



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA CASE NO. 35 OF 2019**

**HALIMA NOOR HASSAN..... APPELLANT**

**VERSUS**

**JOHN KISINGA..... 1<sup>ST</sup> RESPONDENT**

**ROMANO M'TONDOLEWA..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Isiolo before Hon. E. Ngingi, Senior Resident Magistrate delivered 14<sup>th</sup> December, 2018 in CMCC No. 3 of 2012).*

**BACKGROUND**

The Appellant, Halima Noor Hassan was aggrieved by the judgment and decree of Hon. E. Ngingi delivered on 14<sup>th</sup> December 2018. In a plaint dated 26<sup>th</sup> January, 2012 brought contemporaneously with a chamber summons under certificate of urgency, the Appellant had sought judgment for the following orders: -

- (a) An order of permanent injunction restraining the Defendants/Respondents their servant's agents, or employees or any one acting through them or for them from further trespassing or in any other way interfering with the ownership of the suit plot.***
- (b) A declaration that the suit plot is legally owned by the plaintiff.***
- (c) Cost of the suit and interests at court rates.***

The 1<sup>st</sup> Defendant/Respondent filed his statement of defence on 2<sup>nd</sup> February 2012. The 2<sup>nd</sup> Defendant/Respondent apparently did not file any defence. When the Chamber Summons application was placed before the duty court in the lower court, the application was certified urgent and temporary injunction orders were issued pending the inter-partes hearing.

After hearing the parties and the witness and upon considering the materials placed before the trial court, the trial magistrate found no merit in the suit and the same was dismissed with costs to the 1<sup>st</sup> defendant. The Appellant was aggrieved with the finding of the trial court and filed this appeal citing the following grounds:-

- 1. THAT the Learned Trial Magistrate erred in Law and in fact by finding that the 1<sup>st</sup> Respondent's allocation over the suit plot was first in time and had priority over the Appellant's claim whereas there was overwhelming evidence to the contrary.***
- 2. THAT the Learned Trial Magistrate erred in Law and in fact by failing to appreciate that the Appellant was allocated the suit plots property regularly, procedurally and lawfully and had been paying rates for the same, which actions connote the Appellant's proprietary rights over the suit plots.***
- 3. THAT the Learned Trial Magistrate erred in Law and in fact by finding that the sale agreement between the 2<sup>nd</sup> Respondents and the 1<sup>st</sup> Respondent over the suit plot was binding despite the said agreement being in contravention of mandatory and express provisions of the land on agreements for sale of land.***

4. THAT the Learned Trial Magistrate erred in Law and in fact by totally disregarding the report filed by the Isiolo County Physical Planning Officer who had established the position on the ground and proposed that the dispute herein would have been solved if the surveyor's rectified the anomalies on the boundaries of the suit plots.

5. THAT the Learned Trial Magistrate erred in Law and in fact by totally disregarding the report filed by the Isiolo County Physical Planning Officer with regards to the dispute before him despite the said report having explained the proper position taken by the Isiolo County physical Planning office, which is the authority that allocated the subject plots.

6. THAT the Learned Trial Magistrate erred in Law and in fact by failing to appreciate that the dispute before him was boundary related and the Appellant had availed a surveyor's report to prove that indeed the Respondents had encroached onto her plots.

7. THAT the Judgment of the Learned Trial Magistrate is against the law and weight of the evidence on record.

#### **SUBMISSIONS BY THE APPELLANT**

The Appellant through the firm of Mithega & Kariuki Advocates submitted as follows: -

#### **GROUND 1 & 2 COMBINED**

The Learned Counsel submitted that from the evidence before the trial magistrate, the Appellant testified that she is the legal owner of Plot No. 280, Kiwanjani having been allocated the same after her initial plots were acquired by the government for expansion of the Isiolo Airport (See P. Exhibits No. 2 & 3). The Appellant argued that the Respondents did not challenge or controvert her evidence and that the mere occupation of the plot by the 1<sup>st</sup> Respondent was deemed illegal as evidenced by the letter issued by the County Council of Isiolo. The Appellant cited the case of *John Kirui -vs- Richard Rone ELCA No. 156 of 2012 (Nakuru) and reported in (2017) e KLR*.

#### **GROUND 3**

On the third ground, the Appellant referred to a sale agreement relied by the 1<sup>st</sup> Respondent (See Page 35 & 36 of the record of appeal) and argued that the 1<sup>st</sup> Respondent admitted in her evidence that the subject agreement did not reflect the land parcels number and no witnesses attested the same and therefore the purported agreement did not reflect who had drawn it.

She cited **Section 3(a) and (b) of the Law of Contract Act** which she submitted was clearly contravened by the 1<sup>st</sup> Respondent. She referred to the judgment of the trial court where he agreed that the sale agreement did not conform to the requirements of a legally binding sale agreement but proceeded to add that the intention of the parties could be given effect.

#### **GROUND NO. 4, 5 AND 6**

The Appellant argued that the Isiolo County Physical Planning Officer visited the disputed plot and filed a report in court on 16.8.2013. She submitted that the recommendation in the said report was that the dispute between the parties was a boundary related and that a licensed surveyor should rectify the anomalies that had been created in the suit plots.

She submitted that the evidence in the report by an expert should be given the weight it deserved in serving justice to the parties. She argued that the trial court erred in disagreeing with expert evidence and no reason advanced for discrediting the same.

#### **GROUND 7**

On the last ground of Appeal, the Appellant submitted that considering the evidence before the trial court, the Appellant proved her case on a balance of probabilities as required by law and that the Respondents did not bring out any proprietary rights over the suit plot despite being in occupation of the same. She urged the court to allow the Appeal.

#### **1<sup>ST</sup> RESPONDENTS SUBMISSIONS**

The 1<sup>st</sup> Respondent on his part submitted as follows: -

#### **GROUND NO. 1, 2 AND 3**

On the three combined grounds, the 1<sup>st</sup> Respondent submitted that on cross-examination, the Appellant admitted that she did

not have an allotment letter to the impugned plot. He also argued that from the evidence adduced before the trial court, the Appellant acknowledged that she did not have minutes of when the balloting was done and even receipts of payment after balloting.

To the contrary the 1<sup>st</sup> Respondent contends that he was given the plot in dispute from balloting by the government in the year 2005 and that she was shown the same in 2008. He cited **Section 24 of the Land Registration Act No. 3 of 2012 and Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya**.

#### **GROUND NO. 4, 5 AND 6**

The 1<sup>st</sup> Respondent referred to an excerpt in the judgment of the trial magistrate at Page 38 where the magistrate observed as follows: -

*“That Mr. John Kisinga through Janet Mulwa Mawia own plot through a letter of allotment Rep No. 31560/ X 11/81 on the 4<sup>th</sup> September 1998 as shown on the PDP No. 1SL/117/54.*

*This plot was also surveyed on 6<sup>th</sup> January 2012 by the government surveyor. This process ought to be exempted from the balloting exercise since its record were in existence in 1998 before the balloting in 2005.”*

On that mode, the 1<sup>st</sup> Respondent submitted that all the Appellant is saying is that she got the suit plot through balloting in 2005 by which time the said plot had already been allotted and allotment letter issued as can be seen in the disputed physical planning report.

### **ANALYSIS AND DECISION**

I have considered the record of appeal and the submissions by the counsels. I have also considered the Memorandum of Appeal. Since this is a first appeal, this court is guided by the duty of the first Appellate Court set out in the case of **Selle -vs- Associated Motor Boat Company Limited (1968) E.A 123** where **Sir Clement Lestang** stated as follows: -

*“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.*

*However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”*

The subject matter of the suit property which the Appellant in her plaint before the trial court described as Plot No. 280, Kiwanjani situated in Isiolo County. She averred that the impugned property was allocated to her by the Isiolo County Council (defunct). It follows that the dispute having arisen before the promulgation of the Constitution of Kenya 2010, the laws applicable are the old constitution and applicable land laws that were in force then.

It is not in dispute therefore that prior to the purported allotment, the land in question was government land which was defined in the Government Lands Act (now repealed).

**Section 2 of the Government Lands Act (Cap 280)** defined un-alienated government land as follows: -

*A land which has not been alienated to anybody was therefore available for allotment or alienation.*

Under **Section 3 of the Government Land Act**, it was the President who had the power and authority to make grants and disposition of un-alienated land. **Section 5 of the Act** creates the office of the Commissioner of Land. It provides as follows: -

*“There shall be a Commissioner of Lands and such other officers as may be necessary for the administration of this Act, who may, if so, authorized by the Commissioner either generally or specially, perform any of the duties or do of the acts or things required or authorized by the Act, or by any law regulating the sale letting disposal and occupation of government land, to be done by the Commissioner.”*

The procedure of disposing and/or alienation of government land was aptly captured in the case of **Industrial Estate Ltd -vs- Anne Chepsiror & 5 others (2015) e KLR** where it was held as follows:-

*“38: The procedure for issuance of government land and government leases was governed by provisions of the Government Land Act (GLA) Cap 280 Laws of Kenya. This was pursuant to the provisions of Section 4 of the Government Land Act which provides as follows:-*

*“Government Land Act Section 4 “ All conveyances, leases and licences of or for the occupation of government lands, and all proceedings, notices and documents neither this Act, made taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken issued or drawn under and subject to the provisions of this Act.”*

*38.....My reading of the Government Land Act has revealed that two entities had power to issue government land and government leases.*

*These are the President and the Commissioner of Lands. The powers of the President were set out in this Section 3.”*

The plaintiff in this case testified before the trial court where she stated that she got the suit plot from the government after participating in a ballot exercise in the year 2005 and in the year 2008, she was shown the plot by a surveyor namely Ibrahim.

The Appellant had produced numerous exhibits contained in her list of documents which include a letter of acceptance to be resettled after she was displaced from her original plot as a result of expansion of Isiolo Airport dated 17.8.2008. The Appellant also produced a payment receipt for rates as P. Exhibits 2 & 3 respectively. These documents alone could not counter the Plaintiff/Appellant interest in a government

land. The two documents were not issued by either the President or Commissioner who were the only authorized to alienate interest in land under the **Government Lands Act** (now repealed).

The plaintiff did not even call the authors of the two documents to confirm whether they are authorized in law to alienate government land. The plaintiff did produce minutes of the then County Council of Isiolo indicating that the council approved the allocation of the suit plot to the Appellant. There was also no allotment letter issued by the Commissioner of Lands or any other authorized officer alienating the suit land to the Appellant. It was incumbent upon the Appellant to prove on a balance of probabilities that he acquired the suit property regularly and in accordance with the law.

The burden of proof in every claim lies on the one who alleges. The provisions of **Section 107 and 112 of the Evidence Act Chapter 80 of the Laws of Kenya** are relevant in this case and the same states thus:-

*“107 (1) Whoever desires any court to give judgement as to why any legal right or liability dependent of the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

*“112 In civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”*

The Appellant did not prove before the trial court that she had acquired the disputed plot which is a Government land in accordance with the then Government Lands Act (now repealed). The trial magistrate in my view correctly evaluated and analyzed the evidence before him and properly arrived at the finding that the Appellant’s case lacked merit. I therefore have no reason to fault his decision on any points of law and facts.

My finding is that this appeal fails on all the seven grounds and the same is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED, DELIVERED Virtually and SIGNED at GARISSA this 28<sup>th</sup> day of July, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. M/s Masamba holding brief Kariuki for Appellant
2. Respondent/Advocate-Absent
3. Fardowsa-Court Assistant