REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELCA NO. 16 OF 2021

COUNTY COUNCIL OF LAIKIPIA..APPELLANT

VERSUS

JOHN MURIITHI MWANIKI...RESPONDENT

JUDGMENT

A. INTRODUCTION

1. This appeal arises from the judgment and decree of Hon. Teresiah Matheka (PM) delivered on 14th January, 2010 in **Nyahururu PMCC No. 99 of 2006** – *John Muriithi Mwaniki v Peter Ndegwa Thuita & County Council of Laikipia.* By the said judgment, the trial court allowed the Respondent's suit and dismissed the 1st Defendant's counter-claim.

2. The material on record shows that vide a plaint dated 15th March, 2006 and amended on 19th October, 2006 the Respondent sought various reliefs against the Defendants therein including:

(a) A declaration that he was the owner of Plot No. C137 Sipili (new No. C198) and that he was entitled to vacant possession thereof:

(b An order for eviction of the 2nd Defendant from the said plot; and

(c) A permanent injunction against the Defendants from developing, alienating, dealing with or interfering with the said plot.

(d) Cost of the suit.

3. The Respondent also sought an alternative prayer for compensation for all the developments he had undertaken on the plot together with reimbursement of all the disbursements made for the plot.

4. The basis of the Respondent's claim was that he had bought the suit property from one Betty Munjiru *(Betty)* in 1998 who was the original allottee thereof. He further pleaded that upon payment of the purchase price, the suit property was transferred to him by the Appellant and that he took possession and developed it with full knowledge of the Appellant.

5. The Respondent further pleaded that on the instructions of the Appellant the 1st Defendant in the suit had wrongfully entered the suit property and constructed structures thereon after moving from his own Plot No. C136 which was just opposite Plot No. C137.

6. The Appellant filed a defence dated 24th December 2006 in which it denied any legal liability for the Respondent's claim. It was pleaded that although the Respondent had bought Plot No. C137 from Betty he had instead constructed some structures on Plot No. C 136 (New No. C 196) belonging to the 1st Defendant in the suit. The Appellant asserted that the Respondent's plot No. was C198 and that he should relocate to the same.

7. The Appellant further pleaded that the initial allocation of Plot No. 137 was merely on a temporary basis pending completion of a new part development plan (PDP) and that upon finalization thereof it was found that most of the allotees in Sipili Township had occupied the wrong plots and that included the Respondent herein. The Appellant further pleaded that none of the disputing parties had been shown beacons for their respective plots by the Appellant prior to construction being undertaken. It was also the Appellant's case that the various disputes in the Township were resolved by a task force it had established for the purpose.

8. The Respondent filed a reply to defence dated 11th December, 2006 which joined issue upon the Appellant's defence. He denied knowledge of a new PDP for Sipili Township and that, in any event, he was not obliged to wait for finalization thereof before developing

his plot. He denied having constructed on the wrong plot and stated that he was shown beacons by Betty which had been pointed out to her by the Appellant's officers. The Respondent also denied knowledge of the Appellant's task force and pleaded that it never accorded a hearing before it.

9. The record shows that upon a full hearing of the suit, the trial court delivered its judgment on 14th January, 2010 whereby it allowed the Respondent's suit and dismissed the 1st Defendant's counter-claim for possession of the suit property. The trial court held, *inter alia,* that the Respondent had developed the suit property with the full knowledge of the Appellant; that the Respondent had approved the sale and transfer from Betty to the Respondent; that there was a violation of the rules of natural justice since the Respondent was never heard by the task force; and that the Appellant had acted arbitrarily in the exercise of its statutory power of planning and development control.

B. <u>THE GROUNDS OF APPEAL</u>

10. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 11th February, 2010 raising the following 9 grounds of appeal:

> *(a) That the learned trial Magistrate erred in both law and in fact by making a finding that the Respondent had proved his case on a balance of probability when there was no basis for such a finding.*
>
> *(b) That the learned trial Magistrate erred in both law and in fact by failing to appreciate that the Appellant had the sole discretion and statutory authority to plan all the township and commercial centres within its jurisdiction and that in the present instance the suit plot herein was allocated by the Appellant to one Peter Ndegwa Thuita and not to the Respondent*
>
> *(c) That the learned trial Magistrate erred in both law and in fact by failing to appreciate that all the developments caused on the suit plot by the Respondent were without the authority nor sanction of the Appellant and that the same were illegal and of no consequence.*
>
> *(d) That the learned trial magistrate erred in both law and in fact by disregarding the evidence of the Appellant which was very material and from an expert and which consisted of both oral and documentary evidence.*
>
> *(e) That the learned trial Magistrate erred in both law and in fact by disregarding all the official documents issued to the said Peter Ndegwa Thuita by the Appellant for ownership and possession of the suit plot without any cause, justification, basis or at all.*
>
> *(f) That the learned trial Magistrate erred in both law and in fact by giving a lot of concern and weight to the evidence of the Respondent and but failing to accord the same cognizance to the evidence of the Appellant.*
>
> *(g) That the learned trial Magistrate purported to create a new contractual relationship between the Appellant and the Respondent on one part and between the Respondent and Peter Ndegwa Thuita on the other hand in relation to the suit property and which was neither within her discretion nor jurisdiction.*
>
> *(h) That by her decision the learned trial Magistrate purported to replan and/or amend the Appellant's development plan for Sipili Trading Centre which was wrong both in law and in fact.*
>
> *(i) That the learned trial Magistrate erred in both law and in fact by failing to base her judgment on sound legal principals and the said judgment was oppressive and unwarranted.*

11. The Appellant consequently sought the following reliefs:

> **(a) That the judgment of the trial court in Nyahururu PMCC No. 99 of 2006 be set aside and the Respondent's suit dismissed with costs.**
>
> **(b) That the court do make such other orders or directions as it may deem fit in the circumstances.**

C. <u>DIRECTIONS ON SUBMISSIONS</u>

12. When the appeal was listed for directions before the High Court at Nakuru on 24th April, 2015 , it was directed that the appeal shall be canvassed through written submissions. The record shows that the Appellant's submissions were filed on 7th July, 2015 whereas the Respondent's submissions were filed on 6th May, 2016. The record further shows that on 29th September, 2016 the High Court transferred the appeal to the ELC at Nakuru for disposal whereas on 29th June, 2021 the file was further transferred to the ELC at Nyahururu for disposal.

D. <u>THE APPLICABLE LEGAL PRINCIPLES</u>

13. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court in a first appeal were summarized in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

> **"…Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due 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 has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."**

14. Similarly, in the case of **Peters v Sunday Post Ltd [1958] EA 424 Sir Kenneth O'Connor, P.** rendered the applicable principles as follows:

> **"…It is a strong thing for an appellate court to differ from the finding, on a question of fact, 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…"**

15. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt v Thomas [1947] A.C 424** at page 429-430 as follows:

> **"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."**

E. THE ISSUES FOR DETERMINATION

16. The court has noted that the 1st Defendant before the trial court did not file any cross-appeal against the dismissal of the counter-claim. Accordingly, the court shall not consider the counter-claim or make any orders thereon. The court shall also not consider any new grounds raised in the parties' submissions which were not canvassed at the trial or in the memorandum of appeal. Although the Appellant listed 9 grounds in its memorandum of appeal, the court is of the opinion that determination the following 3 issues shall be sufficient to dispose of the entire appeal:

(a) Whether the trial court erred in law and fact in allowing the Respondent's claim.

(b) Whether the trial court erred in law in failing the uphold the Appellant's planning authority in the circumstances.

(c) Who shall bear costs of the appeal.

F. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law and fact in allowing the Respondent's claim

17. The court has considered the material and submissions on record. The Appellant was aggrieved mainly because it reckoned that its evidence had not been considered and given due weight whereas the Respondent's evidence was readily accepted and acted upon without a solid legal basis. The Respondent supported the judgment of the trial court and submitted that he was never accorded a hearing by the Appellant's task force and as such any recommendations or resolutions of the task force were not binding on him.

18. The court has analyzed and re-evaluated the evidence and documents on record regarding the dispute amongst the parties before the trial court. It is evident from the material on record that none of the warring parties had a letter of allotment from either the Appellant or the Commissioner of Lands. The material further indicates that the vendor who sold Plot No. C.137 to the Respondent merely held a Temporary Occupation Licence (TOL) which was issued pending the preparation of a new PDP for Sipili Township.

19. The material on record further reveals that upon completion of the new PDP, it was found that most of the holders of TOL had taken possession and occupied the wrong plots on the ground. This resulted in various disputes within Sipili Township with the consequence that a task force was established by the Appellant to resolve the disputes. Both the Plaintiff and the 1st Defendant before the trial court were found to have occupied the wrong plots hence it was recommended that they should relocate to their rightful plots. That Appellant apparently adopted the recommendation of the task force as a resolution and directed the affected

parties to relocate accordingly.

20. The role of the task force must be correctly understood in this context. The task force was not the allocating authority for the TOLs. It did not alter, review or revoke any allocations and it did not make any new allocations. It was simply to resolve the disputes within the Townships which mainly involved occupation of the wrong plots. The task force may have visited the Township and heard representations from some affected parties but not each and every person was heard. There can be no violation of the rules of natural justice where a task force simply directs that disputing parties should relocated to their rightful plots.

21. There is no material on record to demonstrate that the Respondent's allocation was revoked or a new one made. The material on record simply shows that the new PDP resulted in a change of plot numbers such that Plot 137 became Plot C 198 whereas Plot No. 136 became Plot No.C 196. The real dispute before the trial court was the location of Plot No. C137 (by whatever name) within Sipili Township and not whether or not it existed. In any event, the evidence showed that Plot C.198 was in existence and in occupation of PW4.

22. The evidence on record shows that the prior to taking possession of Plot 137, the Respondent did not request the Appellant's surveyors to point out its beacons. The Respondent conceded as much at the trial. The Respondent did not produce any beacon certificate to demonstrate that the boundaries of his plot were ever pointed out by a competent authority. In those premises, there was no credible evidence before the trial court to show that the Respondent was being asked to relocate to a totally different plot from the one he bought from Betty. On the contrary, the material on record shows that the Respondent was not the only one who had occupied the wrong plot on the ground and that he was simply being asked to move to his rightful plot.

23. The mere fact that the Respondent had already built some temporary structures could not legally insulate him from relocating to the right plot. The mere fact that he constructed those structures with the full knowledge of the Appellant could be of no avail either since the Appellant's surveyors never pointed out the beacons to the Respondent. The court is thus of the opinion that the trial court erred in law in holding that the Respondent should retain his current location simply because it would be cumbersome to relocate his temporary structures or that they were built with the Appellant's knowledge. In any event, the evidence on record shows that the structures were illegally built by the Respondent without first obtaining approval of building plans.

24. For the foregoing reasons, the court is of the opinion that the trial court erred both in fact and law in upholding and allowing the Respondent's claim. The Respondent's entitlement to Plot C 137 was not adversely affected by the Appellant's task force at all since his allocation was never revoked or varied.

(b) Whether the trial court erred in law in failing the uphold the Appellant's planning authority in the circumstances

25. The court has considered the material and submissions on record. The court has also analyzed and re-evaluated the oral and documentary evidence on this issue. Although the trial court recognized that the Appellant was the planning authority, it held that it could not exercise its powers arbitrarily and without observing the law. The trial court was right in making that statement of law but there is no evidence on record to demonstrate that the Appellant violated the law in any manner. There is no dispute that the defunct County Council of Laikipia was the planning authority in 1998 when the Respondent bought Plot No. 137. That was the legal position both under the Local Government Act *(repealed)* and the Physical Planning Act (repealed) . In fact, the Respondent himself conceded at the trail that the Appellant had such statutory authority.

26. There was no evidence before the trial court to demonstrate that the Appellant violated the law in the preparation of the new PDP for Sipili Township. The Appellant's task force had nothing to do with preparation of the PDP since its mandate was to resolve plot allocation disputes within Sipili Township. So, any alleged failures on the part of the task force had nothing to do with preparation of the new PDP. The court is further of the opinion that the issuance of TOLs prior to planning could not legally bar a planning authority from executing its statutory functions and from re-planning the affected area. Similarly, the fact that some licencees had erected some temporary structures could not legally bar or estop a planning authority from executing its statutory functions. The court is thus of the opinion that the trial court erred in law in relegating the Appellant's planning function to the back seat without lawful justification.

C. Who shall bear costs of the appeal

27. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21).** A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287.** Accordingly, the Appellant shall be awarded costs of the appeal.

G. CONCLUSION AND DISPOSAL

28. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. Accordingly, the court makes the following orders for disposal thereof:

(a) That the appeal be and is hereby allowed.

(b) That the judgment and decree of the trial court in Nyahururu PMCC No. 99 of 2006 together with all consequential orders are hereby set aside.

(c) That the Respondent's suit in Nyahururu PMCC No. 99 of 2006 be and is hereby dismissed with costs to the Appellant only.

(d) The Appellant is hereby awarded costs of the appeal.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 3RD DAY OF FEBRUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM

IN THE PRESENCE OF:

MR. OJARE HOLDING BRIEF FOR MS. MWANIKI FOR THE APPELLANT

MR. KINYUA NJOGU FOR THE RESPONDENT

…………………………..

Y. M. ANGIMA

JUDGE