



**Omar & another v Sambul (Environment and Land Appeal E003 of 2021)
[2023] KEELC 21362 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21362 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E003 OF 2021
LC KOMINGOI, J
NOVEMBER 9, 2023**

BETWEEN

JEFFER SHARIFF OMAR 1ST APPELLANT

NEMO SHARIFF OMAR 2ND APPELLANT

AND

OMAR ADAN SAMBUL RESPONDENT

*(Being an appeal against the judgement of the Chief Magistrate's Court at Kajiado,
Hon. Kahuya dated 9th December 2020 in CMCC ELC No. 206 of 2017)*

JUDGMENT

1. By a Memorandum of Appeal dated January 6, 2021, the Appellants, who were the Defendants in Kajiado Chief Magistrates Court ELC No. 206 of 2017 appealed against that entire Chief Magistrate's judgment dated December 9, 2020. In the said judgement, the Honourable Kahuya gave an eviction order and permanent injunction restraining the Defendants (herein Appellants) against trespassing, damaging or alienating plot No. 211 Residential Kajiado Town. Aggrieved by the decision, the Appellants sought to have the judgement set aside on grounds that:
 - i. The Honourable Court erred in law and in fact in failing to appreciate that the Appellant has been in possession of the suit property since 2003;
 - ii. The honourable court erred in law and in fact in failing to acknowledge that there were two different plots, Plot No. 211 and 212;
 - iii. The honourable court erred in law and in fact when it disregarded the Appellants' evidence which showed two distinct plots;



- iv. The honourable court erred in law and in fact when it did not acknowledge that the Respondent's plot was validated in collusions with officials of the County Government of Kajiado;
- v. The honourable court erred in law and in fact in failing to appreciate that a letter of allotment is a valid certificate of title in the circumstances;
- vi. The honourable court erred in law and in fact in failing to appreciate that the Appellants were paying rent and rates until the collusion of the Respondent and the County Government of Kajiado that later on refused to accept rates;
- vii. The Honourable Court erred in law when it was alive to the fact that ELC 66 of 2009 may affect CMCC 206 of 2017 but still granted a permanent injunction despite the circumstances;
- viii. The Honourable Court erred in law and in fact in finding that the Respondent had proved a prima facie case;
- ix. The Honourable Court erred in law and in fact in finding that the Respondent had proved his case on a balance of probabilities;
- x. The Honourable Court erred in law by failing to appreciate the evidence of the Appellants;
- xi. The Honourable Court erred in law and in fact when it found that the Appellants had trespassed over the suit property.
- xii. The Honourable Court erred in law and in fact by not considering that the Appellants were in possession of the suit property before the alleged purchase by the Respondent.

2. The appeal was canvassed by way of written submissions.

The Appellants' submissions

3. In the submissions dated May 25, 2022 counsel gave the history of the suit submitting that the 2nd Appellant is the owner of property known as Plot 9923/212 Kajiado Town having purchased it on December 11, 2003 from Councillor Ezekiel Tumpes Terta who was allotted the plot on 25th November 2003. A letter of Allotment was then issued to the 2nd Appellant on 17th December 2003. Semi-permanent structures were then put and she continued paying land rates/rent until sometime in 2009 when the then Kajiado Town Council refused to collect the rates and also refused to generate a certificate of search for the property as requested.
4. Shortly thereafter, people started making visits to the said plot while taking photographs. This necessitated the 2nd Appellant to file a suit against Kajiado Town Council filed at Machakos as Case No. 206 of 2009 which was later transferred to Kajiado Law Courts as ELC No. 884 of 2017. The said case maintained the *status quo* which meant that the Appellant was to remain on the property awaiting completion and determination of the dispute.
5. Sometime in September 2016, the Respondent tried to gain forceful entry into the suit property which compelled the Appellant to write a demand letter indicating that he was the owner of the suit property and there was a pending court case in Machakos referenced as HCCC No. 66 of 2009 regarding the suit property.



6. Counsel indicated that the Respondent had an allotment was for 11th June 2013 for property referenced as Plot No. 211/Kajiado/Town a residential plot which was purchased from one Elijah Memusi, the area Member of Parliament. Counsel submitted that the Respondent further produced a map which showed that plot 211 and 212 were distinct plots separated by a plot 223 but the lower court did not consider this fact in arriving at its determination. Counsel went on to indicate that it is not clear what happened to plot 212 which was allotted to the 2nd Appellant in 2003. And assuming the plot had been renumbered to plot 211 then due process of repossession and re-allocation ought to have been followed by Kajiado County Government.
7. To aid in determining the accurate status of plots 211 and 212 a county surveyor visited the suit property and filed a report indicating that the property belonged to the Respondent. The Appellant raised queries of the report stating that the said Abdi Nur who apparently represented the 2nd Appellant at the alleged site visit was neither known to him nor sent by the Appellant. Additionally, the Appellant claimed that the said County surveyor did not consider nor interrogate the 2nd Appellant's documents during the exercise which brought forth the validation report that was used by the lower court to determine that the suit property belonged to the Respondent.
8. With this, Counsel submitted that the issues for determination were: Whether the Appellants were entitled to the reliefs sought and who should bear the costs of the suit.
9. On whether the Appellants were entitled to the reliefs sought, counsel submitted that the two allotments were done in the years 2003 and 2013. There was no evidence of how the plots were renumbered and re-allocated without due process being followed which was contrary to article 40 of the *Constitution*. Counsel pointed out that the Respondent's testimony and County Surveyor's letter dated September 4, 2017 indicated that the allotment letters bore different plot numbers but on the ground the plot was one and it belonged to the Respondent. Counsel contested this allegation submitting that once land has been allotted and the allottee abides by set conditions, then the land is no longer available for alienation to a third party without it first being repossessed. As such the allotment letter conferred absolute ownership to the 2nd Appellant unless it was challenged as having been acquired through fraud, mistake or misrepresentation. To support this, reference was made to *Rukaya Ali Mohamed v David Gikonyo Nambacha & another, Aster Holdings Ltd v City Council of Nairobi & 4 others* (2017) eKLR, *Joseph Tobiko Kelempu v Cooperative Management Committee of Emparnat Farmers Dairy Cooperative Society Ltd* [2021]eKLR, *Nelson Muturi Ndumbeya Harun v County Government of Kajiado* [2020] eKLR and Court of Appeal's *Benja Proeprieties Limited v H.H. Dr. Syedna Mohammed Burhannudin Sahed & 4 others* (2015) eKLR.
10. Counsel added that if at all the two allotments were valid, then the doctrine of first in time should have prevailed as held in *Faraj Maharus v J.B. Martin Glass Industries and 3 others* C.A. 130/2003 (unreported).
11. Further, counsel questioned whether the Respondent after purchasing the suit property conducted due diligence. He submitted that had the Respondent done this, then he would have seen that someone else was in physical possession of the suit property citing *Musk Deer Limited v Benjamin K. Kipkurui & another* [2018] eKLR which held: "...what happened to the common and obvious caution of "buyer beware"? The appellant did not demonstrate having carried out any due diligence whatsoever..."
12. Counsel went on to submit that the Respondent's argument that he wrote a letter to the County Land Dispute Board which confirmed that the suit property was his could not hold water since the Board was not the allotting authority citing the case of *Joseph Tobiko Kelempu v Cooperative Management Committee of Emparnat Farmers Dairy Cooperative Society Ltd* [2021]eKLR where



court stated that the County Surveyor could not have been the allotting authority. Further adding that the National Land Commission's (NLC) letter dated August 10, 2016 relied upon by the Lower Court was unmeritorious because NLC's jurisdiction lay with reviewing grants and dispositions of public land as per article 67 of the Constitution while the land in question had been alienated for private use hence making it private land as per section 9(2) of the Land Act.

13. Counsel added that the county surveyor's report arrived at a misleading conclusion because it neither made reference to the 2nd Appellant's allotment, deed plans, County records or court case number 884 of 2017 but whimsically concluded that the said property belonged to the Respondent. Counsel questioned that if the plots were different, how did the court come to a determination that the Respondent had proven a prima facie case against the Appellants? Reference was made to Timothy Mutokaa Kariuki v Adan Maalim Ibrahim [2017] eKLR where court found that where there two plot numbers are different then a *prima facie* case cannot be found.
14. Finally counsel submitted that the lower court's judgement embarrassed and prejudiced administration of justice by dealing with a matter that was pending in a superior court and that the judgment should be set aside with costs.

The Respondent's Submissions.

15. Counsel for the Respondent in the submissions dated 3rd August 2022 submitted that the Respondent was the confirmed owner of plot No. 211/ Kajiado Township which was different from the Appellants' plot No. 212 and this was confirmed by the County Government surveyor's letter dated 10th October 2016. Counsel went on to submit that there was no evidence of the alleged collusion between the Respondent and the County Government of Kajiado as had been alleged by the Appellants rehashing that the plots position had been confirmed by the County Government Surveyor.
16. Counsel for the Respondent also submitted that the Respondent had produced an allotment letter, a search certificate, map and letters from the County Government of Kajiado and National Land Commission as evidence of his ownership whereas the Appellant did not produced any tangible evidence of ownership. Adding that plot 211 and 212 were different and distinct hence case HCC 66 of 2009 which was in relation to plot 212 was not applicable to the matter at hand.
17. In conclusion, counsel prayed for that the Appeal be dismissed.

Analysis and determination

18. I have considered the memorandum of Appeal, Record of Appeal, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether the trial court's decision in CMCC ELC No. 206 of 2017 was sub judice.
 - ii. If response to the above question is negative, whether the Appeal against the trial court's decision in CMCC ELC No. 206 of 2017 was meritorious.
 - iii. Who should bear costs of this Appeal?



19. This being a first appeal, it is imperative that the court re-examines the evidence, evaluate it and arrive at its conclusion. In *Selle v. Associated Motor Boat Company* (1968) EA 123 the Court of Appeal stated as follows;

“An appeal to this court from a trial by the High Court is by way of re-trial and the principles upon which the court action such an appeal are settled. Briefly put they are, that this court must consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact, if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

20. One of the Appellants’ grounds for Appeal as set out in the Memorandum of Appeal was that the trial Court erred in law in making a finding and determination when it was alive to the fact that there was pendency of High Court Civil Case No. 66 of 2009 which was linked to the Lower Court’s case Chief Magistrate’s Court Case No. 206 of 2017 but still granted a permanent injunction despite the circumstances. The summary and history of the matter has been outlined in preceding paragraphs. The Respondent in his submissions acknowledged existence of the said suit but indicated that he was not a party to the suit and that the matter in that suit was for plot No. 212 and not 211.

21. Section 6 of the [Civil Procedure Act](#) provides as follows on the issue of *sub judice*:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

22. The fundamental purpose of this Section is to serve as a safeguard against the abuse of the court process and to avert potentially vexatious and conflicting situations, where multiple courts may render conflicting judgments on identical matters sharing the same set of facts. This legal principle not only fosters consistency and predictability in the administration of justice but also upholds the fundamental principles of fairness and judicial efficiency. Addressing the issue of *sub judice*, the Supreme Court of Kenya in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR stated:

“... The term ‘sub-judice’ is defined in [Black’s Law Dictionary](#) 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are



pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives....”

23. The 2nd Appellant participated in these proceedings to conclusion knowing that there existed another suit in which she has sued the County Government of Kajiado. It was incumbent upon her to apply that the suit giving rise to this appeal (CM ELC No. 206 of 2017) be stayed to await determination of ELC 101 of 2018 (Formerly HCCC 66 of 2009) she did not do so. Having allowed the suit to proceed to its conclusion means that she has to live with the consequences of the Judgment in CM ELC 206 of 2017. Nothing prevented her from applying for stay of proceedings in that suit.

Be that as it may, nothing prevents the 2nd appellant from enjoining the Respondent to that suit. (ELC 101 of 2018).

24. The Learned Trial Magistrate in her Judgement observed;

“it is my belief the reason for this dispute is because the 2nd defendant’s plot is yet to be validated by the respective county government. The letter of Allotment relied upon was in my view inconclusive as to what plot No.212 is after the validation exercise.”

.....

On his part the plaintiff’s land was validated and given the number B906 (formerly 211 CBD) thus explaining why he was the bonafide owner as per search certificate and *vide* several confirmation letters both by the National Land Commission and the County Government of Kajiado”.

25. I do not fault the Learned Trial Magistrate for arriving at these findings, given the evidence presented.

26. The upshot of the matter is that I find no merit in this appeal and the same is dismissed. Each party do bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9TH DAY OF NOVEMBER, 2023.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Kiptoo for the Appellants.

N/A for the Respondent.

Court Assistant - Mutisya

