



**Mutuku v Gitonga (Environment and Land Appeal 11 of 2020)
[2023] KEELC 17852 (KLR) (6 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 11 OF 2020**

BM EBOSO, J

JUNE 6, 2023

BETWEEN

MICHAEL MWEU MUTUKU APPELLANT

AND

BERNARD NGUGI GITONGA RESPONDENT

*(Being an Appeal against the Judgment of Hon G. Omodho Senior Resident
Magistrate, delivered on 26/9/2020 in Thika CMC Civil Case No. 1329 of 2010)*

JUDGMENT

1. This appeal challenges the Judgment rendered by Hon G Omodho, SRM, on 26/9/2018 in Thika CMC Civil Case No 1329 of 2010. The appellant, Michael Mweu Mutuku, was the defendant in the said case. The respondent, Bernard Ngugi Gitonga, was the plaintiff. The dispute in the trial court revolved around the question of ownership of what was described in the exhibited allotment letters as Unsurveyed Residential Plot No 240 – Thika Municipality. The appellant waved two allotment letters which he contended were the foundation of his claim of ownership. The respondent waved one allotment letter, contending it to be the foundation of his ownership claim. The trial court found in favour of the respondent. The key issue in this appeal is whether the respondent discharged the burden of proof in the trial court. I will outline a brief contextual background to the appeal before I delve into the key issue that falls for determination in the appeal.
2. Vide a plaint dated December 16, 2010, the respondent sued the appellant, alleging that the appellant had unlawfully entered into the suit property. He contended that the suit property belonged to him pursuant to a letter of allotment issued to him on 4/9/1998. He prayed for: (i) general damages for trespass; (ii) an eviction order; and (iii) costs of the suit.
3. The appellant filed a defence dated 24/1/2011 in which he contested the respondent’s claim. He averred that he was an innocent purchaser for value without notice, having purchased the suit property



from the Trustees of Wanjuka Self Help Group who held the initial letter of allotment relating to the suit property dated 4/9/1998. He added that subsequent to him purchasing the suit property from the trustees of the Group in December 2008, the Commissioner of Lands issued to him a subsequent letter of allotment relating to the suit property and he duly accepted the terms and conditions set out in the said subsequent letter of allotment. It was the case of the appellant that he entered the suit property pursuant to the letter of allotment which vested the suit property in him.

4. During trial, the respondent testified and closed his case. He produced the following exhibits: (i) an original letter of allotment dated September 4, 1998, Ref 23136/XIlli, signed by one EK Muchai on behalf of the Commissioner of Lands; (ii) an enforcement notice dated November 25, 2010 issued to the appellant stopping the appellant from undertaking unapproved construction on the suit property; and (iii) a demand letter dated 8/1/2010 written to the appellant requiring him to vacate the suit property.
5. Similarly, the appellant testified and closed his case without leading further evidence. He produced the following exhibits: (i) a sale agreement dated December 18, 2008; copies of ID cards of the trustees of Wanjuka Self Help Group; (iii) allotment letter dated 4/9/1998 in the name of Wanjuka Self Help Group; (iv) allotment letter dated 27/8/1998 in the name of Michael Mweu Mutuku [the appellant]; (v) area list; (vi) beacon certificate; (vii) area map; and (viii) photographs.
6. Upon conclusion of trial, and upon receiving submissions from the parties, the trial court rendered the impugned Judgment, in which it made a finding that the respondent had established that he was the lawful allottee of the suit property. The trial court ordered eviction of the appellant by way of demolition of his structures from the suit property. The trial court awarded the respondent costs of the suit.
7. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following grounds:
 1. The learned trial court erred in law and in fact by entering judgment against the appellant despite there being insufficient evidence to do so as the burden of proof was not discharged on the applicable standard.
 2. The learned magistrate erred in law and fact when he made orders based on circumstantial evidence and devoid of crucial exhibits such as the report from the Land Commission as to whose allotment paper was indeed genuine.
 3. The trial magistrate erred in law and in fact when it delivered judgment which fell short of reasonable rationale to warrant dismissal of the appellant's defence and counterclaim. (sic)
 4. The trial court erred in law and in fact when it failed to appreciate that the appellant was also owner to the suit premises by virtue of direct allotment from the Commissioner of Lands. (sic)
 5. The trial magistrate erred in law and in fact when she relied on evidence which was not corroborated by fact of law or otherwise.
 6. The learned trial court erred in law and in fact when she failed to appreciate that it was not her duty to declare the rightful letter of allotment when it had no known procedure and process to determine authenticity of the letter of allotment.

Submissions

8. The appeal was canvassed through written submissions dated November 30, 2022, filed by M/s Muturi Njoroge & Co Advocates. Counsel for the appellant identified the following as the key issues that



- fell for determination in the appeal: (i) Whether the respondent availed sufficient evidence so as to discharge the burden of proof on the applicable standard; and (ii) Whether the trial court belaboured on which allotment letter was genuine? (sic).
9. Counsel for the appellant submitted that the trial court made orders based on circumstantial evidence and devoid of “crucial exhibits such as the report from the Lands Commission as to whose allotment paper was indeed genuine”. Counsel contended that the trial court failed to appreciate that it was not its duty to “declare the rightful letter of allotment when it had no known procedure and process to determine authenticity of the letter of allotment”. Counsel contended that in the absence of Wanjuka Self Held Group, the trial court relied on uncorroborated evidence.
 10. It was the position of counsel for the appellant that the applicable standard of proof required the respondent to do more to demonstrate why he brought the claim 12 years after the appellant took possession of the suit property; why he did not complain to the authorities prior to 2010; and why he was entitled to the suit property yet he did not develop it in terms of the conditions set out in the letter of allotment. Counsel urged the court to allow the appeal.
 11. The respondent filed brief written submissions dated 30/1/2023 through M/s Kamiro R N & Co Advocates. Counsel for the respondent pointed out that the appellant tendered a contradictory defence and contradictory evidence. Counsel argued that the appellant contended that he was a purchaser of the suit property and at the same time contended that he was an original allottee. Counsel summed up the appellant’s case in the following words:

“There was actually total confusion by the appellant in his evidence.”
 12. Counsel urged the court to uphold the Judgment of the trial court and dismiss the appeal.

Analysis and Determination

13. I have read and considered the original record of the trial court alongside the record filed in this appeal. I have also considered the parties’ rival submissions; the relevant legal frameworks; and the applicable jurisprudence on the key issue. Parties did not agree on a common set of concise issues that should be determined by this court.
14. Taking into account the grounds of appeal and the submissions that were tendered in this appeal, the single issue to be determined in this appeal is whether the respondent satisfied the burden of proof in the trial court. Before I dispose the issue, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
15. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”



16. The above principle was similarly outlined in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
17. The respondent’s case was that he was allotted the suit property by the Commissioner of Lands through a letter of allotment dated 4/9/1998. He tendered evidence to the effect that he accepted the allotment and paid to the Department of Lands the monies that were set out in the letter of allotment. He produced the original letter of allotment.
18. Further, the respondent led evidence demonstrating that when the appellant entered the suit property, he objected to the appellant’s action and despite the objection, the appellant continued to erect unapproved structures on the suit property. The respondent produced a demand letter written to the appellant by his advocates and an enforcement notice issued to the appellant by Thika Municipality requiring the appellant to cease erecting unapproved structures on the suit property.
19. On his part, the appellant contended that he purchased the suit property from the trustees of Wanjuka Self Held Group, adding that the said trustees held an allotment letter from the Commissioner of Land, dated 4/9/1998. The appellant further contended that subsequent to purchasing the suit property from the said trustees, the Commissioner of Lands issued to him a subsequent allotment letter in his name. During trial, the appellant produced the two letters of allotment.
20. The letter of allotment bearing the name of Wanjuka Self Help Group was a replica of the letter of allotment held by the respondent except in terms of the colour of the paper and the name of the allottee. None of the trustees of Wanjuka Self Help Group was called as a witness to demonstrate the origin of the letter of allotment dated 4/9/1998 that the appellant held.
21. The second letter of allotment which the appellant relied on was dated 27/8/1998. This particular letter of allotment pre-dated the letter of allotment dated 4/9/1998 that was allegedly issued to Wanjuka Self Help Group. The letter contradicted the appellant’s evidence that he initially purchased the suit property from the trustees who surrendered to him the Group’s letter of allotment dated 4/9/1998 and that subsequent to that, the Commissioner of Lands issued to him a letter of allotment in his own name.
22. The record of the trial court indicates that the appellant conceded during cross-examination that there was a problem relating to dates on the allotment letters that he had exhibited.
23. This court’s evaluation of the above evidence is that the appellant’s attempt to controvert the respondent’s evidence backfired when it emerged that his defence and documentary evidence were not adding up. They were contradictory. The contradiction in the letters of allotment dealt his defence a devastating blow. He failed to lead evidence by the people who had uttered to him the allotment letter dated 4/9/1998. The second letter of allotment had been back dated. Secondly, it is clear from evidence on record that the appellant erected unapproved structures on the suit property in total disregard of the respondent’s protest and the Local Authority’s enforcement notice.
24. Given the above evidence, this court fully agrees with the finding of the trial court on the question as to whether the respondent discharged his burden of proof as required under the law. That is the finding of this court on the single issue in this appeal.



25. On costs, the general principle in Section 27 of the *Civil Procedure Act* is that costs follow the event. No proper reason has been advanced and no special circumstances exist to justify a departure from the general principle.

26. The result is that this appeal is dismissed for lack of merit. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Kamiro for the Respondent

Court Assistant: Hinga

