



Odhiambo (Suing as the Legal Representative of the Estate of Flora Anudo Ogembo - Deceased) v Odero & another (Environment and Land Appeal E083 of 2021) [2023] KEELC 17149 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E083 OF 2021**

E ASATI, J

MAY 4, 2023

BETWEEN

ANNAH ANYANGO ODHIAMBO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FLORA ANUDO OGEMBO - DECEASED) APPELLANT

AND

ZAKARIA OGARE ODERO 1ST RESPONDENT

THE COUNTY GOVERNEMENT OF KISUMU 2ND RESPONDENT

(Being an appeal from the judgement of Honourable F. Rashid – Principal Magistrate, Winam, delivered on 3rd August, 2021 in the original Winam PMC E& L Case No.108 of 2018)

JUDGMENT

Introduction

1. Vide the Memorandum of Appeal herein dated 25th November, 2021 the Appellant filed this appeal challenging the judgement in Winam PMC E & L Case No.108 of 2018 (the suit) delivered on 3rd August, 2021. The grounds of appeal as set out in the Memorandum of Appeal are that: -
 - a. The Learned Magistrate erred in Law and in fact in arriving at the finding that the Plaintiff was the author of her own misfortunes in as far as it relates to the developments of the land.
 - b. The Learned Magistrate erred in Law and fact when she misapprehended herself by applying and relying on sections of an irrelevant statute (*Land Registration Act* No.6 of 2012) which provides the legal Frame work for the management of land under which the suit property belongs with regard to issue of notice, eviction and demolition of the structures.
 - c. The Learned Magistrate erred in law and in fact in that she failed to consider the evidence of PW2 an expert witness in making her determination.



- d. The Learned Trial Magistrate erred in law and in fact when she failed to analyze in total all the documents presented to her by the Appellant and in particular the receipts of payment of rates which were presented by the Plaintiff but the trial Magistrate in her findings, failed to assess the evidence of the Appellant's receipts in making her determination.
 - e. The learned trial Magistrate erred in law and procedure in not making a finding against the 2nd Respondent who after entering appearance and filing a Defence, did not participate in the proceedings and did not make a finding on their participation.
 - f. The learned Trial Magistrate totally erred in Law and fact in that she failed to consider or sufficiently consider the material placed before her and as a result came to wrong conclusions and prejudiced the Appellant.
2. The appellant is the personal representative of Flora Anudo Ogembo deceased, who was the original Plaintiff in the suit. The original Plaintiff had sued the Respondents herein vide the plaint dated 1st November, 2017 which was later amended and replaced with the amended plaint dated 1st August, 2019. The original Plaintiff Flora Anudo Ogembo died in the pendency of the suit and vide an order made on 9th September 2021, she was substituted with the current Appellant
 3. The suit was first filed in the Environment and Land Court at Kisumu as Ksm Elc Case No.315/2017 but later transferred to the Principal Magistrate's Court at Winam for disposal.
 4. The 1st Respondent defended the suit *vide* written statement of defence dated 20th March, 2019 in which the 1st Respondent denied the claim, and stated that he was the bona fide registered proprietor of land parcel No.LR NO.22960 (IR NO.1716620) as delineated on land survey plan number 369443 which is the recognized title and that the Plaintiff did not hold any documents of ownership of the land.
 5. The 2nd Respondents did not file defence.
 6. After hearing the evidence, the trial court delivered its judgement on 3rd August, 2021 dismissing the Plaintiff's (Appellant's) claim in its entirety and awarding costs to the 1st Respondent. The Appellant was dissatisfied with the judgement and preferred the appeal herein.

Submissions

7. The appeal was canvassed by way of written submissions pursuant to directions taken by consent on 24/01/2023. Written submissions dated 15th February, 2023 were filed by the firm of Maxwell O. Ogonda and Associates on behalf of the Appellant. Written submissions dated 13th March, 2023 were filed by the firm of Bruce Odeny & Company Advocates on behalf of the 1st Respondent.

Issues for Determination

8. The grounds of appeal as set out in the Memorandum of Appeal form the issues for determination herein.

Determination

9. This is a first appeal and as such, this court is under an obligation to reanalyze the evidence adduced before the trial court so as to come to its own independent conclusion. The court will do this as it determines each of the grounds of appeal.
10. The first ground of appeal raises the issue of whether or not the trial Magistrate erred in law and in fact in arriving at the finding that the Plaintiff was the author of her own misfortune.



The trial court in determining whether or not the Plaintiff was entitled to the orders sought, observed that prayers (a), (b) and (c) in the plaint could not be granted against the 1st Defendant because the parcel of land in respect of which the Plaintiff was seeking injunction and eviction did not exist. That the Plaintiff could not benefit from an illegality and that the 1st Defendant was entitled to enjoy his property as envisaged by Section 24(a) of the Land Registration Act 2012. That the Plaintiff is not holding any documents of ownership. The court concluded that the Plaintiff was the author of her own misfortune and should bear the burden of building on someone else's land. That all the visible signs were showing that the land belonged to the 1st Defendant but the Plaintiff still went ahead and commenced construction thereon which the 1st Defendant stopped.

11. The evidence before court was, according to the testimony of PW1, that she was the legal allottee of plot No. Mamboleo 59/341A, Kisumu Municipality and SG 230 – Mamboleo Kisumu Municipality which were allotted to her by the Municipal Counsel of Kisumu vide Letter of allotment of plots dated 19th November, 2010. That she promptly paid all the stipulated dues, took immediate possession of the plots which are adjacent to each other and commenced development of storeyed buildings which are now at an advanced stage. That she sought and obtained all the relevant permits, plan approvals and have been abiding by all the legal and/or statutory regulations and obligations required of her by the 2nd Defendant. That it was in October 2017 that the 2nd Defendant *vide* a letter dated 19th October, 2017 authorized the 1st Defendant to demolish PW1's buildings on the plots which are now registered as plot No. Kisumu/Mamboleo/LR 22960 and that on the basis of the letter, the 1st Defendant commenced demolition of the buildings without giving notice.
12. She produced exhibits among them a letter dated 19th November, 2010 from the Municipal Council of Kisumu and payment receipt No.16177 dated 15th July, 2010, a letter dated 19th October, 2017 by the County Government of Kisumu (City of Kisumu) dated 19th October, 2017 addressed to Zacharia Odero, architectural plan report dated 2nd March, 2013, photographs and letter to the County Secretary, County Government of Kisumu dated 23rd October, 2017.
13. The 1st Defendant (Respondent) on his part testified as DW1 that he is the owner of land parcel No.LR 22960 situated in Kisumu IR 171620 which he got through an application he made to the government. He produced exhibits including certificate of title dated 20th January, 2016 for LR 22960 (IR 171620), Letter from Commissioner of Lands dated 22nd November, 2010, National Land Commission newspaper advertisement, Gazette Notice No.6862, Demand Letter from Adiso & Co. Advocates and Letter from Bruce Odeny & Co. Advocates dated 6th September, 2017. That the land belongs to him and that not plaintiff.
14. The Appellant submitted on this issue that from the evidence on record, there was no way the trial court could have found that the Appellant was the author of her own misfortune because all the misfortunes the Appellant experienced were as a result of the actions of the 2nd Respondent who initially advertised the suit plots, the Appellant did bid, was a successful bidder, paid the requisite fees and was allotted the plots. That the Appellant was not privy to the fact that the 1st Respondent also had title to the suit property. That hence the court erred in finding that the Appellant was the author of her misfortunes.
15. The 1st Respondent submitted that indeed the Appellant was the author of her misfortunes as she failed to exercise due diligence prior to developing the suit property despite all pointers indicating that there would be more than meets the eye with regard to the title.

That the Appellant slept on her rights and acquiesced for a great length of time. That the period between the last advertisement by the 2nd Defendant and the date of the letter by the National Land



Commission declaring the advertisement illegal was about 1 month and it therefore beats logic for the Appellant to claim that she proceeded with development of the suit property to an advanced stage worth Kshs.6,050,104.68 without knowing that the allotment of the suit property had been declared illegal and that the 1st Respondent had title to the suit property. That the Appellant commenced the process of developing the suit property without a certificate of title under her name. That it is impossible that the Appellant only came to learn of the National Land Commission's decision a whole 7 years after developing the suit property to an advanced stage.

16. It is not disputed that the suit property was allotted to the appellant by the 2nd Respondent and soon thereafter the appellant proceeded to develop the property. It is not disputed that as at the time of commencing the development, the Appellant had no certificate of title to the suit property. It is further not disputed that the National Land Commission nullified the purported advertisement and allocation of lands inclusive of the suit property and further that the suit property was subsequently allotted to the 1st Respondent who is the current title holder.
17. I note that the allotment letter by the 2nd Respondent to the Appellant was dated 19th November, 2010 and the letter by Commissioner of Lands nullifying the advertisement and allotment was dated 22nd November, 2010. A difference of less than 4 days apart. The architectural design report and attendant documentation and payment for the same were being done in July 2013 long after the allotment had been nullified. The 2nd Respondent gave the approval and signed the conditions in respect thereof on 29th July, 2013 through Ochieng Oneko identified as the 2nd Respondent's building inspector. One wonders why the 2nd Respondent was urging the Appellant on even after the gazette and allotment had been nullified. The letter from the Commissioner of Lands was addressed to the 2nd Defendant and copied to Permanent Secretary, Ministry of Local Government Nairobi and the Provincial Local Government Officer, Nyanza and the District Land Officer, Nyanza. There is nothing to show that the Appellant was informed of the contents of the letter and particularly the nullification. The burden was with the 2nd Defendant to inform the people it had allotted the plots to of the cancellation thereof and even recall the allotment letters. Blame for the Appellant's loss could therefore not be laid solely on the Appellant.

I find that the appellant was misled and misguided by the 2nd Respondent in proceeding to develop the suit plots. The 2nd Defendant gave the appellant the impression that all was well, received her payment for the allotment, approved her building plans and in all these failed to inform her that the allotment had been nullified and the plots allotted to the 1st Respondent who was now the registered owner. She was not the author of her own misfortune.

18. The second ground of appeal raised the issue of whether or not the trial Magistrate erred in law and fact when she applied and relied on Sections of the *Land Registration Act* which provides the legal framework for the management of land under which the suit property belongs with regard to issue of notice, eviction and demolition of structures.

In the judgement, the trial court referred to Section 24(a) of the *Land Registration Act*, in finding that the 1st Defendant is entitled to enjoy the suit property as the registered property thereto.

19. The Appellant submitted on this issue that the Magistrate erred in law and in fact by failing to appreciate the provisions of Section 12(a) of the *Land Act* No.6 of 2012 in relation to how the appellant obtained title and in particular the allotment issued to the Appellant by the 2nd Respondent. That the trial court failed to appreciate that the demolition by the 1st Respondent of the building constructed by the Appellant were done in an illegal and unlawful way in contravention of the law hence caused the Appellant to suffer damage and loss. The Appellant further submitted that the trial Magistrate failed to apply the provisions of Section 152 E of the *Land Act* No.6 of 2012 which provides for guidelines



on eviction. And that the trial court failed to find that as a result of the actions of the Respondent and in particular the 2nd Respondent, the Appellant suffered loss which ought to have been rectified by way of awarding damages as prayed to the tune of Kshs.6,050,104.68.

20. The Respondent submitted on this issue that it is not in dispute that interest in land can be acquired by way of an allotment as stipulated in Section 12(1) of the Land Act No.6 of 2012, that the issue in dispute is whether the allotment process occurred. Reliance was placed on the case of D. Joseph N.K. Arap Ngok –Vs- Justice Moiwo Ole Keiwa & 4 Others, C.A.60/1997 where it was held that a letter of allotment cannot confer an interest in land and cannot be used to defeat a title of person who is the registered proprietor of the land.

That the process of eviction of the Appellant from the suit property was conducted procedurally and in accordance with Section 152 of the Land Act as a Notice to vacate was served to the Appellant and that the 1st Respondent was authorized *vide* letter dated 19th October, 2017 by the 2nd Respondent to demolish the structures on the suit property.

21. In paragraph 9 of the amended plaint the appellant pleaded that the 2nd defendant *vide* letter dated 19th October 2017 authorized the demolition of the buildings on the suit lands which demolitions were commenced without giving the appellant notice. She pleaded in paragraph 9 (a) that the actions of the 2nd defendant caused her to suffer great financial loss to the tune to be quantified during the hearing of the suit. She prayed, in the alternative to the other claims in the amended plaint, for an order directing the 2nd defendant to compensate the Plaintiff for the pecuniary loss incurred by the plaintiff as a consequence of the allotments given to the Plaintiff by the 2nd Defendant.

22. I find no evidence of compliance with the law when removing the appellant from the suit land. What is evident is that the 2nd Respondent authorized the 1st Respondent to demolish the structures on the land. The 2nd Respondent did this *vide* a letter dated 19th October 2019 signed by one Moses Werunga City Engineer and addressed to the 1st Respondent. It read:

“Re: Demolition on Plot Ksm/Mamboleo/LR 22960

This is to inform you that you have been authorized to carry out demolition work on the above underlined plot subject to the following conditions;

- i. The demolition work must be skillfully undertaken.
- ii. Ensure that area which are weak and precariously hanging are supported firmly before the demolition work starts.
- iii. Observe safety of all builders.
- iv. The demolished material must be tipped away on a site designated by the Director Environment and City Engineer.”

The letter was not copied to the appellant.

23. The 3rd ground of appeal is that the trial court erred in law and fact in failing to consider the evidence of PW2 an expert witness.

PW2 according to the proceedings was one John Oguna who testified that he was a quantity Surveyor. He produced a valuation report showing that the cost of the building at the time of demolition was kshs.6,050,104.68. The Appellant submitted that the trial court failed to find that the actions of the Respondents led to Appellant to suffer loss to the tune of Kshs.6,050,104.68.



24. The 1st Respondent submitted that the Appellant’s allegations in the Memorandum of Appeal that she presented the trial court with documents to prove ownership are false.

That the Appellant failed to call an expert witness for reasons that during cross-examination, PW2 testified that he did not have any documents to prove that he was a Surveyor and further that he was not the author of the report he produced before court. That his evidence therefore was of low probative value.

25. A reading through the judgement reveals that the court referred to evidence of PW2 as part of the summary of the evidence. The court noted that: -

“One John Oguna a Quantity Surveyor testified as Pw.2 on behalf of one Edwin Otieno. He produced a copy of valuation report indicating the value of the demolished building as Shs.6,050,104.68. He produced the valuation report as P.exh.6. In cross-examination, he stated he is not the maker of the report. He also said that he did not know the plot on which the building was situated and that he did not conduct a search at the lands office to confirm whether the land existed.”

However, no finding was made on this evidence. Under the proviso to section 35 of the *Evidence Act*, a document can be produced by a witness who is not the maker. In this case the issue was considered and the court gave a ruling allowing PW2 to produce the valuation report. The court ought to have taken the evidence of Pw.2 into account.

26. The next ground of appeal was that the trial Magistrate erred in law and in fact when she failed to analyze in total all the documents presented to her by the Appellant and in particular the receipts of payment of rates which were presented by the Plaintiff but the trial Magistrate in her findings failed to assess the evidence of the Appellant’s receipts in making her determination.

The proceedings show that among the documents produced by the Appellant as per the list of documents were official receipts of payment.

27. The Appellant submitted on this that the trial Magistrate at page 3 line 10 to 13 of the Judgement stated that there is no proof that the Appellant accepted the offer and paid the consideration as required.

That without such evidence, she cannot be the rightful owner of the suit land. That this finding by the Magistrate was erroneous. That had the trial Magistrate analyzed the documents produced well she would have come to the finding that indeed the Appellant was in possession of the suit property. That the documents indeed proved that there was allotment of the suit property by the 2nd Respondent to the original plaintiff and that she paid for the allotment and thereafter went ahead and developed the property.

28. Perusal of the record shows that the letter of offer dated 19th November, 2010 given to the Appellant by the 2nd Respondent contained terms of the offer. One of them was for payment of a sum of Kshs.39,000. The payment receipt produced as exhibits shows that a sum of Kshs.39,100 was paid to the 2nd Respondent. The other condition was that the plot had to be developed within the next 24 months. This constituted evidence of acceptance of the letter of offer. The finding that there was no evidence of acceptance of the offer was erroneous.

29. The next ground of appeal raised the issue of whether or not the trial Magistrate erred in not making a finding against the 2nd Respondent who after entering appearance and filing defence did not participate in the proceedings and did not make a finding on its non-participation.



A reading of the judgement reveals that the trial court noted at the introduction of the judgment on page 1 thereof that the 2nd Defendant did not enter appearance despite being served and that the case proceeded in their (2nd Respondent's) absence. That indeed no finding was made at all concerning the 2nd Defendant.

30. The Appellant submitted on this that the 2nd Defendant was sued alongside the 1st Respondent. That the misfortune that befell the Appellant was as a result of the actions of the 2nd Respondent. That it was an error in law and fact on the part of the trial Magistrate not to so find and that the trial court erred in law and fact in not finding the 2nd Respondent liable for the damages and loss the Appellant suffered.

31. The 1st Respondent submitted on this that the trial Magistrate did not err in law and procedure in not making a finding against the 2nd Respondent because the issue had already been deliberated upon by the National Land Commission, *vide* Gazette Notice No.6862 thus the same would amount to res judicata. He submitted further that the court reiterated in the judgement that;

‘On the issue of compensation, I note that the National Land Commission in Gazette Notice number 6862 found that the Plaintiff should be compensated by the 2nd Defendant.’

He relied on Section 7 of the *Civil Procedure Act* and the decision in *Joshua Ngatu –Vs- Jane Mpinda & 3 Others* (2019)eKLR and *Herdson –Vs- Herdson* (1843)67 ER 313 and submitted that the issue of compensation of the Appellant by the 2nd Respondent is *res judicata*, the same having been determined by the National Land Commission.

That the Appellant should have approached the court by way of appeal regarding the issue of compensation as the court cannot purport to re-open the issue. I find no evidence on record to show that the issue of compensation of the appellant was decided by the National land Commission

32. The last ground of appeal is that the learned trial Magistrate totally erred in law and fact in that she failed to consider or sufficiently consider the materials placed before her and as a result came to wrong conclusions and prejudiced the appellant. This ground has been covered by the findings on the other ground of appeal herein.

33. The relief sought in the appeal is that the appeal be allowed, judgement and decree of the court appealed from be set aside and in its place judgement be made in favour of the appellant as prayed in the plaint. The prayers in the amended plaint were: -

- a. An order of permanent injunction restraining the Defendants either by themselves, their agents and/or assigns from entering, dealing and/or demolishing the building on plot numbers Mamboleo Sg/341 A Kisumu Municipality and 230-SG Mamboleo, Kisumu Municipality.
- b. A declaration that the Plaintiff is the bona fide allottee of plot numbers Mamboleo Sg/341A Kisumu Municipality and 230-SG, Mamboleo, Kisumu Municipality.
- c. An order of eviction directed to the 1st Defendant and compensation to the Plaintiff to the extent of damage already caused to the property OR in the alternative, an order directing the 2nd Defendant to compensate the Plaintiff for the pecuniary loss incurred by the Plaintiff as a consequence of the allotment given to the Plaintiff by the 2nd Defendant.
- d. Costs of this suit and interest on (b) and (d).

34. Having found that the 1st Respondent is the title holder to the property and that whatever allotment that had been made to the appellant was nullified soon thereafter, I find no basis to interfere with the



trial court's findings on the payers for orders of injunction, declaration or eviction as prayed in prayers (a), (b) and (c) of the amended plaint.

35. However, on the claim for compensation I find that the 2nd Defendant is liable to compensate the appellant for the loss. The appellant prayed for compensation as an alternative prayer in the amended plaint she availed the evidence of PW2 and the valuation report quantifying the loss at Kshs 6,050,104.68. The trial court ought to have awarded this on the basis of the evidence adduced.
36. I find merit in the appeal. The appeal is allowed. The judgement in Winam PMC E & L No.108 of 2018 dated 3rd August 2021 is hereby set aside and replaced with judgement dismissing the suit against the 1st Respondent (1st Defendant in the suit) and entering judgement in favour of the appellant against the 2nd Respondent for Kshs 6, 050,104.68 being compensation for the loss suffered. Costs of the suit and of the appeal are awarded to the appellant and the 1st Respondent, to be paid by the 2nd Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 4TH DAY OF MAY, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

Mr. Ariho Advocate for the Appellant.

No appearance for the Respondents.

