



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 6 OF 2019**

**PRISCILLA KAJUJU MARERO.....APPELLANT**

**VERSUS**

**WILLIAM MIRITI NABEA.....RESPONDENT**

*(Being an Appeal from the Judgment/Decree in Isiolo CMCC 23/2013 by Hon. E. Ngugi – Senior Resident Magistrate dated 14/12/2018)*

**JUDGMENT**

**Introduction**

This Appeal arises from the judgment and/or decision of Honourable E. NGUGI – S.R.M Isiolo issued on 14<sup>th</sup> December 2019. The Appellant who was the plaintiff in the primary suit had sought the following reliefs:-

*(a) An order of injunction permanently restraining the defendant by himself, his agents, assigns or persons claiming under him from entering into the plaintiff's parcels of land known as Lower Kiwanjani/32 or in anyway interfere with the plaintiff's proprietary rights over the suit land.*

*(b) An order that the defendant be ordered to vacate the suit plot and in defiance of which be forcefully evicted.*

*(c) Costs of the suit.*

The Respondent filed a statement of defence denying the Appellant's claim. In a judgment delivered on 14<sup>th</sup> December 2019, the trial Court dismissed the plaintiff/appellant's case with costs to the defendant. Being aggrieved by the said decision, the appellant filed appeal and listed the following six (6) grounds of appeal:-

- 1. The Trial Magistrate wholly misapprehended the appellant's claim and the evidence tendered in his favour as a result whereof he arrived at a 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 in law and fact by failing to accord the evidence in favour of the appellant requisite weight.*
- 4. The Honourable trial magistrate failed to critically scrutinize and analyze the evidence on record as a result whereof he off handedly dismissed the plaintiff's claim.*
- 5. The judgment on record is untenable, unconscionable and the same amounts to a miscarriage of justice.*
- 6. The Honourable trial magistrate erred both in law and fact by fetching and relying upon a report unknown to the parties the report whose maker was not summoned for cross-examination.*

**Appellant's Submissions**

On behalf of the Appellant, the firm of Mokuia Obiria & Asso. Advocates argued the appeal and the grounds coalesced together and

submitted that

the trial magistrate misapprehended the plaintiff' case and misdirected himself by relying on extraneous factors thereby arriving at a wholly lopsided and untenable decision. The learned counsel argued that the statement of defence on record does not raise any triable issue. He submitted that the trial magistrate in analyzing the evidence straight jacketed his mind and failed to investigate as to who took possession early in time. In conclusion, the appellant argued that the trial magistrate erred in law by over-relying on some report dated 5<sup>th</sup> June 2015 which report neither of the contestants appeared to have commissioned. He argued that the decision by the trial magistrate is a bad judgment that should not be left to stand.

### **Respondent's Submissions**

The Respondent through the firm of Mbaabu Inoti & Co. Advocates submitted that the appellant has taken issue with the respondent's statement of defence. However, a perusal of the lower Court's proceedings does not show any instance where the appellant ever applied for the said defence to be struck out under *Order 2 Rule 15 CPR*.

The respondent also submitted that even if the appellant would have applied to have the defence struck out, he could not have succeeded since the grounds for striking out a defence are so high. On ground Number 6 of the Appeal, the respondent submitted that the Inspection report and the recommendations thereto were admitted as evidence in the lower Court and that the appellant never raised objection to its admission. The respondent also argued that the appellant never sought to cross-examine the maker of the said report and cannot now turn around to take this Court in circles.

On the issue of possession of the suit land, the respondent stated that from the evidence on record, it is apparent that he testified on oath and stated that he had been in occupation of the suit property since 1997 and that the same was formalized on the 23<sup>rd</sup> August 2012. The respondent also stated that he produced a Site Inspection Report for Plot 32A before the trial magistrate which indicates that no dispute had been lodged and that the County had no objection to any transaction. The respondent referred to a letter by Isiolo County dated 26<sup>th</sup> March 2014 which stated that the appellant herein was not a plot beneficiary from the list of 36 beneficiaries.

### **Legal Analysis**

I have looked at the memorandum of Appeal and the record of Appeal. It is trite law that the mandate of an appellate Court is to re-analyze and re-evaluate and thereafter draw its own conclusion bearing in mind that it has neither seen nor heard the witnesses. In doing so, I hereby examine each of the six grounds of Appeal as follows:-

#### **Ground No. 1**

The Appellant in his evidence before the trial magistrate stated that he was given the disputed plot No. 32 Lower Kiwanjani in Isiolo by the County Council of Isiolo. She produced a letter of allotment issued from Ardhi House Nairobi dated 9<sup>th</sup> February 1999 and signed by one I. A. Machuka. The approximate area of the land allocated is 0.20 Hectares which she was required to pay premium and other charges amounting to Ksh. 18,723/=. On cross-examination, the appellant admitted that she did not make a formal application for the plot. She did not produce minutes by the County Council of Isiolo or the relevant allocation Committee showing that the appellant was indeed allocated the alleged plot. The appellant also produced a PDP as Plaintiff Exhibit No. 2 which accompanied the allotment letter. The plaintiff called one witness namely Charles Kithiori Imwiti. The defendant on the other hand testified alone and explained how he acquired the suit property from the County Council of Isiolo. He produced a letter of allotment, PDP and a Site Inspection report as Defence Exhibits 1, 2 and 3 respectively. The defendant was also referred to a further list of documents containing a letter from Isiolo County Government Department of Physical Planning dated 26<sup>th</sup> March 2014 authored by one Arthur K. Mbalia. In that letter, the author stated that Priscillah Kajuju, the appellant herein was not a plot beneficiary at Lower Kiwanjani and the PDP which was produced by the plaintiff/appellant as PDP No. ISL/117/98/311 did not come from their records and that no allotment letters could have been processed using the same since it had no Approval development plan number given. That letter was produced as Defence Exhibit No. 4. An extract of the said report by the County Physical Planner (Defence Exhibit No. 4) which was lifted by the trial magistrate reads in part as follows:-

*"The PDP's provided by the parties are PDP No. ISL/117/98/311 for the plaintiff and PDP KW/12/08 for the defendant. PDP No. ISL/117/98/311 was prepared by the Physical Planning office on 4<sup>th</sup> of November 1998 for existing residential plots in Lower Kiwanjani. However, this office has no evidence of the circulation of the PDP to the County Council of Isiolo for adoption by the Town Works 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. Infact this office has identified a lot of anomalies on the PDP copy presented by the plaintiff as compared to the original PDP".*

The trial magistrate in his judgment observed as follows:-

*"It is noted that the said findings or report was not challenged by the plaintiff through contrary evidence or another expert witness. The contents of this report therefore remain uncontroverted. ....Accordingly the Court adopts the findings of the County Physical Planner Isiolo County dated 5<sup>th</sup> of June 2015 and finds allotment letter (P.EX 1) and the accompanying PDP to have been irregularly issued and conveying no proprietary interests on the plaintiff over L.R. No. 32 A Lower Kiwanjani".*

The appellant is now challenging the decision by the trial magistrate on grounds that he misapprehended his claim and the evidence tendered. I agree with the evaluation and analysis of the evidence by the trial magistrate in relying on the expert evidence contained in the report by the County Physical Planner, Isiolo County dated 5<sup>th</sup> June 2015. The appellant through her Advocates M/S Maamu did not object the production of the report and the trial Court had no reason not to consider the same in his findings.

**Ground No. 2**

The trial magistrate heavily relied on the evidence adduced by the plaintiff and the report by the County Physical Planner which is the allocating authority. These two sources of evidence are primary in determining the issues in controversy. The appellant has not identified what he thinks is extraneous which the trial magistrate relied in arriving at his decision.

**Ground No. 3 & 4**

The plaintiff stated that he was given the plot by the County Council of Isiolo. She did not produce a letter applying to be allocated the plot. The report by the County Physical Planner dated 5<sup>th</sup> June 2015 dealt a blow to the plaintiffs/appellant evidence as the same were said to have no evidentiary value. I find the trial magistrate properly analyzed and evaluated the evidence presented before him in arriving at his decision.

**Ground No. 5 & 6**

I am satisfied that the decision by the trial magistrate is based on proper analysis and evaluation of the materials placed before him and the applicable law. The evidence relied were admitted by Court particularly the report by the County Physical Planner. The production and admission of those materials was not objected by counsel for the appellant. It is therefore untenable to object the admission of the documents at this stage.

**Decision**

In view of the foregoing discourse, I find this Appeal lacking merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

***DATED, DELIVERED Virtually and SIGNED at Garissa this 28<sup>th</sup> 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