



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CIVIL SUIT NO. 92 OF 2008

WASO BUILDING ROAD WORKS CO. LTD.....PLAINTIFF

VERSUS

FAYO GALGALO.....1ST DEFENDANT

ABDULAHI DALACHA.....2ND DEFENDANT

ASLI ROBA ON BEHALF OF ALI ROBA.....3RD DEFENDANT

ABDULAHI ABDIRAHMAN.....4TH DEFENDANT

ABDIKADIR GALGALO.....5TH DEFENDANT

ABDI KUSO.....6TH DEFENDANT

MAALIM MALOW.....7TH DEFENDANT

ABDI HUSSEIN.....8TH DEFENDANT

JUDGMENT

The pleadings

1. **Waso Building Road Works Co. Ltd** (the plaintiff herein) is an incorporated company registered in Kenya, and it instituted these proceedings vide a plaint dated 15th July 2008, where the following prayers were sought;

- a. **A declaration that L.R. No. 117/91/16 measuring 2.0 Ha. (Approximately 5 acres) is the property of the Plaintiff Company.**
- b. **An Order of eviction against each Defendants.**
- c. **An Order of injunction restraining the Defendants jointly and severally by themselves, their servants and/or agents from entering, remaining or otherwise interfering with the plaintiffs right on the said land.**
- d. **Damages and/or mesne profits.**
- e. **Cost and interests.**
- f. **Any other or better relief this Honourable Court may deem fit and just to grant.**

2. The plaintiffs' claim is that it was an allottee of 5 acres within Isiolo Township Known as Departmental L.R. No. 117/91/16 (herein also referred to as the suit premises). That the land was approved and set aside by the Isiolo County Council for the making of building blocks and tiles by the Plaintiff. In July 2008, the Defendants unlawfully and wrongfully laid claim on the suit land whereby they invaded the same and started subdividing and fencing it. The county Government of Osiole gave Notices to the Defendants to leave the land but the Defendants have refused to head to the Notices necessitating the filing of this case.

3. The plaintiff had also filed an application contemporaneously with the suit where it sought orders of a temporary injunction against the

Defendants' interference with the suit premises pending the hearing and determination of this suit. In a ruling delivered on 14.1.2010, the court directed that status –quo be maintained and the order of injunction was granted in terms of prayer 2 in respect of the application of 15.7.2008.

4. A joint statement of Defence was filed on 8.8.2017, whereby plaintiff's claim is denied. Defendants aver that the said premises belonged to them having legally been allocated by the County Council of Isiolo.

THE EVIDENCE

Plaintiff's case

5. **PW1 OSMAN MAALIM** testified that him and his wife own the plaintiff company. He adopted as his evidence, his statement dated 25.3.2013. He also produced exhibits which are documents in his list dated 22.4.2013 (11 items) as exhibits 1-11. These documents are:

(i) Development plan

(ii) Clearance certificate

(iii) Enforcement notice

(iv) Council minutes

(v) Letter by the county council of Isiolo to the commissioner of lands dated 22.5.1992

(vi) Full council minutes

(vii) Certificate of registration

(viii) Confirmation letter

(ix) Letter of allotment

(x) Receipt for payment of land rates

(xi) Company's resolution dated 12th July, 2008.

6. PW1 avers that he got the land in the year 1991 for purposes of making blocks and associated purposes as seen from the minutes of the Council (Pexh4). That by that time the Plaintiff was a registered business name which was later converted to a company as shown by the Certificate of Registration (Pexh7).

7. PW1 further stated that he has never utilised the land. The land was a forest with vacant possession. He has also not followed up to get title to the land. He claims that the Defendants entered the suit land in the year 2008. At that time, it is the 2nd, 3rd and 4th Defendants who had encroached the land, while the others followed subsequently. He then sought enforcement notices from the council and he thereafter filed this suit stopping the Defendants' developments through an injunction issued by this court.

8. During cross examination, PW1 stated that he had a Part Development Plan for the property, (Pexh 1). He showed the court the original copy and the court noted that the Original Plan did not bear a stamp. PW1 further told the court that the plan was signed by the Director, Commissioner for Lands, and that the plan was made by one Ndarongo. However, Ndarongo's name is not there but his signature is allegedly there.

9. It was also his testimony that he had paid for the plot up to date and has receipts (Pexh 10) to show this. He testified that for the hand written receipts he was paying for the un-surveyed plot.

Defence case

10. The documents relied on by defendants including their recorded statements are found in a bound blue bundle running from page 1 to page 154 (hand written markings in red).

1st defendant's case.

11. **DW1 FAYO GALGALO** is the 1st defendant. He adopted as his evidence, his statement dated 26.4.2013. DW1 avers that the plaintiff does not have any plot on the suit land. He claims that the Defendants are his neighbours and everyone has their individual plots. They are fourteen (14) in number who occupy and own the suit land.

12. It was his testimony that Pw1 sued those who are on the commercial side of the plot leaving those who are behind. He stated that it is Pw1 who is encroaching unto their plots. That he has never received any enforcement letter from the plaintiff and he has never seen any of

the plaintiff's beacons.

13. DW1 further stated that he has a Part Development Plan but no plot No, and that the area where the suit land is situated is known as Kambi Garba Area reserved for both commercial and Residential Purposes. His commercial Plot is measuring 100ft by 100ft. DW1 opined that the plaintiff only had a sketch of the site as opposed to a Part Development plan, whereas he (DW1) has a plan which shows individual planned plots and the roads. He also told the court that the County government never wrote to them informing them to leave the suit plots. He opined that there is no way one can get a letter of allotment without a plot.

14. He relied on the following list of Documents marked as **Dexh 1-7** to support his testimony. These are; **Physical Planning Map/ Tracing dated 4/9/1998, Allotment Letter, Letter by District Physical Planning officer dated 29/9/1998, Letter by District Commissioner dated 2/2/1999, Letter by County Clerk dated 8/12/1998, Letter dated 23rd November 1998 approving PDP by District Land Officer Isiolo, Minute Number 53/1998 showing PDP was approved by full council Meeting on 15/1/1999.** (All these documents run from page 2-11 in defence bundle).

2nd defendant's case.

15. **DW2, ABDULLAHI DALACHA is the 2nd defendant.** He adopted as his evidence, his statement dated 26.4.2013. He avers that he was allocated his plot in 1985. The same is plot No. 56 Kambi Garba Isiolo measuring 100ft by 100ft as per PDP I5L/117/98/66 shown as No B. That he was given the land by the defunct Council of Isiolo vide minute No. 44/85 and that he has been farming and has put up a structure on the property.

16. In cross-examination he testified that the Plot was allocated to him in the year 1985 and he started to develop the same in the year 2008. That he got his allotment letter from the Council which reflects his plot as B but in the register it is No. 56. That in the letter of allotment it shows the same as 0.15 Ha, and is a designated commercial plot. He averred that it is an error for the letter of allotment to indicate the property as residential.

17. DW 2 relied on the following list of Documents marked as **Dexh 8-17** in support of his testimony. These are; **Minute No. 44 of 1985, Full Council Meeting of 15/1/1986, Letter dated 2/8/1994, Physical Development Plan, Council meeting of 20/9/1990, Letter dated 12/3/1986, Letter of allotment, Letter from Physical Planner, Rent receipt dated 15/7/2008 & 7/7/2008.** (These are 9 Documents in the list dated 26.4.2013 running from page 13- 65 in the defence bundle).

Case for the 3rd defendant.

18. **DW3, one ASLI ROBA,** testified that she is a daughter to **Ali Roba.** She avers that her father owned Plot No. 446 Kambi Garba Area measuring 100ft by 100ft where her father occupied the land from 1998 by building a timber structure. She stated that the Plot has euphoria tree fence. She claims that her father has ownership Documents including the Part Development Plan and the minutes of the council. She stated that she is familiar to the other Defendants and that the Plaintiff has no property in the suit premises. She also denied ever receiving any eviction Notice.

19. She relied on the following documents marked as **Dexh 18-25** in support of her testimony; **Minute No. WTPM dated 13/10/1998, Minute of approval of PDP by council dated 27/9/1998, Minute showing File folio No. 229 dated 12/10/1999 by clerk of Council to Physical planner, 3 rent receipts, Letter from Isiolo County dated 3rd June 2013, Rent Receipt.** (The documents are in two lists, the one of 26.4.2013 and that of 2.9.2013 running from page 77-91 in defence bundle).

20. *Case for the 4th defendant.* No one testified for this defendant.

Case for 5th defendant.

21. **DW4 ABDIKADIR GALGALO** is the 5th defendant. He adopted as his evidence, his statement dated 25.5.2018. He stated that he is a Chief but not from the jurisdiction of the suit premises, that he is also the owner of Plot No. 433 B and A, that he applied to get the plot which was approved through the minutes and that he has been in the property since the year 1998 where in the year 2000, he had put up a timber structure which was demolished later by plaintiff. He also stated that the plots were pointed out on the ground by the physical planner and he had paid for the demarcation and rental fees before the commencement of this suit.

22. He relied on the following Documents marked as **Dexh 26 -31** in Support of his testimony; **Minutes and appendix to Minutes dated 20/9/1998, Letter ref No. 150/CC/LMO/3/36/612 dated 24th August 1998 to the District Planning Office, Confirming Letter dated 4/3/1999, PDP prepared by the District Physical Planning Officer, Receipts of payment to the Govt surveyor for PLOT No. 433 A AND 433B dated 29/11/2018, Rent receipt for Plot No. 433A and 433B dated 13/01/14.** (The documents are in the list dated 16.1.2014 running from page 96- 117 of defence bundle).

Case for 6th defendant.

23. **DW5 ABDI KUSO HELEMA** is the 6th defendant. He adopted as his evidence, his statement dated 26.4.2013. He avers that he is the owner of Plot No. 417 at Kambi Garba, but no one stays on the plot because it was destroyed. He stated that the plot has indigenous tress which his father planted. He further stated that the plaintiff has not put up a fence and does not stay there. He equally denied receiving a letter from the council informing him to vacate the land. He added that he used the land for farming and had put up a small structure for resting while farming.

24. He relied on the following Documents marked as **6Dexh 1-6** in Support of his testimony; **Letter dated 24th October 1997, Receipts for plot rent dated 5/5/2008, Tracing of the Plot Certificate dated 26/11/1998, Handwritten Note showing schedule of payments of Kshs.5,600/=, Letter from County Secretary confirming ownership by D6 of Plot No. 417 Kambi Garba, Rent receipt dated 29/10/2013.** (The documents are in two lists, one of 26.4.2013 and that of 11.2.2014 running from pages 119 -130 in defence bundle).

Case for 7th defendant.

25. **DW6, HAJI MALLOW GUHICHA** is the 7th defendant. He adopted as his evidence, his statement dated 26.4.2013. He avers that he owns plot No 102 in Kambi Garba, which was a big chunk of land when he acquired it, but survey came and it was sub divided. He built a house on the land and gave the same to Abdi Hussein to farm for five (5) years. He stated that the Plaintiff has no land in the suit premises nor is there any factory there, but Pw1 resides with his family close to where the suit land is.

26. DW 6 relied on the following Documents marked as **7Dexh 1-7** in Support of his testimony; **Letter dated 6th July 1989, Letter to District Physical Planner dated 19/4/2000, Receipts for plot rent dated 13/1/1997, 5/1/1999, 8/7/2008, Tracing of the Plot Certificate, Latter from C. Kitonga to the Clerk Council of Isiolo Dated 12/2/2008, Letter dated 29/10/2013 confirming ownership.** (The documents are in two lists, one dated 26.4.2013 and another of 5. 11.2013 running from pages 132- 142 of defence bundle).

Case for 8th defendant.

27. **DW7, ABDI HUSSEIN** is the 8th defendant. **He adopted as his evidence, his statement of 26.4.2013.** He testified that he is the owner of plot 401. Initially, the plot was No. 102 which was subdivided into three plots between himself, **Dw6** and **Wako Boru** (who did not come to court). DW7 avers that initially, they just entered that land and subdivided it amongst themselves and thereafter, they applied for a formal subdivision of the same. That the surveyor came and subdivided the land whereby, DW 7 got 100ft by 100ft parcel and DW6 also got 100ft by 100ft parcel. DW7 claims that he entered the and in the year 1989 and has since then been conducting farming on the said plot. He also had fenced the same with milky plants.

28. It was his testimony that he paid rates to the Council and only stopped when this case started. They were informed that they should await the outcome of the case. He stated that they do meet with Pw1 and great each other but Pw1 has never complained that DW 7 is using his land. He stated that they were summoned by the area chief only to find that PW1 had called the District Officer and the members of special branch. Still, DW 7 was allowed to continue farming on the suit land and no one ever informed him to leave the land.

29. In support of his case, DW7 relied on the documents marked as 8th D - Exh 1-8 which documents run from page 145- 154 in defence bundle.

ANALYSIS AND DETERMINATION

30. I have considered the pleadings here in, the evidence and the rival submissions of the parties. I frame the issues for determination as follows;

Whether the Plaintiff should be declared as the legal proprietor of the suit land. If this shall be in the affirmative, then Whether the Defendants and or their agents/servants should be evicted from the suit land.

Whether the Plaintiff should be declared as the legal proprietor of the suit land.

31. I begin by mentioning that none of the parties herein have titles to the suit premises and they all claim their ownership from the allotments issued by the defunct County Council of Isiolo. In the case of **Stephen Mburu & 4 others vs Comat Merchants Ltd & Anor [2012]** Kimondo J held that:

“.....from a legal standpoint a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property”

See also **Shadrack Kuria Kimani v Stephen Gitau Nganga & another [2017] eKLR.**

32. In the case of **John Mukora Wachihii vs. Minister of lands & 6 Others NBI PETITION NO. 82 OF 2010, Mumbi Ngugi J** held that **“the right to property as recognized in article 40 of the constitution of Kenya 2010, and section 75 of the repealed constitution of Kenya as concerns rights to land, could only be enjoyed by registered proprietors of land..... The petitioners who held allotment letters, as concerns the suit land had certain interests in the land whose extent and validity could be determined in a different forum.....”**

33. It is clear that plaintiff's rights and interests in the suit land never crystallized into rights of a registered proprietor. The plaintiff therefore has to demonstrate that his interests in the suit land can sufficiently be identified so as to be protected by this court.

34. The backbone of court proceedings is that **He who alleges must prove. Section 107 of the Evidence Act** provides that **“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.”**

35. **Section 109** of the aforementioned act stipulates that; **“the burden of proof as to any particular fact lies on the person who wishes the**

court to believe in its existence”.

36. In the case of **Stephen Wasike Wakhu & Another –Vs- Security Express Limited [2006] eKLR**, the court stated as follows:

“A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum that “he who alleges must prove.””

37. The plaintiff herein alleges to have been allocated 2 hectares of the suit premises vide Council Meeting Min No. 21/91 dated 25th April 1991. That the Development plan was made and he sought approval in the year 1992 which was confirmed on 22nd May 1992 and that he was issued with an allotment letter on 10th January 1999.

38. Firstly, there is a lacuna as to who had applied for the allocation of the suit land. In his recorded statement dated 25.3.2013, pw1 states as follows ***“in the year 1991, I applied for a plot from the county council of isiolo for purposes of making blocks and associated works.”*** He goes on to state that ***“on 26.3.1991, the council of Isiolo approved my application vide minute no. 21/91 and the committee recommended that Waso Block makers be allocated hectares of land for block making and associated works.”***, yet by then, pw1’s company had a business name termed as ***Waso construction company*** –see plaintiff’s exhibit 6. The subsequent letter of allotment was issued to ***Waso Building and Road Works Company ltd*** see plaintiff exhibit 9. I find that pw1 has not established the co-relation between him, waso block makers, Waso Construction Co. Ltd, the Plaintiff as a business name and the plaintiff as a Company. Of particular interest is at what time did he transfer the property from himself to the business and the company, and what procedure did he follow to facilitate such transfer.

39. The second issue to consider are the minutes relied on by the plaintiffs. He refers to the Minutes of the Council Referenced as Min. No.26/91 dated 25.4.1991. The minutes availed by the plaintiff are those dated 1.7.1991 and hence the full content of the minutes no 26/91 of 25.4.1991 are not known to this court. The letter availed as pexh 5 which mentions the minutes also don’t have the said minutes as annexures.

40. The third issue the court has considered is that of identification of the suit plot. What is the extent of the parcel that was allocated to pw1? The letter of allotment makes reference to an un-surveyed plot. Was survey done and beacon certificate issued?. No!. Pw1 had showed the court the original copy of his Part Development Plan (P.D.P) where he was saying that the same had a stamp of the government. But the court had looked at the document and it had no such stamp. I agree with the Defendants that the Plan which is attached by the Plaintiff is only a sketch map of the area. PW1 has therefore not sufficiently demonstrated that his land can be identified on the ground.

41. Fourthly, I have taken into account the reason as to why pw1 had applied for the plot in 1991. He was to make blocks. He never made any. There is no evidence that he ever utilized the suit land at any given time. Going by his second prayer in the plaint ***“an order of eviction against each of the defendant”***, it is clear that defendants were the ones who were on the suit land by the time the suit was filed. Where was the plaintiff all this time?

42. The fifth point to consider is the nature of interests acquired by the plaintiff through the allotment letter. In clause 2 in the allotment letter dated 10.1.1999, it is stipulated as follows;

“I should be glad to receive your acceptance of the attached conditions together with banker’s cheque for the amount as set out below within 30 days of the post mark..... If acceptance and payment respectively are not received within 30 days from the date hereof, the offer herein contained will be considered to have lapsed....”

43. There is no evidence to show that pw1 ever complied with the conditions set out in the said letter of allotment so as to lead to the process of issuance of the title under cap 281 or cap 300. In the case of ***Mbau Saw Mills Ltd. Vs. The Attorney General and 2 Others, Nyeri ELC NO. 59 of 2007***, the court had this to say on issue of allotment letters;

“I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law”

44. I therefore conclude that plaintiff has not demonstrated that he acquired any interests on the suit land through the allotment letter as there is no letter of acceptance and no prove of payment of the shs. 70,390 indicated in the letter of allotment.

45. The defendants did try to counter the evidence of the Plaintiff. Their list of documents are consistent. Between the years 1985 to 1998 the Defendants sought from the Council the consent to be issued with plots in Kambi Garba. The Council granted them approvals and showed them the particular parcels of land. They later did a survey of the area and through an application to the Clerk of the County Council of Isiolo, a Physical Development plan was conducted. The Part Development Plans were later approved by the minutes of the Council as is evident on page 10 of defence bundle and they were later issued with allotment letters. This ascertainment of defendant’s plots is clearly

manifested in the rates payment processes. For instance some of the defendants were paying rates as indicated in the following documents;

- 2nd defendant, plot no K/Garba 56 (see page 72 of the bundle),
- 3rd defendant, plot no K/Garba 446 (see page 84 of the bundle),
- 5th defendant, plot no. KAMBI/GARBA 433B (see page 84 of the bundle),
- 6th defendant, plot no. KAMBI/GARBA 417 (see page 130 of the bundle),
- 8th defendant, plot no. KAMBI/GARBA 401 (see page 154 of the bundle).

46. On the other hand, plaintiff's rate payment documents availed as Pexh 10 contains the following particulars; ***"property rate payment for K/GARBA/UNS"***. This means that even in year 2012, years after plaintiff had filed this suit, his plot was still unknown. He was paying rates for an un-surveyed plot!.

47. The plaintiff has not sued the county government of Isiolo yet it appears that if he has any claim at all, then that entity is the one which ought to show him his land. Way back on 14.1.2008, Judge Emukule while dealing with the application for injunction made by plaintiff had this to say ***"what emerges from the respective affidavits in reply is that the defendants/respondents received allocation of plots within Isiolo Township. It is also clear that these plots have identical numbers in the minutes. What is also clear is that these plots are not similar in size to the 2 ha area plot allocated to the plaintiff. The common theme is that these plots are all at Kambi Garba. Despite the indication in the part Development plans of individual blocks of plots they are not numbered, and confusion among the allottees, and the plaintiff and defendants herein may well be understandable. There is therefore need for the parties (the plaintiff and the defendants) to humbly approach the county council of Isiolo, the District physical planning officer and the district surveyor to carry out a ground survey and point out to each the plaintiff and the defendants the relevant grounds of their respective plots"***.

48. Did the plaintiff heed to this proposal? He didn't and therefore, this court cannot declare him to be the owner of land which he did not acquire, he has not identified and he has never possessed.

49. The Plaintiff has therefore clearly failed to establish its case on a balance of probabilities and I proceed to dismiss the case with costs to the defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 2ND DAY OF OCTOBER, 2019

IN THE PRESENCE OF:-

C/A: Kananu

D. Kimaita for plaintiff

Ayub A. for defendants

Plaintiff

Defendants

HON. LUCY. N. MBUGUA

ELC JUDGE