the offer of an alternative plot made by the 2nd Respondent was never communicated to the 1st Respondent as she confirmed in her evidence. That both the Appellant and the 2nd Respondent were liable for trespass of the 1st Respondent’s plot No.1 – 50 as the 2nd Respondent provided building approvals to the Appellant for illegal developments carried out on the suit property.
23. Counsel further submitted that the trespass of the Appellant of the suit property having been established, the 1st Respondent became entitled to damages. That the use of the term nominal damages does not mean damages of small quantity. That the court is empowered under the provisions of Order 42 Rule 31 of the Civil Procedure Rules to confirm the judgement of the trial court and vary the decree so as to describe the Kshs.5,000,000/- as general damages instead of nominal damages.

Issues for Determination

24. From the record of appeal generally and in particular the grounds of appeal raised and the submissions made, the issues that emerge for determination in this appeal are;
 - a. whether or not the trial court erred in holding that the Appellant had trespassed onto the 1st Respondent’s land parcel.
 - b. whether or not the trial court arbitrarily deprived the Appellant of his right to property in plot No.11 contrary to the provisions of article 40 (1)(a) of the *Constitution* of Kenya 2010.
 - c. whether or not the trial court erred in its finding regarding compliance by the 1st Respondent with the terms and conditions of the Letter of Allotment.
 - d. whether or not the trial court erred in its finding on whether the 1st Respondent was allocated alternative land by the 2nd Respondent.
 - e. whether or not the award of Kshs.5,000,000/- made to the 1st Respondent as general damages had legal basis
 - f. whether or not the judgement was against the weight of the evidence.
 - g. who pays the costs of the appeal?

Analysis and Determination

25. This being a first appeal, this court is obligated to re-examine the evidence placed before the trial court with a view to reach its own independent conclusion.
26. The record shows that a total of 3 witnesses testified in the suit. For the 1st Respondent (Agnes Teresa Kwaka) who was the Plaintiff in the suit, the evidence comprised of her testimony and the exhibits she produced. For the Appellant herein (James O. Tolo) who was the 1st Defendant, the evidence comprised of his testimony and the exhibits he produced and for the 2nd Respondent (the Municipal Council of Kisumu) who was the 2nd Defendant, the evidence comprised of the testimony of one Arnold Omondi Guya, Director of Housing in the employment of the 2nd Respondent.



27. The first issue for determination is whether or not the trial court erred in finding that the Appellant had trespassed onto the 1st Respondent's parcel of land. The record shows that the 1st Respondent pleaded in the amended plaint that land parcel number Uns. Residential plot number 11 in the Migosi Site and Service Scheme within Kisumu belonged to her by reason of her acceptance of the allotment given to her by the Commissioner of Lands. That in 2008 she discovered that the 1st Respondent had without her consent or knowledge and without any colour of right whatsoever entered the property, took possession and constructed thereon buildings and structures. The 1st Respondent in her testimony produced among other exhibits a letter of offer dated 20th June, 1986 for Market Sale plot No.1-50 and a Letter of Allotment dated 17th February, 1995 for UNS. Residential Plot 11 Migosi, Kisumu Municipality for a term of 99 years from 1st August, 1995 subject to the conditions in the said Letter of Allotment. The Letter of Allotment was signed by the Commissioner of Land. She testified that when she found her plot occupied by the Appellant, she went to court for redress.
28. The Appellant on the other hand through his statement of defence, denied ever trespassing onto the suit property. He pleaded in paragraphs 5 and 6 of his written Statement of Defence that he applied to the 2nd Respondent for a plot for residential purposes in the year 1986, that the 2nd Respondent consequently issued him with a Letter of Offer and Allotment Letter, that he took possession and developed the plot after receiving approvals from the 2nd Respondent. The Appellant produced as exhibits among other documents, letter of offer dated 20th June, 1986 for Market Sale Plot No.1-51 and Letter of Allotment for UNS Residential Plot No.11 – Kisumu Municipality. He testified that although he was given plot No. 1-51 and the 1st Respondent Plot No. 1-50, his plot was now No.11 the same Number for the Plaintiff. That it was Surveyor from the 2nd Respondent who identified the plot for him.
29. The witness for the 2nd Respondent testified vide his witness statement dated 13th June, 2019 which was adopted as his evidence in chief. He stated that plot No.1-50 was allocated to 1st Respondent while No.1-51 was allocated to the Appellant. That Mr. Tolo was shown plot No.1-50 which he went ahead and developed without any opposition from the 1st Respondent. He explained the source of the confused and mix up to have been caused by a Mr. Opiyo and Mr. John Mibey who were officers with the 2nd Respondent. On cross-examination the witness stated that the Appellant was shown the plot by the Surveyor that both plot Number 1- 50 and 1- 51 have the same plot number that is No.11. That both the Appellant and the 1st Respondent have 1 plot.
30. The record shows that after hearing all this evidence, the trial court faulted the 2nd Respondent for the double allocation of the land, found that there was no evidence of allocation of alternative land to the 1st Respondent and proceeded to grant all the prayers in the plaint.
31. The Appellant faults the trial court for this findings and decision. The Appellant contends through the grounds of appeal that the trial court gravely erred in law in finding and holding that the Appellant was guilty of trespass. That having found as a fact that the 2nd Respondent had acknowledged its mistakes in allocating the same plot to the Appellant which plot had already been allocated to the Respondent and that upon re-numbering both the 1st Respondent's plot No.1-50 and the Appellant plot No.1-51 were assigned the same No.UNS Residential Plot No.11 Migosi, Kisumu Municipality the trial court erred in not finding that the 1st Respondent did not hold a better title than the appellant.
32. I have considered the submissions made by Counsel for the parties as outlined hereinabove. I have taken into account the definition of the tort of trespass on which the suit was based, as contained in section 3(1) of the Trespass Act. I am in agreement with the submission by the Appellant that to prove



the tort of trespass on land, one has to demonstrate that the entry onto the land was illegal, unlawful and without a justifiable or reasonable cause.

33. Looking at the evidence placed before the trial court, I find no evidence that the Appellant's entry onto the land parcel known as UNS Residential Plot No.11 Migosi Kisumu Municipality was without justifiable cause. The Appellant had gone through the same process that the 1st Respondent went through in acquiring title to the property. He held a Letter of Allotment just like the Respondent. The difference is that the Appellant entered the land ahead of the 1st Respondent and with the guidance and approval of the 2nd Respondent, occupied and developed it.

I find that the holding by the trial court that the appellant was guilty of trespass was erroneous.

34. The next issue is whether or not the trial court arbitrarily deprived the Appellant of his right to the suit property contrary to the provisions of article 40 of the *Constitution* of Kenya.

The decision of the trial court allowed all the prayers in the amended amended plaint. In essence, the appellant was restrained from entering or interfering with the suit land in any way whatsoever. He was compelled to demolish his developments on the suit land in default the same be demolished by court bailiffs.

35. The Appellant faults this decision on the ground that the trial court erred in not holding the 1st Respondent did not hold a better title than the Appellant, that the Appellant just like the 1st Respondent, were in the position of innocent purchase of value without notice and in validating the title of the 1st Respondent and thereby invalidating that of the Appellant, the court arbitrarily deprived the Appellant of the land.

36. A reading of the judgement shows that the trial court heavily blamed the 2nd Respondent for the mix up and the misfortune of the 1st Respondent. It is clear, in the process the court gave little thought to the evidence both oral and documentary produced by the Appellant and the rights of the Appellant. There was no justification for validating one title while invalidating the other. I find that the judgement in essence deprived the Appellant his right to property under article 40 of the *Constitution* without cause.

37. The next issues for determination is whether or not the trial court erred in its findings regarding compliance by the 1st Respondent with the terms and conditions of the Letter of Allotment. In paragraph 5 of the amended amended plaint, the 1st Respondent pleaded that after accepting the offer of allotment and having paid the requisite allotment fee, now awaits the issue to her by the Commissioner of Lands of a certificate of lease in respect of the suit property. In response, the Appellant in paragraph 3 of his Statement of Defence denied the contents of paragraphs 5 of the plaint. After considering the evidence placed before it and the submissions made, the trial court held in its judgement that the witness of the 2nd Respondent did not deny that even after 30 days of the issuance of the Letter of Allotment, the 2nd Respondent did not decline to receive all monies required including the survey fees to process the title in favour of the Plaintiff. that the principle of estoppel applies to the submissions. That in any event, the same was not pleaded in the Defence and did not fall as a point for determination.

38. The Appellant faults the court for this finding on the grounds that the trial court erred in failing to find and hold that the 1st Respondent had failed to comply with the conditions contained in her Letter of Allotment dated 17th February, 1997 and that the same had therefore becomes null and void and does not confer on her any valid and legally enforceable claim to ownership of and title to the said UNS Residential Plot No.11 Migosi Kisumu Municipality. Further that the trial Magistrate erred in finding and holding that the question of the 1st Respondent's compliance with the conditions contained in her



- Letter of Offer and/or Letter of Allotment dated 17th February, 1997 was not pleaded in the defence and therefore did not fall for determination since the issue of compliance arose not only from paragraph 5 of the plaint but also from the Letter of Allotment itself.
39. It is clear from the contents of the Letter of Allotment that the allotment was conditional and that the conditions were that the 1st Respondent was to do a formal written acceptance of the conditions and make payments of the charges prescribed in the letter. The same was to be done within 30 days from the date of the Allotment Letter. The evidence on record is that compliance was not done within the time stipulated by the Letter of Allotment. The 1st Respondent testified that her acceptance was done vide her letter dated 18th October 1999. This was about 2 years after the lapse of the 30 days period for acceptance provided for. The effect of failure of compliance within 30 days was that the offer lapses. I find that the offer for allotment of the suit land to the 1st Respondent lapsed at the expiry of 30 days from the date of the Letter of Allotment for reason of non-compliance with the terms thereof by the 1st Respondent.
 40. The next issue is whether or not the trial court erred in its findings and decision on whether or not the 1st Respondent was allocated an alternative plot. The fact of allocation of alternative land to the 1st Respondent was introduced vide the testimony of the witness of the 2nd Respondent. Through his witness statement, the witness for the 2nd Respondent testified that Mr. Mibey offered Mrs. Kwaka (1st Respondent) another plot USAID Estate (block 4). The witness produced a sketch map showing the position of the plot marked “A” that the 1st Respondent was offered. In court, the witness testified on cross-examination that the Plaintiff was allocated another plot – USAID plot.
 41. On this, the trial court noted that it was upon realizing their mistake that Mr. Mibey purported to offer an alternative plot and that it was alleged that the Plaintiff was compensated in the year 1999. The court found that there was no evidence either by documentation or otherwise that the Plaintiff was compensated.
 42. The Appellant’s position on this is that even if the court had found no evidence, it should still have ordered the 2nd Respondent to actualize the offer of alternative plot to the 1st Respondent.
 43. The position of the 1st Respondent on this as expressed in her written submission is that the offer of alternative plot was never communicated to her.
 44. Indeed, there were documents produced to show allotment of the alternative plot. There was also no evidence that the 1st Respondent had been informed of the allotment of alternative plot. I however agree with the submission by the Appellant that on the grounds firstly, that the 2nd Respondent had accepted the Allotment Letter fees from the 1st Respondent albeit after the offer had lapsed, secondly that the 2nd Respondent had admitted to having offered the 1st Respondent alternative plot in lieu of the suit land and thirdly that the 1st Respondent did not object to the idea of being given alternative plot but was only concerned that the offer was not communicated to her, the trial court ought to have ordered the 2nd Respondent to actualize the offer of the alternative plot to the 1st Respondent.
 45. The next issue is whether or not the award of general damages of Kshs.5,000,000 had legal basis. In the amended amended plaint, the 1st Respondent prayed for damages for trespass and for loss of mesne profits. Having found that there was no trespass by the Appellant on the suit land, there is no basis for an award of general damages for trespass.
 46. Under section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter, or issue shall follow the event.



47. For the foregoing reasons, I find that the appeal has merit and allow 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 terms that the 1st Respondent's claim against the Appellant is dismissed with no orders for costs.

b. Costs of the appeal are awarded to the Appellant to be paid by the 2nd Respondent.

Orders accordingly.

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

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Appellant.

Ndolo for the 1st Respondent.

Okero for the 2nd Respondent.

