Wanyoike & another v Kenya Medical Research Institute & another (Environment & Land Case 31 of 2020) [2023] KEELC 20657 (KLR) (3 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20657 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 31 OF 2020

LL NAIKUNI, J

OCTOBER 3, 2023

BETWEEN

HEZEKIAH MACHARIA WANYOIKE ..... 1ST APPELLANT

CECILIA WANJIRU WAMAITHA ..... 2ND APPELLANT

AND

KENYA MEDICAL RESEARCH INSTITUTE ..... 1ST RESPONDENT

JOWA (KINS) LIMITED ..... 2ND RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgement in this matter pertains to the Appeal instituted before this Honourable Court by the 1st and 2nd Appellants herein - Hezekiah Macharia Wanyoike and Cecilia Wanjiru Wamaitha. It was brought through the Memorandum of Appeal dated 1st March, 2019. The appeal was lodged as the Appellants were dissatisfied by the entire Judgement of the Trial Magistrate's Court Honourable Khapoya S. Benson, Senior Resident Magistrate sitting at Taveta and delivered on 1st February, 2019 in Civil Case No. 22 of 2015 compiled 386 pages Record of Appeal dated 19th July, 2022 and filed before this Court on 20th July, 2022. The said Record of Appeal was acknowledged as being proper by the Advocate for the Respondents.

2. On 7th December, 2022, direction on the filed appeal was taken pursuant to the Provision of Section 79B of *Civil Procedure Act* CAP. 21 Order 42 Rules 11, 13 & 16 of the Civil Procedure Rules 2020. Subsequently it was directed that the appeal be disposed off by way of Written Submissions thereof.

   Pursuant to that all the Parties complied accordingly and the Honorable Court reserved a date for the delivery of this Judgement on notice accordingly.

II. The Appellant's case

3. As indicated, being dissatisfied by the whole Judgement of the Trial Court filed this appeal through a Memorandum of Appeal on the following grounds: -

    a. That the Trial Magistrate erred in law and fact by dismissing the Appellants' entire case.

    b. That the Trial Magistrate erred in law and fact by treating and managing the Appellants case casually.

    c. That the Trial Magistrate erred in law and fact by relying only on maps of the disputed area.

    d. That the Trial Magistrate erred in law and fact by failing to appreciate the necessity of visiting the scene of the alleged transgressions.

    e. That the Trial Magistrate erred in law and fact by failing to appreciate that the Defendants' witness did not approve plan of the designated area.

    f. That the Trial Magistrate erred in law and fact by declining the Appellants request and application to call additional witnesses including officials of Taveta Town Council.

    g. That the Trial Magistrate erred in law and fact by showing open bias against the Appellants.

    h. That the Trial Magistrate erred in law and fact by ignoring the legal implications of Kenya Gazette Notice No. 5039 of 18th October, 2013.

    i. That the Trial Magistrate erred in law and fact by failing to appreciate the implications of the National Land Commission Financial Awards to the Appellants.

    j. That the Trial Magistrate erred in law and fact by failing to appreciate the implications of the Appellants grievances against his counsels.

    For the appeal the Appellants sought for the following orders: -

        a. The appeal be allowed with costs;

        b. The Judgement and orders of the Trial Magistrate delivered on 1st February, 2019 be and is hereby set aside.

        c. There be re-trial of the case.

4. On 21st December, 2022, the Learned Counsels for the 1st and 2nd Appellants herein, the Law Firm of Messrs. Ragira, Gideon & Company Advocates filed their Written Submissions dated 20th December, 2022. Mr. Angima Advocate informed Court he would submit as follows on behalf of the Appellants dealing with each and every of the filed grounds separately.

Under Ground No. (a)

5. The Learned Counsel held that by a Plaint dated 1st July, 2015, the Plaintiffs sought for the following reliefs: -

    a. A declaration that the Plaintiffs were the owners of Plot No. T/MM/115/1 and T/MM/115 Taveta town;

    b. An Order for injunction to issue restraining the Defendants by themselves, their servants, agents and any other person acting on their instructions from trespassing Plot No. T/MM/115/1 and T/MM/115 until Suit was heard and determined;

c. The Defendants be by themselves, their agents, servants and/or anybody acting on their authority restrained by way of an injunction from trespassing, construction, erecting and/or doing anything affecting Plot No. T/MM/115/1 and T/MM/115 until suit was heard and determined;

d. Damages for trespass;

e. The costs and interest of this suit be provided for; and

f. The Court be pleased to grant any order it deems fit to grant in the circumstances.

According to the Learned Counsel the Trial Magistrate while delivering the Judgment failed to appreciate the fact the Appellants had been and were still in occupation of the disputed properties and proceeded on to dismiss their entire suit.

Under Ground No. (b)

6. The Learned Counsel submitted the Trial Court failed to take into account that the issue of the land ownership was very emotive and decided to treat the Appellants case casually.

Under Ground No. (C)

7. The Learned Counsel averred that the Trial Magistrate failed to consider the whole map provided by the Appellants and only considered the features of the disputed area.

Under Ground No. (d)

8. The Counsel submitted that despite the Appellants requesting for a site visit for the Court to get first hand information, the Trial Magistrate ignored the request, instead it proceeded on to deliver the Judgement without considering the evidence on the ground. The Court failed to appreciate the fact that the Appellant had been in the disputed Plot for more than twenty two (22) years and had done some developments and constructed houses thereon. He was of the view conducting the site visit was critical in the interest of justice.

Under Ground No. (e)

9. The Learned Counsel argued that during the hearing of the case, before the Trial Court the Defendants' witness never cited nor produced any approved plan of the designated area. According to the Counsel was a miscarriage to justice.

Under Ground No. (f)

10. The Counsel informed Court that the Appellants with the intention to have parties provide more information on the boundaries of the suit land sought to amend the Plaint in order to include the Director of Physical Planning, the Director of Survey and Director of Land Adjudication and Settlement and also to call more witnesses but the Magistrate declined the request. To decline to these governing entities to shed more light to the matter, the Court obstructed justice.

Under Ground No. (g)

11. By failing to allow the Appellants to call more witnesses and have the government entities to the suit was a clear biasness to the case against the Appellant according to the Counsel.

Under Ground No. (h)

12. Through the Kenya Gazette No. 5039 of 18th October, 2013 the two (2) plots were gazetted to be owned by the Appellants.

    Subsequently, there was no other Kenya Gazette Notice which cancelled the ownership. The Counsel urged the appeal to relook into the Kenya Gazette and the allotment letters thereof.

Under Ground No. (i)

13. The Learned Counsel argued that the Magistrate never considered or take into account that the National Land Commission's legal mandate to manage land and where necessary to award financial compensation for land taken away on compulsory basis for public use. The Counsel was of the view there was need to relook into this issue during the appeal.

Under Ground No. (j)

14. The Learned Counsel urged Court to observe that the Appellants changed Advocate several times until they filed a notice to act in person.

    In conclusion, the Learned Counsel urged the Court to allow the appeal against the decision of the Lower Court as prayed with costs.

III. The 1st and 2nd Respondents case

15. On 27th February, 2023 the Learned Counsel for the 1st Respondent through the Law firm of Messrs. Muriu, Mungai & Co. Advocates filed their Written Submissions dated 24th February, 2023, Mr. Kongere Advocate commenced his submissions by providing the Court to a detailed and comprehensive facts of this case. In a nutshell he stated that the Appellants filed the Suit as supposed owners of the parcels of land which they identified as Plot. No. T/MM/115/1 and T/MM/115. According to the Counsel, he held that the Appellant alleged that the 1st and 2nd Respondents had started digging trenches around these two (2) parcels of land with a view to erect a perimeter wall. To them they considered the action by the Respondents amounted to trespass on these parcels.

16. Hence they asked Court to make a declaration to that effect and that they were the legal owners. They sought for injunction orders restraining the Respondents from interfering with their possession. From these, the 1st Respondent responded stating that Plot No. T/MM/115/1 and T/MM/115 were infact not properties legally recognized. Instead they were parcel numbers unlawfully created by the then Town Council of Taveta within an existing larger parcel identified as Plot No. Taita Taveta/Block 1/291 which was allocated to the 1st Respondent by the Commissioner of Lands. Hence from the documents submitted it was obvious the title by the 1st Respondent was superior to that being claimed by the Appellants.

17. Therefore, according to the Counsel the Trial Court upon hearing the case found that a Temporary Occupation Licence could not defeat the 1st Respondent's claim founded on a Letter of Allotment and therefore dismissed the case by the Plaintiff with costs.

18. The Learned Counsel asserted that although the 1st and 2nd Appellants being dissatisfied by the decision by the Trial Magistrate Court preferred an appeal before this Court based on ten (10) grounds. The Learned Counsel wished to condense the said grounds into three (3) broad grounds while responding to them as follows: -

19. Firstly, refusing to obtain evidence from the third parties and consider that evidence to cater for grounds Nos. (f), (h) & (i) of the grounds by the 1st and 2nd Appellants. Accordingly, the Counsel rehashed that the Appellants complained that the Trial Court refused to visit the site (ground No. (d)), refused to allow the calling of additional witnesses (ground No, (f)), failed to consider some gazette Notice (ground No. (h)) and failed to consider evidence of some report by the National Land Commission (ground No. (i)). The Counsel averred that it was after the closure of their case that the Plaintiff applied to re-open its case so that the Court could take additional evidence. The application was refused through a ruling delivered on 10th February, 2019. Although they seem to have been aggrieved by the said ruling but they failed to prefer an appeal against it. Furthermore the appeal filed on 1st March, 2019 was out of time under Section 79 G of the *Civil Procedure Act*, Cap. To support their point, the Learned Counsel cited the case of:- "Pascal Obonyo Agwesa & 4 Others -Versus- Simon Juma Odiyo (2019) eKLR").

20. Further the Counsel was of the argument that no such evidence was ever presented before the Trial Court for it to have considered it. Indeed the Learned Counsel argued that it was still to be informed the meaning of what "National Land Commission Financial Awards" was or meant nor seen any such Kenya Gazette Notice No. 5039 of 18th October, 2013. To the Counsel, the Kenya Gazette Notice issued of 18th October, 2013 ran from No. 13866 to 13971 and hence these grounds should be rejected.

21. Secondly, failing to properly consider the evidence as brought out under grounds Nos. (a); (c) & (e) of the filed appeal by the Appellants. The Counsel stated that the Appellants were blaming the Respondents for failing to present an "approved plan of the designated area" Based on the Provision of Section 107 of the *Evidence Act* Cap 80 on burden of proof upon them presenting a Letter of Allotment to the Suit Property which was superior title than the documents they had presented. Thus it was incumbent upon the Appellants to prove their case of a superior title. Indeed the 1st Respondent produced a Beacon Certificate, field notes and a letter from the Director of Survey all in support of the allocation of the Plot and hence wrong to state that the Court only relied on an area map.

22. Indeed, the Counsel underserved that the only evidence presented by the Appellants to proof ownership of the Suit Properties was a Temporary Occupation Licenses and hence the grounds no. (a) & (e) of the appeal should be dismissed.

23. Finally, the Learned Counsel asserted the ground by the Appellants failing to accord them a fair hearing under grounds Nos. (h); (g) and (j) of the Appeal were misplaced, unfounded and unmeritorious. The Counsel contended that if the case was handed casually then the hearing could not be fair. Additionally, he argued that if the Judicial Officer was openly bias then the hearing would have become a travesty. To him for a party to allege bias he must present cogent evidence that would move the Court to conclude that the trial was unfair. This never happened as what happened they just lost a case. To support their point of view he relied on the case of "Accredo AG & 3 others – Versus - Steffano Uccelli & another [2018] eKLR") on the need for evidence on the biasness. The threshold was therefore high one. It could not be achieved by merely stating that the Trial Court was "openly bias".

24. There has been nothing to indicate how "casually" the case was handled by the Trial Court. On the issue that the Appellants frequently changed Advocates would not have any effect on how their case proceeded as they all along had constituted right to have appointed an Advocate of their choice to represent them in the case.

25. In conclusion, with regard to the request made by the Appellants that there be an order for a re-trial of the case. The Learned Counsel submitted that this is an order to be made very sparingly as it would be perceived as geared towards assisting the 1st and 2nd Appellants. To buttress his point, the Learned

Counsel cited the case of "Oraro & Rachier Advocates –Versus- Co - operative Bank of Kenya Limited (2001) eKLR") where Court held: -

> " But whether or not to order a fresh hearing of a matter is a power which must be exercised sparingly. That is because our judicial system is adversarial and Courts must guard against taking steps which although correct, might be viewed as geared towards assisting one party in the litigation".

26. According to the Learned Counsel it's the Appellants who caused or were responsible for the failings. For instance, they failed to bring all the relevant evidence, parties to the suit, made a belated application to correct those errors but which was refused by Court close a Counsel who they now believed was incompetent. To this end the Counsel argued that if the Court was to order fresh trial clearly this would be perceived to mean the Court was giving the Appellants an opportunity to fill gaps and correct the errors they committed before the Trial Court. Therefore, he urged the Court to dismiss the appeal for lacking merit with costs.

IV. Analysis and Determination

27. I have keenly assessed the Pleadings- the Appeal, the Memorandum of Appeal dated 1st March, 2019, the 386 pages Records of Appeal; the Written Submissions by all the Parties, the cited myriad authorities, the relevant Provisions of *Constitution of Kenya, 2010* and the Statutes.

28. In order for this Honorable Court to arrive at an informed reasonable equitable and fair decision, the Court has crystallized the subject matter of the Appeal by the 1st and 2nd Appellants into the following three (3) salient issues for its consideration. These are: -

    a. Whether the issues raised by the 1st and 2nd Appellants from the filed Memorandum of Appeal dated 1st March, 2019 against the Judgement by the Trial Court delivered on 1st February, 2019 has any merit whatsoever and meets the threshold of an appeal.

    b. Whether the Parties herein are entitled to the relief sought from the filed Appeal herein; and

    c. Who will bear the Costs of the appeal.

    ISSUE NO. (a) Whether the issues raised by the 1st and 2nd Appellants from the filed Memorandum of Appeal dated 1st March, 2019 against the Judgement by the Trial Court delivered on 1st February, 2019 has any merit whatsoever and meets the threshold of an appeal.

29. Under this sub-heading the facts of this case have been elaborately stated out from the filed pleadings nonetheless as it's trite law that the Appellant Court has the unfettered powers to evaluate and analyze all the evidence adduced during the trial- To begin with, while dealing with all appeals emanating from the decision by the trial Courts, as a first appellate Court it is guided and informed by the principles summarized in myriad of decisions in particular that of: - "Selle & Another – Versus- Associated Motor Boat Co. Limited & Others (1968) E.A. 2123" at Page 126 as:-

> " 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 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 had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

30. Similarly, in the case of "Peter –Versus - Sunday Post Limited 1958 E.A. 424" Sir Kenneth O'Connor P. rendered the applicable principles as follows:-

> " It is a strong thig for an appellate court to differ from the finding on a question of facts, 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...."

31. It's imperative that the Court will extrapolate on the facts briefly. From the filed Amended Plaint dated 20th August, 2015 the Appellants averred that they were the owners of Plot Nos. Majengo Mapya T/MM/115/1 and T/MM/115 for the 1st and 2nd Respondents respectively and they had Letters of Allotment in form of The Temporary Occupation Letters (TOT) from the Town Council of Taveta. The Appellants claimed to have developed the Plots and been in occupation for the last twenty two (22) years, they had invested intensively. However, they claimed that without notice or consent of the Appellants the 1st and 2nd Respondents started digging a trench with a view of fencing the said suit parcels to them these actions were illegal and a threat to the investment they had caused on the land and they would have required compensation. They sought for injunction orders and a declaration that the suit parcels were legally theirs.

32. On the other hand the 1st and 2nd Respondents held that these plots were unknown in law. According to them, what existed was Plot No. Taita Taveta/Block 1/291 and whereby they had Letter of Allotment issued to them and dated 19th May, 1999 by the Commissioners of Lands to KEMRI measuring ten (10) acres to be used for construction of a Malaria and other Protozoa Research Centre. By the time of being issued the parcel the land was unsurveyed but was properly identified on Plan No. 89/CT/1780 which accompanied the Letter of Allotment. They had all the pre-requisite documents which included:-

    a. A copy of Survey Plan No. 89/CT/A80 Beacon Certificate dated 20th June, 2011;

    b. Director of Survey letter dated 13th June, 2023; and

    c. Application for Development Permission dated 29th January, 2015; and

    d. Drawing Approvals on 2nd March, 2015.

    Based on all these documents they held that they were the legal owners to the Suit Property (ies). This is adequate on the facts of the case.

33. Now turning to the issues of the case from the above facts, the main bone of contention is on the ownership of the two (2) properties evidently. From the pleadings and the evidence adduced in this matter, the only documents that the Appellants are holding as a demonstration of the ownership and/or proprietary interest to the suit property is the undated Temporary Occupation Licenses in form of Letter of Allotment by the Town Council of the Taita Taveta.

34. It's not in doubt that although the Trial Court failed and/or never made an attempt to invoke the Provision of Order 18 Rule 11 of the Civil Procedure Rules 2020 by conducting a site visit ("Locus in Quo") which this Honorable Court feels would have been extremely necessary, it's graphically evident that the 1st and 2nd Appellants had already caused some development and extensive investment on the two (2) parcels of land. The Court will be revisiting this issue at a later stage of this Judgment.

35. Additionally, the 1st and 2nd Respondents hold a Letter of Allotment dated 19th May, 1999. It's accompanied with other documents such as Survey Plan issued to them by the Council of Taveta. Having stated this, it is for this Honourable Court to make decision based on the principles of Justice, Equity and Conscience of these two (2) sets of legal documents between Letter of Allotment and The Temporary Occupation License (TOL) bears the precedence. To respond to this question I am persuaded by the several decisions by Court on the subject matter. To begin with the suit land was public land and hence not available for allocation. In the case of:- Nelson Kazungi Chai and 9 Others –Versus- Pwani University college (2017)eKLR Court held: -

> "It bears repeating that allocation of land under the Government Lands Act was only possible where land was unalienated. Such was not the case herein. The land in question had already been reserved for the Institute which was the Respondent's predecessors".
>
> In the case of:- "John Kariuki Maina –Versus- Town Clerk of the Municipal Council of Thika (2015) eKLR Court held:-
>
> "It is indeed settled law in Kenya that a Temporary Occupation License to occupy Government land is not sufficient to create or transfer title to the grantee or personal representative".
>
> By and large, I discern and fully concur with the position taken by the Trial Magistrate and the Learned Counsel for the Respondents that Temporary Allocation Letters (TAL) and in this case the Temporary Occupation License (TOL) legally speaking do not confer proprietary interest onto a property.

36. In order to proceed further, the Court is further guided on the principles of the burden of proof. It is provided under sections 107(1) (2) and 109 of the *Evidence Act*, Cap 80 as follows:

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In application of this legal principle to the instant case, from the evidence of an expert, the 1st and 2nd Respondents were able to demonstrate that Plots No. T/MM/115/1 and T/MM/115 were subsumed within the Plot No. Taita Taveta/Block 1/129. On the contrary, from the record, the Appellants only presented before Court the Temporary Occupation License (TOL) as proof of the ownership to the two (2) properties.

On the other hand, the Respondents was able to present a Letter of Allotment dated 19th May, 1999. Based on the decision and which was cited by the Learned Counsel for the Respondent and Trial Court: "Waas Enterprises Limited –Versus - City Council of Nairobi and Anor (2014) eKLR" Court held: -

> " ..... once an allotment Letter has been issued and the allottee meets the condition therein, the land in question is no longer available for allotment since a letter of allotment

confers an absolute right of ownership or proprietorship unless it is challenged by the allocating authority or is acquired through fraud, mistake or misrepresentation or that the allocation was out rightly illegal or it was against public interest.

For the sake of argument and benefit of doubt I have taken cognizance that the Appellants were issued with the Temporary Occupation License for the two (2) properties on October, 2011 while the Respondents were issued with the Letters of Allotment on 19th May, 1999 they proceeded to obtain other relevant documents as stated above, Beacon Certificate on 20th May, 2011.

These documents were obtained much earlier and hence have precedence.

According to the provision of Registration of Title Act Temporary Occupation License never confer ownership.

ISSUE NO. (b) Whether the Parties herein are entitled to the relief sought from the filed Appeal herein;

37. Under this sub-heading, the Honourable Court holds that the Appellants had been in occupation of the Public land for a particular period. They claim to have invested on it extremely it's important that they never produced any evidence in form of a ground or evaluation report to demonstrate the extent of the investment caused.

It's now well established that for such a claim ought to be proved by the Claimant. Suffice to say, the question that lingers in mind is whether the Appellants would be entitled to any compensation under the provisions of Article 40 (3) of *the Constitution* of Kenya, 2010 and Sections 101 to119 of The *Land Act* No. 6 of 2012. It has already been demonstrated no such compensation would be sustainable nor viable for the following reasons.

Firstly, the land being public land was not available for allocation.

Secondly, the Appellants have failed to demonstrate they had been in occupation as alleged. No such evidence was adduced.

Thirdly, the land was already allocated to the Respondents for a particular purpose being conducting of research for malaria and protozoa.

The 1st and 2nd Appellants failed to bring the cogent evidence to support their case and only remembered to do so after they had closed their case.

As to the issue of a re-trial, that cannot be sustainable in the given circumstances as clearly it would be perceived as the Court trying to assist the Appellant correct its errors against the Respondent.

For these reasons, I am fully satisfied that the appeal must fail for lack of merit.

ISSUE NO. (d) Who will bear the Costs of the appeal

38. It's now well established that the issue of cost is at the discretion of Court. Costs means the award that is a party is granted at the conclusion of the legal action or proceeding in any litigation. The Provision of Section 27 (1) of *Civil Procedure Act* Cap 21 holds that Costs follow the event. By events it means the results or outcome of the legal action or proceedings.

39. From the instant case, the 1st and 2nd Appellants have not been successful to proof their case overturning the decision of the Trial Court. Ideally, they would have to bear the costs but in given circumstances, it is to the interest of Justice, Equity and Conscience that each party bears it's costs.

V. Conclusion and findings

40. Consequently, having conducted an elaborate analysis of the frame issue emanating from filed from the filed Memorandum of Appeal by the 1st and 2nd Appellants herein and on the preponderance of probabilities, the Honorable Court has arrived at the following orders: -

    a. That Judgement entered to the effect that the Appeal by the 1st and 2nd Appellants through the Memorandum of Appeal dated 1st March, 2019 be and is hereby dismissed for lack of merit.

    b. That the Judgment delivered by the Trial Magistrate Court in Civil Suit No. 22 of 2015 by the Honorable Senior Resident Magistrate Hon. Khapoya S. Benson be and is hereby upheld accordingly.

    c. That each party to bear their costs of the Appeal.

It Is Ordered Accordingly

JUDGEMENT DELIVERED BY MICROSOFT TEAMS VIRTUAL MEANT, SIGNED AND DATED AT MOMBASA THIS 3RD DAY OF OCTOBER, 2023.

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HON. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgment delivered in the presence of:-

a. M/s. Yumnah the Court Assistant;

b. No appearance for the 1st and 2nd Appellants;

c. M/s. Cheruiyot holding brief for Mr. B. Kongere Advocate for the 1st Respondent; and

d. No appearance for the 2nd Respondent.