REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 5 OF 2019

CHARLES KITHIORI IMWITI.....APPELLANT

VERSUS

KINYUA KOOME.....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. Ngigi E. Ngigi – Senior Resident Magistrate in Isiolo CMCC No. 22 of 2018 delivered on 14th December, 2018)

JUDGMENT

BACKGROUND

Charles Kithiori Mwiti the Appellant herein had sued Kinyua Koome the Respondent in the Chief Magistrate Court at Isiolo. By a plaint dated 27th May 2013 and filed in Court on 28th May 2013, the Appellant averred that he was the registered owner of parcel of land known as Lower Kiwanjani/33 measuring approximately ½ an acre which was allegedly surveyed and allocated to him way back in 1999.

The Appellant further averred that on the 8th May 2013, the Respondent without any justification and/or colour of right invaded his land and purported to put up a dwelling temporary structure. In an amended plaint dated 17th July 2018, the Appellant averred that during the pendency of the suit, the Respondent moved in to the suit land and settled therein albeit illegally and sought for inter alia an order that he be ordered to vacate the suit plot and in defiance be forcefully evicted. By a statement of defence dated 30th July 2018, the Respondent denied the Appellant's claim and put him to strict proof thereof. The Respondent sought to have the suit dismissed with costs.

During the hearing, the Appellant testified and called one witness namely Priscilla Kajuju. In his testimony, the Appellant stated that he was allocated the suit land by the Commissioner of Land and rendered a copy of the letter of allotment in evidence. The Appellant also tendered receipts issued by the County Council of Isiolo for rates/rents. The witness called by the Appellant stated that they are neighbors with the Appellant and that there were a total of 36 people who were allocated land at the same area.

The respondent on the other hand testified and stated that he has been in occupation of the suit land since 1994 and that he had lived on the land for more than 24 years. He stated that his stay was formalized by the Lands office on the 23rd August 2012. He produced a site inspection report for the suit plot described as plot No. 33 and that the County had no objection to the plot being allocated to him since there was no prior commitment or dispute in respect to the same. The defendant also produced a PDP for the suit plot and an application for water connection which was approved for the defendant in respect of the suit plot No. 33 Kiwanjani. The respondent also produced a letter by the Isiolo County dated 26th March 2014 confirming that the appellant was the registered owner of the plot No.34 and not 33 which he is claiming.

After hearing the parties and their witnesses, the trial Court dismissed the plaintiff's claim with costs. In his analysis, the trial magistrate made the following observations at page 3 of his judgment:-

> 1. The two sides have given evidence of how they came to acquire the subject land. Further on the side of plaintiff, he has produced an allotment letter in his names whereas the defendant relies on a PDP and a letter from a Physical Planner (DEX 1) and another from the Works officer Isiolo County Council.

The court has considered the evidence as adducted by the sides but more importantly the contents of a report to Court by the Physical Planner dated the 15th June 2015. I have found the said report as of prime importance in solving the ownership dispute owing to the following;

Firstly, he said report has been authored by an expert witness and who has the necessary knowledge and understanding of land allocation and

registration process. Secondly the said office is in possession or has access to vital records relating to issuance and preparation of PDPs and allocation of the land by the then Isiolo County council and now the Government of Isiolo. Upon being presented by the documents from the two sides, the said officers had found as follows:-

> "The PDD provided by the parties are PDP No. ISL/117/98/311 for the plaintiff and PDP No. KW/12/08/02 for the defendant. PDP No. ISL/117/98/311 was prepared by the Physical Planning office on 14th of November 1998 for existing residential plot in Lower Kiwanjani. However, this office has no evidence of circulation of the PDP to the County Council of Isiolo for adoption by the Town Works and Markets Committee as a basis for allocation. In addition, according to the records, this plan has never been approved contrary to the documents presented to this office".

The trial court further observed that there can never be a letter of allotment unless the PDP is approved and/or circulated. The Court went ahead and adopted the findings of the said report and found that the letter of the allotment issued to the appellant was illegally and irregularly issued and that the same cannot therefore confer any proprietary interest to the appellant.

Aggrieved by the judgment of the trial court, the appellant filed the present appeal vide a Memorandum of Appeal dated 9thJanuary 2019 citing the following six (6) grounds:

1. The trial magistrate wholly misapprehended the appellant's claim and the evidence tendered in this favour as a result whereof he arrived at the wrong decision.

2. The Honourable trial magistrate erred both in law and fact by relying on extraneous factors thereby arriving at a judgment that is not supported by the evidence on record.

3. The Honourable magistrate erred both by the law and fact by failing to accord the evidence in favour of the appellant the requisite weight.

4. The Honourable magistrate failed to critically scrutinize and analyze the evidence on record as a result whereof he offhandedly dismissed the plaintiff's claim.

5. The judgement on record is untenable unconscionable and the same amounts to a miscarriage of justice.

6. The Honourable trial magistrate erred in both law and fact by felching and relying upon report unknown to the parties the report whose maker was not summoned for cross examination.

SUBMISSIONS BY THE APPELLANT AND THE RESPONDENT

When this appeal came up for directions on 7/11/ 2019, the parties agreed to dispose of the same by way of written submissions. The appellant through counsel Mr. Mokua expounded on these grounds of appeal and submitted that the learned trial magistrate misapprehended the appellant's case and misdirected himself by relying on extraneous factors thereby arriving at a wholly lopsided and untenable decision. The learned counsel further submitted that the learned trial magistrate in analyzing the evidence on record straight jacketed his mind and failed to investigate as to who took possession of the suit land earlier in time. He argued that the trial magistrate over reliance of some report dated 5th June 2015 which report neither of the contestants appeared to have commissioned. He did not cite any decided case(s) in support of this Appeal. The counsel for the respondent Mr. Mbaabu also filed written submissions opposing this appeal. in his submissions, Mr. Mbaabu argued that the respondents defence before the lower court raised triable issues otherwise the appellant could have filed an application under Order 2 Rule 15 CPR to have the suit struck out for disclosing no reasonable cause of action or defence or for being scandalous frivolous, and vexatious. The learned counsel further submitted that the statement of defence filed by the respondent raised specific denials of the appellant's claim which were rightly considered by the trial court in the impugned judgement.

On ground No. six (6) of the appeal, the counsel for the respondent argued that the report dated 5th June 2015 is a recommendation from a site inspector report which was produced and admitted in evidence of the lower court and that the appellant never raised any objection to its admission. He further submitted that from the proceeding before the trial court, there is no indication that the appellant had sought to have the maker of the said report summoned for proposes of cross examination

The learned counsel also submitted that the respondent had testified before the trial court to the effect that he had been in occupation of the suit properly since 1994 and even produced a site inspection report for plot 32A which indicates that no dispute had been lodged and that the County had no objection to any transaction. The learned counsel referred to a letter by the Isiolo County dated 26th March 2014 which was also produced in evidence which stated that the appellant herein was not a plot owner from the list of 36 beneficiaries. The counsel cited the following cases in opposing this appeal:

1. Jubilee Insurance Company Limited –VS- Grace Ayuma Mbinda (2016) e KLR

2. Job Kiloch –VS- Nation Media Group Ltd., Salaba Agencies Ltd. & Michael R* (2015) e KLR

DETERMINATION

I have considered the record of Appeal, the submissions by learned Counsel and the authorities cited. As the first Appellate court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion on the dispute. I am alive to the fact that as an appellate court this court will not ordinarily interfere with the findings of fact by the trial court unless they were based on no evidence at all, or on a

misapprehension of it or the court is shown damonstrably to have acted on wrong principles in reaching the findings. (See case of ***Mwanasokoni –VS- Kenya Bus Services Ltd (1982-88) KAR 278 and Kiruga –VS- Kiruga & Another (1988) KLR 348***).

The gist of the dispute between the parties in the trial court which has given rise to the present appeal is a plot described as Lower Kiwanjani/33 measuring approximately ½ an acre. According to the evidence adduced by the Appellant, the suit land was allocated to him by the Commissioner of Lands vide an allotment letter dated 9th February 1999. The Appellant also produced a copy of part development plan, copies of revenue receipts and enforcement notice dated 9th May 2013. An allotment letter is a process and not an end itself. It is common knowledge that under the ***Government Lands Act (repealed***), unalienated land held by the Government of Kenya (GoK) would be given to the then county council as a grant for various development purposes. The land would be given either absolutely or limited to a term of 99 years or other written terms and the government would then have the reversionary rights. More importantly, the Grant would specifically direct as to the use of the land, for example the development of a housing project or the establishment of a school. It was also specific as to the nature of the development whose plan was drawn up and submitted to the then Commissioner of Lands for Approval. Where the original Development Plan provided plots for open spaces the then County Council ought to have conducted an open transparent and democratic process where persons residents in the area are invited to apply and the appropriate allocation Committee gets an opportunity to interrogate and identify the deserving applicants whose names would be kept in a register of allottees.

The trial Magistrate in his evaluation of documents produced before him noted that the report by the physical planner dated 5th June 2015 was of paramount importance in resolving the ownership dispute since the report was authored by an expert witness who had knowledge and familiar with land allocation and registration process. He also laid emphasis on the said document and observed that the office of the Physical Planner is in possession and/or has access to vital records relating to issuance and preparation of PDP`s and allocation of land by the then Isiolo County Council (now County Government of Isiolo). The trial Magistrate further stated that the author of the said report had noted in his report that there was no approved PDP for the allocation of the plaintiff`s plot described as PDP No. ISL/11/98/3111 and no evidence of circulation of the same to the County Council of Isiolo for adoption by the relevant allocation committee for purposes of allocation. These are critical procedural requirements necessary before alienation of public land held by the then county councils in trust for the residents. I also note from the letter of allotment produced by the plaintiff/appellant dated 9th February 1999 that the same did not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. In the case of ***Commissioner of Lands and another Vs Kithinji Murugu M'agere (2014) e KLR, Judge G.V Odunga*** (as he then was) stated that acceptance may be in writing or by conduct. He stated as follows;

> "In this case, the applicant's case is that having been allotted the Suit parcels of land, the respondents ought to be compelled to Issue him with the title documents. In Dr. Joseph N.K. Arap N'gok Vs Justice Moijo ole Keewa and others civil apprehension No. Nai. 60 of 199, it was held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held. In this case save for the Miritini property, no evidence has been exhibited that the applicant paid the requisite fees for the Ngong Township Properties. Accordingly, it is not possible to find that the applicant had met the conditions specified in the leller of allotment with respect to the said property. In the premises, there is no basis upon which I can find that the applicant has shown that, he has a legal right or substantial interest the performance of which must be done by the respondent. With the respect to the Miritini property, it is contended by the respondents that in the absence of an acceptance by the applicant, it cannot be said that the applicant fulfilled the conditions specified in the letter of allotment."

In the said letter of allotment produced by the plaintiff dated 9th February 1999, the plaintiff was required to write an acceptance letter by fulfilling the terms and conditions set out therein. One of the terms of the said letter of allotment was the payment of a Stand Premium of Kshs. 10,000 rent from 1/2/99 to 31/12/1999, conveyancing fees, registration fees, stamp duty, survey fees, approval fees and planning fees all amounting to Ksh. 18,723. In addition, the plaintiff was required to pay annual Rent and Rates under the Rating Act (Cap. 267) Laws of Kenya.

The acceptance of a letter of allotment can either be in writing or by conduct through payment as one of the terms. I find that the trial magistrate property directed his mind to the evidence adduced and the applicable law. In addition, I find that the plaintiff did not comply fully with the terms of the allotment letter within the stimulated 30 days by making the payments stipulated therein. The plaintiff did not also call a witness from the County Government of Isiolo to show that indeed the plaintiff is the rightful allottee of the suit property. The plaintiff from the evidence on record stated that he was shown the boundaries for his plot and fenced off. However, there is no surveyor called by the plaintiff who identified the boundaries or beacon certificate.

From the evaluation of the evidence and materials placed before him, I am satisfied that the trial magistrate properly considered and directed his mind in arriving at the impugned judgement. In the re-suit therefore, I find this appeal lacking merit and the same is hereby dismissed with costs.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Appellant/Advocate- Absent

2. Respondent/Advocate- Absent

3. Fardowsa ; Court Assistant- Present