REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 122 OF 2019

GOLICHA ROBA TOTO.....APPELLANT

VERSUS

ZEINAB ABDIKADAR.....1ST RESPONDENT

COUNTY GOVERNMENT OF ISIOLO.....2ND RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the judgment and decree of Hon. S.M. Mungai (CM) dated 1st October, 2019 in **Isiolo CMCC No. 29 of 2017** - *Golicha Roba v Zeinab Abdikadir and the County Government of Isiolo*. By the said judgment, the trial court dismissed the Appellant's suit with costs to the Respondents.

2. The material on record indicates that vide a plaint dated 8th March, 2013 and amended on 17th July, 2014 the Appellant sought an order for the eviction of the 1st Respondent from his plot No. 20 Isiolo Town and an order for the 2nd Respondent to rectify and restore its records to their original state and remove Plot No. 24 from the site of Plot No. 20 Isiolo Town. The 1st Respondent also sought damages, mesne profits and costs of the suit.

3. The basis of the Appellant's claim was that in 1992 or thereabouts he was allocated residential Plot No. 20 by the 2nd Respondent through a balloting process and that he thereafter made all the requisite payments for the plot to the concerned authorities. He pleaded that upon being shown the plot he fenced it and constructed a semi-permanent house thereon.

4. It was further pleaded that the Respondents had since fraudulently and in breach of trust re-designated the said plot as Plot No. 24 and reallocated it to the 1st Respondent. The 1st Respondent thereupon allegedly invaded the suit property and damaged the Appellant's properties thereon.

5. The 1st Respondent filed a defence dated 19th April 2013, in which she denied the Appellant's claim in its entirety. The 1st Respondent denied any fraud or collusion in the alleged re-allocation of the Appellant's Plot No. 20. She contended that her Plot was No. 24 Tullu Roba Estate and pleaded that there was no nexus between the two plots. She further pleaded that she was allocated her Plot No. 24 in 1992 and she had no knowledge of the Appellant's claim. She, therefore, prayed for dismissal of the Appellant's suit with costs.

6.. The 2nd Respondent filed a defence dated 5th April 2013 and amended on 30th April 2015 whereby it denied the Appellant's claim. The 2nd Respondent denied that the Appellant was ever allocated Plot No. 20 and that it had not approved any part development plan for its allocation. It was further denied that the Appellant had made any payments with respect to Plot No. 20 and that if any payment was ever received then it was not with respect to allocation of the said plot.

7. The 2nd Respondent further denied the alleged fraud and collusion in re-designation and re-allocation of Plot 20 to the 1st Respondent. It also denied the particulars of fraud and breach of trust attributed to it by the Appellant and put him to strict proof thereof. Consequently, the 2nd Respondent prayed for dismissal of the Appellant's suit with costs.

8. The Appellant filed a reply to the 1st Respondent's defence as well as a reply to the 2nd Respondent's defence whereby he simply joined issue with the Respondents on their defences and reiterated the contents of his plaint. The Appellant also stated that the discrepancies in his names was as a result of misspelling and that he had sworn an affidavit to clarify the issue.

9. The record shows that upon full hearing of the suit, the trial court held that the Appellant had not proved his case against the Respondents to the required standard and proceeded to dismiss it with costs. The trial court was of the opinion that the Appellant did not prove that his plot was surveyed as required by the Director of Surveys; that he did not tender a copy of the beacon certificate in evidence; and that he had not complied with the terms of allotment in making prompt payment of the allotment dues. The trial court was further of the opinion that the Appellant had not proved the fraud alleged against the Respondents.

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

10. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 24th October, 2019 raising the following 6 grounds of appeal:

> *(a) The learned trial Magistrate's judgment was against the weight of the evidence placed before him.*
>
> *(b) The learned trial Magistrate erred in law and fact in that he did not give due weight to the evidence placed before him by the Plaintiff.*
>
> *(c) The learned trial Magistrate erred in law and in fact in that he gave wrong interpretation to the documents placed before him by the Plaintiff.*
>
> *(d) The learned trial Magistrate erred in law and fact in that he held that the Plaintiff had not proved his case to the required standard.*
>
> *(d) The learned trial Magistrate erred in law and in fact in that he gave undue weight to the Respondents' evidence and documents thereby tilting the case against the Appellant.*
>
> *(e) The judgment of the trial court is bad in law and fact.*

11. Consequently, the Appellant prayed for an order setting aside the judgment and decree of the trial court and an order allowing his suit before the trial court.

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

12. When the appeal was listed for hearing on 2nd September, 2020, it was directed that the appeal shall be canvassed through written submissions. The parties were given 21 days to file and exchange their respective submissions. The record shows that the Appellant filed his submissions on 17th September, 2020 whereas the Respondents filed their joint submissions on 28th September, 2020.

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 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 Vs 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. Although the Appellant raised 6 grounds in his 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 law in dismissing the Appellant's suit.

(b) Whether the Appellant's suit was time barred under the law.

(c) Who shall bear costs of the appeal.

F. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law in dismissing the Appellant's suit

17. The court has considered the material and submissions on record on this issue. Although the trial court dismissed the Appellant's suit on the basis that he had failed to prove his case to the required standard, the Appellant contended that he tendered sufficient evidence to prove his claim and that the suit was decided against the weight of evidence. The material on record indicates that the Appellant balloted for allocation of a plot in 1992 and was apparently allocated Plot No. 20 in Isiolo Township.

18. The material on record further indicates that the Appellant was issued with a letter of allotment dated 14th January, 1993 and that he subsequently made some payment for the allocation. Even though the payment was made out of time, it would appear that payment was accepted and receipted by the c oncerned authorities. The said allocation was acknowledged by the defunct County Council of Isiolo when they published a notice in the *Kenya Times* daily of 25th August 1995 listing the Appellant as an allotee of Plot No. 20.

19. The material on record further indicates that sometime in 2011, the County Council of Isiolo decided to reallocate plots in several estates vide a resolution passed by the Town Planning and Markets Committee on 3rd November, 2011 in order to cater for some squatters who had invaded the plots of those who had balloted for them earlier. The original ballotees were to be relocated to other areas within Isiolo.

20. The court is thus of the opinion that the decisive issue in this appeal is whether or not due process was followed in undertaking the second allocation of 2011 with respect to plots which had been balloted for and allocated in 1992 or thereabouts. The evidence tendered on behalf of the 2nd Respondent at the trial was that it was necessary to relocate some of the original allotees whose plots had already been occupied and developed by squatters. That may have been a noble policy decision but was due process followed in the process?

21. The court is of the opinion that once a letter of allotment has been issued with respect to a particular plot, there is no room for a second allocation of the same plot unless the first allocation is lawfully revoked. The evidence on record indicates that the original allottees were never issued with notice of the intended revocation and reallocation of their plots to squatters. They were never accorded a chance of being heard before the adverse action was taken by the Town Planning and Markets Committee. That much was conceded by DW7 who was the County Executive Committee member for Lands and Physical Planning of the 2nd Respondent.

22. In the case of **Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others (2019) eKLR**, the Court of Appeal referred to its earlier decision in **Benja Properties Ltd v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR** on the issue of double allocation:

" ...this court stated that an allotment of an interest in land is a transaction *in rem* attaching to and running with a specific parcel of land. In the instant case, the second letter of allotment to the Appellant did not attach *in rem* to any land since there was no parcel upon which the allotment could attach."

23. The 1st Respondent contended and submitted that the Appellant's suit was properly dismissed because he did not demonstrate any nexus between Plot 20 Isiolo Town and Plot 24 in Tullu Roba. It was contended by the 1st Respondent that those two plots were different and distinct and that she had nothing to do with Plot 20 which the Appellant was claiming. The evidence on record, however, points to the contrary. The evidence of DW6 who was the County Surveyor in Isiolo testified that when he visited the suit property he found that the Appellant and the 1st Respondent were claiming the same property.

24. The other reason why the court is unable to accept the 1st Respondent's contention Plot 20 and Plot 24 as distinct and separate is that if that were so, then the 2nd Respondent would have easily resolved the dispute by pointing out the two plots to the disputing parties. The material on record indicates that when the County surveyor visited the disputed land he found that both the Appellant and 1st Respondent were claiming the same plot.

25. The Respondents contended that the Appellant's suit was rightfully dismissed because he did not make the required dues for the allotment within the stipulated time as per the letter of allotment. The court is of the opinion that the question of whether or not late payment for an allotment invalidates the letter of allotment depends on the circumstances of each case. For instance, where the allocating authority waives the requirement of payment within 30 days the letter of allotment cannot be said to have been invalidated. The allocating authority may also waive the timeline by accepting payment out of time.

26. In the case of **Stephen Mburu & 4 Others v Comat [2012]eKLR** the court was faced with a similar objection to a letter of allotment. The Plaintiff in that case contended that the 1st Respondent's letter of allotment was invalidated by late payment of the allotment fees. The High observed, *inter alia* that:-

> **" ...It may well be true that the 1st Defendant did not pay the stand premium and other charges within the prescribed time in the letter of allotment but payment was accepted..."**

27. The material on record indicates that as late as 1995 the County Council of Isiolo was still granting leeway to the allottees to accept the allotments and make the requisite payments. Moreover, the material on record indicates that the allocating authority continued to accept payment from the Appellant out of time. It is also evident from the 2nd Respondent's amended defence that late payment was not one of the issues raised before the trial court.

28. Finally, the Respondents submitted that the Appellant's suit was properly dismissed because the Appellant had failed to prove any fraud on their part. They cited several authorities in support of that submissions and on the standard of proof for allegations of fraud. The court is in agreement with the Respondent's submissions on the standard of proof. Allegations of fraud ought to be proved on a standard higher than a balance of probabilities although not as high as beyond reasonable doubt.

29. The court is, however, of a different opinion on whether or not on the material on record the Appellant had proved fraudulent conduct on the part of the Respondents. The court is of the opinion that it is not necessary for a claimant to prove all the particulars of fraud which may be enumerated in his pleading. It is sufficient if the claimant proves at least one of them. The evidence on record reveals that the Appellant's plot was taken away unlawfully and without due process. Acting unlawfully was one of the particulars of fraud pleaded in the amended plaint. The court is thus of the opinion that the trial court erred in law in holding that the Appellant had not proved any fraudulent conduct on the part of the Respondents. The court has also noted from the record that the 1st Respondent who was allocated the suit property as a "squatter" was actually an employee of the County Council of Isiolo at the material time.

(b) Whether the Appellant's suit was time barred

30. The court has considered the material and submissions on record on this issue. The pleadings on record indicate that none of the Respondents raised the issue of limitation in their respective defences before the trial court. It was, therefore, sneaked into the appeal by the Respondents' written submissions filed on 28th September, 2020. The Appellant did not even have a chance to submit on the issue since it was raised after he had already filed his submissions. The court is thus of the opinion that it is not a legitimate issue for determination in the appeal.

31. Even if the issue of limitation were to be considered in the appeal, it is doubtful if the Appellant's suit could be said to have been time barred simply because he was allocated the suit property in 1992. A cause of action does not accrue automatically upon allocation of a plot. A cause of action can only arise when the wrongful actions complained of have been committed by the alleged wrongdoers. The material on record shows that the 2nd Respondent purported to re-allocate the suit property in 2011 or thereabouts. The Appellant's cause of action could not, therefore, have accrued prior the year of re-allocation.

(c) Who shall bear the costs of the appeal

32. 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 party should be awarded costs of the appeal. Accordingly, the Appellant shall be awarded costs of the appeal to be borne by the Respondents.

G. CONCLUSION AND DISPOSAL

33. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. The court is satisfied that the trial court erred in law in holding that the Appellant had failed to prove his case against the Respondents to the required standard. Consequently, the appeal is hereby allowed in the following terms:

> **a) The judgment of the trial court dated and delivered on 1st October, 2019 in Isiolo CMCC No. 29 of 2017 is hereby set aside.**
>
> **b) That Judgment be and is hereby entered for the Appellant as prayed in Prayer (a) and (b) of the plaint dated 8th March, 2013 and amended on 17th July, 2014 save for damages and mesne profits.**
>
> **c) The Appellant is hereby awarded costs of the appeal and the suit before the trial court.**

34. 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

JUDGE

Judgment delivered at MERU this 27th day of May 2021.

In the presence of:

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L. N. MBUGUA

ELC JUDGE