REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 7 OF 2019

HADIJA HAJI GALMA.....APPELLANT

-VERSUS-

ABDI AHMED KAWIR.....RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the judgment and decree of Hon. S.M. Mungai (CM) dated 13th December, 2018 in **Isiolo CMCC No. 30 of 2011** - *Abdi Ahmed kawir v Hadija Haji Galma*. By the said judgment, the trial court allowed the Respondent's suit for eviction against the Appellant and dismissed the Appellant's counterclaim. The Respondent was also awarded costs of the suit.

2. The material on record shows that vide a plaint dated 30th May, 2011 and amended on 21st September, 2011 the Respondent sought an eviction order against the Appellant from Plot No. K also known as **Isiolo Municipality Block 3/267** *(the suit property)*. The Respondent pleaded that he was the registered owner of the suit property of which he had been in possession but that the Appellant had trespassed thereon and occupied a portion thereof without any lawful justification or excuse. The Respondent further pleaded that despite issuance of a demand and a notice of intention to sue the Appellant had failed to vacate the suit property hence the suit.

3. By a defence and counter claim dated 24th August, 2011 and amended on 31st January, 2012 the Appellant denied the Respondent's claim in its entirety. She pleaded that she had always been in possession of the suit property and that her occupation was lawful. It was her contention that the suit property was allocated to her by the defunct County Council of Isiolo. She pleaded further that she had been in occupation thereof for over 25 years hence the respondent's suit was time-barred.

4. By her counterclaim, the Appellant sought cancellation of the Respondent's title to the suit property and an injunction to restrain the Respondent from harassing her, evicting her or from interfering with her use, occupation, and ownership of the suit property. The Appellant also sought costs of the suit.

5. The material on record indicates that upon full hearing of the suit the trial court found for the Respondent and consequently allowed his claim for an eviction order. In its judgement, the trial court found and held that the Respondent had proved his ownership of the suit property through production of a certificate of lease and other relevant documents demonstrating how he acquired the suit property.

> 6. By the same judgment, the trial court found and held that the Appellant had failed to demonstrate her claim to the suit property. The trial court observed that the Appellant had not produced any documents to demonstrate her allocation of the suit property. Consequently, her counter claim was dismissed with costs to the Respondent.

B. THE GROUNDS OF APPEAL

7. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 8th January, 2019 raising the following 18 grounds of appeal:

> *(a) The learned trial Magistrate erred in fact and law by delivering a flat judgment devoid of the necessary ingredients as he failed to state all the points/issues for determination, the decision thereon and the reasons for the decisions and has therefore occasioned failure of justice.*
>
> *(b) The learned trial Magistrate erred in fact and law by failing to acknowledge that the suit was time barred by the statute of Limitation of Actions Act, Cap. 22 Laws of Kenya and striking it out.*

(c) The learned trial Magistrate erred in law and fact by failing to analyze the whole evidence of the defence witness, including sworn testimony that was never tested in cross-examination by an absentee plaintiff and thereby arriving at the wrong decision.

(d) The learned trial Magistrate erred in law and fact to consider the Appellant's counterclaim and dismissing it without delving into its merits.

(e) The Learned trial Magistrate erred in fact and law by failing to recognize and acknowledge from the evidence that the Appellant had requested for allocation of the impugned plot and no objection had been raised by anyone, and that she was subsequently allocated the plot through a full council meeting evidenced by minutes and a PDP number.

(f) The learned trial Magistrate erred in fact and law by failing to factor in the uncontroverted evidence by the Appellant that some original documents in support of her claim had been accidentally lost and as such were not available at the time of full hearing of the suit

(g) The learned trial Magistrate erred in fact and law by failing to recognize and acknowledge that the Appellant was in occupation and utilization of the suit land long before the purported date of allocation of the plot to the Respondent and that the Respondent has never set foot on the impugned suit property.

(h) The learned trial Magistrate erred in fact and law by failing to recognize and acknowledge that the Appellant had vested interest in the suit land having occupied it since 1993 way before the plots were formally demarcated and allocated.

(i) The learned trial Magistrate erred in fact and law by failing to deduce from the Respondent's evidence that he had never been occupation of the suit property as alleged and that he even didn't seem to know where the impugned plot is located in Isiolo town.

(j) The learned trial Magistrate erred in fact and law by failing to recognize and acknowledge that the Respondent only referred to a ***plot K*** *in his pleadings and evidence and not the plot known as* ***Isiolo Municipality Block 3/267****, which he only admitted in evidence as knowing of its existence after the Appellant had filed its defence and counter claim, and subsequently amending its plaint; a clear proof that the Respondent was mistaken as to the identify of his land and only shifted goal posts through multiple amendments of the plaint.*

(k) The learned trial Magistrate erred in fact and law by admitting into evidence a Certificate of Lease (P. exh. 7) on the date of the Respondent's case, long after close of pleadings and without any reasonable cause, and by that action denying the Appellant the opportunity to challenge evidence brought against her, in effect limiting her right to a non-derogable right of a fair hearing.

(l) The learned trial Magistrate erred in fact and law by determining the whole suit on the basis of a Certificate of Lease (P. exh. 7) issued under a repealed law and whose origins and authenticity are dubious.

(m) The learned trial Magistrate erred in fact and law by predicating his determination of the suit on an allotment letter of dubious authenticity purportedly granted to a person who was never called to give evidence in court.

(n) The learned trial Magistrate erred in fact and law to recognize multiple and obvious contradictions in evidence tendered by the Respondent (PW1) which factored on his credibility as a witness and put into question the veracity of the facts.

(o) The learned Trial Magistrate erred in fact and law by failing to deduce from the Respondent's evidence that there are apparent contradictions as to how he came to own the suit property; to wit by a sale or donation, and how this renders credence to the Appellant's assertion that the Respondent has no legitimate claim on the suit property

(p) The learned trial Magistrate erred in fact and law by admitting into evidence the contradictory affidavit evidence of Hon, Mokku (P. exh 6) who was never called as a witness for the purposes of cross- examination by the Appellant.

(q) The learned trial Magistrate erred in fact and law by failing to find that any allocation made after the suit property was demarcated for allocation, and allocated to the Appellant without any challenge was illegal ab initio.

(r)The learned trial Magistrate erred in fact and law in predisposing himself to a position favourable to the Respondent and failed to accord the Appellant the right to a fair hearing with the effect of arriving at a decision that was unreasonable, wrong in law and unjust in effect.

C. DIRECTIONS ON SUBMISSIONS

9. When the appeal was listed for hearing on 31st August, 2020, it was directed that the appeal shall be canvassed through written submissions. The Appellant was given 21 days to file and serve her written submissions whereas the Respondent was to file and serve his within 21 days upon the lapse of the Appellant's period. The record shows that the Appellant's submissions were filed on 2nd November, 2020 whereas the Respondent's submissions were not on record by the time of preparation of the judgment.

D. THE APPLICABLE LEGAL PRINCIPLES

10. 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 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."**

11. 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…"**

12. 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

13. Although the Appellant raised 18 grounds in her memorandum of appeal, the court is of the opinion that the appeal may effectively be determined by resolution of the following 4 keys issues:

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

(b) Whether the trial court erred in fact and in law in dismissing the Appellant's counter-claim.

(c) Whether the Respondent's suit was time barred under the law.

(d) Who shall bear costs of the appeal.

F. ANALYSIS AND DETERMINATION

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

14. The court has considered the material and submissions on record on this issue. It is evident from the material on record that the trial court was satisfied that the Respondent had proved his ownership of the suit property to the required standard. The trial court pointed out that the Respondent had produced a certificate of lease for the suit property; a letter of allotment to Hon. C.G. Mokku who had apparently donated the suit property to the Respondent; and a statement of rates from the County Council of Isiolo.

15. The Appellant contended that the Respondent did not prove his case for a number of reasons. First, it was contended that there was a discrepancy in the Respondent's name in that the Certificate of Lease described him as Abdi Ahmed Abdi whereas the plaint described him as Abdi Ahmed Kawir. Second, it was contended that the plot claimed by the Respondent was Plot K and not Isiolo Municipality Block 3/267 and that the Respondent had mischievously amended his plaint to make reference to the latter. Third, it was contended that the Appellant's Certificate of Lease was suspicious or dubious in that it was introduced into the case about 6 years after commencement of proceedings.

16. The court has considered the submissions by the Appellant on the discrepancies in the Respondent's name. The court is not satisfied that they are credible or persuasive. The record of proceedings shows that the discrepancy in the Respondent's names was not one of the issues

raised at the trial. The court has noted some of the statements for rates and rent from the County Council of Isiolo refers to the two names interchangeably. At any rate, the Appellant did not tender any evidence at the trial to demonstrate that those names referred to two different persons.

17. The Appellant's submissions on the description of the suit property is not persuasive either. Although it is true that the Respondent amended his plaint to plead that Plot K was also known as **Isiolo Municipality Block 3/267** amendment of pleadings is a lawful process. It is also noteworthy that in her defence and counterclaim the Appellant pleaded in her counterclaim that Plot K was also known as **Isiolo Municipality Block 3/267.** She cannot therefore turn around after trial and claim that those were two different parcels. It is trite law that parties are bound by their pleadings.

18. The court is unable to agree with the Appellant's submissions that the Respondent's Certificate of Lease was suspicious or dubious. The mere fact that it was introduced late in the proceedings does not necessarily make it of doubtful authenticity. The record shows that the Appellant did not object to its production at the trial and she did not tender any evidence to demonstrate that it was not genuine even though she testified after the Respondent had closed his case.

19. The court is thus of the opinion that the trial court was entitled to find on the basis of the evidence on record that the Respondent had proved his ownership of the suit property to the required standard. The Appellant did not produce any competing Certificate of Lease or letter of allotment with respect to the suit property. The trial court cannot, therefore, be faulted for reaching the conclusion that it did.

(b) Whether the trial court erred in fact and in law in dismissing the Appellant's counter-claim

20. The material on record indicates that the trial court dismissed the Appellant's counterclaim because it was not backed by evidence. The Appellant had pleaded in her defence and counterclaim that she had been allocated the suit property by the defunct County Council of Isiolo hence she was the lawful owner thereof. The date of the allocation, however, was never disclosed either in the pleadings or evidence. It was never disclosed even in the Appellant's submissions. So, what was the evidence of the alleged allocation at the trial? The Appellant produced 5 letters dated between 1997 and 2008 none of which demonstrated allocation of the suit property to her.

21. Those letters were mainly letters of complaint that some wealthy and powerful persons were trying to take away some undisclosed plot from her. Some of the letters indicated that the Appellant's complaint was being investigated. One of the letters dated 22nd July, 1997 was a letter by the acting Clerk of the County Council of Isiolo requesting the District Physical Planner to select a suitable site for possible allocation to the Appellant and 2 others. There is, however, no evidence on record to demonstrate that the Physical Planner ever identified such a plot and whether any allocation was ever made to the 3 persons named in the letter.

22. The court is thus of the opinion that there was no credible evidence of allocation of the suit property to the Appellant. The Appellant did not produce any letter of allotment or any other title document which could lend credence to her counterclaim. The Appellant's contention that she had lost the relevant documents cannot be evidence of allocation of the suit property. It was her duty to obtain certified copies of the documents from the relevant public offices before the trial of the action.

23. It would appear from the material on record that the Appellant must have realized the weakness and inadequacy of the evidence in support of her counterclaim. That must be the reason why she filed an application dated 22nd July, 2019 for leave to introduce additional documentary evidence at the appellate stage. That application was canvassed on merit and dismissed by the Hon. Justice L. Mbugua. As things stand now, there is absolutely no evidence on record to demonstrate the Appellant's counter claim.

24. In the premises, the court is of the opinion that the trial court cannot be faulted for dismissing a counter claim which was not proved to the required standard or at all. The court thus finds no error of law or fact on the part of the trial court in dismissing the Appellant's counter claim.

(c) Whether the Respondent's suit was time barred under the law

25. The Appellant's advocate submitted that since Hon. C.G. Mokku was issued with a letter of allotment in 1994 which he donated to the Respondent then it was "safe to conclude" that the suit was filed more than 12 years after the "dispute" arose. Although the Appellant did not cite any statutory provisions in support of that submission they must have intended to refer to **Section 7 of the Limitation of Actions Act (Cap. 22).**

26. **Section 7** of the said **Act** stipulates that:

> **"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".**

27. It is clear from the provisions of the said Section that the limitation period of 12 years starts running from the date of **accrual** of the cause of action. So, when did the Respondent's cause of action accrue to him? Although the Appellant contended that it accrued in 1994 when a letter of allotment was issued, the court is unable to agree with that contention. A letter of allotment does not necessarily confer an interest in land upon the allotee.

28. In the case of **Stephen Mburu & 4 Others v Comat Merchants Ltd & Another [2012] eKLR** the High Court made the following observations regarding the legal status of a letter of allotment:

> **" From a legal standpoint, a letter of allotment is not a title to property. It is a transient and often conditional right to take**

the property. See Wrek Motor Enterprises v Commissioner of Lands & Others Nairobi Civil Appeal No 71 of 1957 (unreported) Jai Superpower Cash and Carry Limited v Nairobi Civil Appeal 11 of 2002, Court of Appeal (unreported). Mirrored against the 1st Defendant's registered interest in the land, and the evidence, the Plaintiff's claim is on a quicksand... A registrable interest has been created and two lease titles issued. The registered interest ranks higher that the transient rights in the letters of allotment."

29. The Appellant did not tender evidence to demonstrate when the Respondent's or the donor's rights over the suit property crystallized. It was certainly not 1994 when the letter of allotment was issued to Hon. C.G. Mokku. The only lead on record is that a Certificate of Lease was issued to Hon. C.G. Mokku on 10th August, 2011 whereas the Respondent obtained his Certificate of Lease on 26th November, 2012. So, whether the limitation period is computed from 2011 or 2012, it could not be said that the Respondent's suit was time barred by the time the plaint was filed on or about 30th May, 2011. The court, therefore, finds no fault with the finding and holding of the trial court that the Appellant had failed to demonstrate that the Respondent's suit was time barred under the **Limitation of Actions Act (Cap. 22).**

(d) Who shall bear the costs of the appeal

30. 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.** The court finds no good reason why the successful litigant should not be awarded costs of the appeal. Accordingly, the Respondent shall be awarded costs of the appeal to be borne by the Appellant.

G. CONCLUSION AND DISPOSAL

31. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the Appellant's appeal is hereby dismissed in its entirety with costs to the Respondent.

It is so decided.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 20TH DAY OF MAY 2021.

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Y. M. ANGIMA

ELC JUDGE

JUDGMENT DELIVERED AT MERU THIS 27TH DAY OF MAY 2021.

IN THE PRESENCE OF:

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L. N. MBUGUA

ELC JUDGE