



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 72 OF 2019

HABIBA JATTANI GUYO APPELLANT

VERSUS

HASSAN GALGALO 1ST RESPONDENT

RUKIA GALO 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. J. Ngigi (S.R.M.) delivered on 12th February, 2019, in Isiolo CMCC No. 22 of 2009)

JUDGMENT

1. The appellant seeks to overturn the decree of the lower court on the grounds that the court failed to appreciate her family's occupation of the plot alongside her documents and payment of attendant land rates to the County; over relying on a surveyor's report; ignoring the possibility of double allocation and invalidating her allocation in favour of the respondents.

2. This being a first appeal the court is required to re-assess rehear and re-appraise itself on the lower court records, come up with its own findings and conclusions. *See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.***

STATEMENT OF FACTS

3. The appellant's claimed she was a sole registered proprietor, occupier and developer of **Plot No. 427 Kambi/Gabra**, which the respondent had on 5.12.2008 without any lawful justification trespassed into, removed beacons and started laying a claim on. She prayed to be declared as the sole owner, and a permanent injunction restraining the respondents from interfering with her land.

4. By a defence dated 10.7.2009 the respondents, averred they were the genuine owners of the plot as well as the ones in actual possession and denied receiving notification before the suit was filed.

5. It appears on 16.2.2020, parties consented that the County Clerk of the County Council be ordered to submit a report over ownership of plot **No's 427 and 457 (a)** vis a vis **PDP No. ISL/117/98/71 gazetted on DN Friday June 4, 1999**. In the report the site for **Plot No. 427** could not be located.

6. By a letter dated 27.10.2010 the court was furnished with a PDP report, no objection letter, a gazette extract, allocation letter and a sketch map.

7. By a letter dated 19.11.2013 the County Secretary also confirmed both parties had ownership documents and were paying rents.

8. On 26.10.2010 the court visited the site in the presence of the parties. The District Surveyor testified, pinpointed the site plan guide. He produced 1 SL1 117/98/71 as **Exh 1**, letter from County Council of Isiolo dated 17.12.2008 as **Exh 2** and a District Commissioner's letter dated 10.2.2009 as **Exh 3** authorizing the respondents to develop the plot. The witness was stood down for cross-examination.

9. Pw2 Hillary Mutisya the District Physical Planning Officer told the court **ISL/117/98/71** referred to Isiolo whose reference was **117** and the year of planning as **98** and the plan number as **71**. He was also stood down for cross-examination so that he could avail more supporting documents.

10. In cross examination PW2 told the court the plot was being claimed by two people and the PDP was the official document they had whereas the allocation letter showed the appellant as the allottee though the verification plan could not tell who the plot belonged to.

11. Further he told the court the letter did not show the acreage but the council minutes would indicate it.

12. PW1 in cross examination stated the land in issue was planned but not surveyed in the sense that boundaries had been earmarked for purposes of a part development plan whereas surveying is the implementation of the development plan on the ground. He confirmed the plan had been advertised and formalized and that the **Plot No. 427 and 457 A** had originated from the County Council offices. He confirmed the County Council by letter dated 30.3.1998 had stated the plots belonged to the respondents and that his records showed plots they existed on the ground.

13. Abdi Kadir Guyo a legal officer with the Isiolo County Council told the court **Plot No. 457A** belonged to the 1st respondent, produced minutes to that effect as **DMFI (1)** for the Town planning and market committee, full council meeting minutes as **D exh 2**, a newspaper extract as **DMFI 3**, a letter to district surveyor from the County council engineer as **D exh 4**, land rate receipt as **DMFI 5**. He stated the county council had no record to show the appellant owned **Plot No. 457** even though she had been paying rates, survey and planning fees since 2008. He told the court he did not know the physical location of her plot. He produced the record for **Plot No. 457A & B as PMFI 6**.

14. Regarding whether the two plots referred to one and the same plot, he was non-committal since there must be scrutiny of the minutes that allocated the plots otherwise the council would be wrong to double allocate the same plot to two different people.

15. He also confirmed the respondents were the first ones to pay land rents on 17.7.2008. The witness told the court he could not know when the plots were allocated since the council only kept a record/register for those paying rates whereas the plans were under the custody of the physical planner. He stated the minutes lacked entry number 53, as reflected by the minutes of Town Planning Committee for minute No. 12/97 alleged to have approved the plot for the appellant though he did not have it before court.

16. The appellant took the witness stand on 18.9.2012. He told the court she had applied for the plot on 20.9.1997 which was allocated vide minute No. 53 on 18.8.1997. She produced the minutes as **PMFI 1**, produced rates payment receipts as **Exh 2 and 3**, receipt for survey fees as **P exh's 3**, PDP plan as **P xh 5**, rent payments as **P exh's 6 and 7** for 2008 and 2006 – 7 and for 2012 as **P exh 8**.

17. She stated at the time of the scene visit she was the one living on the land, with a house and fence round the plot. She testified the respondents came with council surveyors on 5.12.2008 and removed the fence and purporting to take measurements whereof she chased them away.

18. In cross examination she stated prior to applying for the plot she was already living on the land. She admitted her recipes bore no plot number but could not tell if minutes included a plot number. She insisted she was not aware if the minutes indicated the plot belonged to the respondents and said she was not aware of the D.C's letters indicating the plot belonged to the respondents. Further she stated she was unaware that the PDP she had produced in court indicated the plot belonged to the respondent's as **Plot No's 457 A & B**. She denied having seen the minutes approving the respondents as the genuine owners of the plot.

19. In re-examination the appellant stated the DC had no powers to allocate land and insisted the County council had said the plot belonged to her. In her view, it was odd for the council to claim they could not locate her plot on the ground.

20. Omar Godana Dida testified she knew the appellant as the owner of Plot No. 427 which she had developed.

21. DW1 the 1st respondent told the court he was allocated the plot vide a letter dated 30.3.98 as per the council's minutes for 20.9.97. Later on he got a PDP which was gazzetted attracting no objections after which he was shown the plot in 2009. Thereafter, the appellant lodged a claim yet her letter dated 17.12.2008 did not mention any plot number. He urged the court to dismiss the suit.

22. In cross examination, he said his minutes for allocation was No. 61 and that he had followed the right procedure for allocation on top of paying the requisite fees. He insisted there was no one on the land and that a letter dated 17.12.98 by the appellant was not genuine since it did not indicate any plot number.

23. DW2 testified she was genuinely allocated her plot, started paying rates though it was the appellant in occupation with a house though she was there illegally and without her consent. She confirmed the appellant construction had occurred before the suit was filed.

SUBMISSIONS

24. The appellant submits by virtue of her long, actual, uninterrupted possession and use of the plot, coupled with the exhibits produced, the court was wrong to deny her the land contrary to the law yet she had discharged the burden of proof as per **Sections 107 & 109 of the Evidence Act**. She relies on **Ann Wambu Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 E.A 334.**

25. Regarding grounds 4, 5, 6 and 7 of the appeal, it is submitted the County surveyor's report had omissions of material facts, was misleading and inconclusive hence it ought not to have been relied upon given there was a possibility of a double allocation.

26. Further the appellant submits the court misdirected itself by giving priority to the respondents' documents on allocation yet the appellant was the one in actual possession since 1990, not forgetting her structures on the ground as opposed to the respondents' claim went 5.12.2008. She relies on **Ann Wambu Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 E.A 334.**

27. On the other hand by submissions dated 19.8.2021, it is stated the appellant's plot on the ground could not be verified through her exhibits documents or otherwise, unlike the respondents' exhibits which tallied with what was on the ground.

28. Secondly it is submitted the appellant unlike the respondents' had no formalized or verified P.D.P and letters from the council.

29. Further it is submitted the County surveyor and the physical planner's evidence was clear the occupation of the appellant was on a wrong plot belonging to the respondents, that her occupation could not be justified, the evidence of Abdikadir Guyo as well as the letters dated 30.3.1998 at page 64 of the record of appeal and all other documentations including a letter dated 19.11.2013 from Maurice Ogola pointed the respondents as the rightful owners.

30. Having gone through the lower court pleadings, evidence, submissions and the ground of appeal, the issues for determination are:-

a) Who among the parties has a clear root of ownership over the plot?

b) If the lower court was justified based on the facts, evidence and law in arriving at the decision to dismiss the appellant's claim.

31. As a general rule, parties are bound by their pleadings and issues flow from the pleadings.

32. The appellant alleged she was the registered owner of **Plot No. 427 Kambi/Garba Isiolo Town**. In order to prove ownership she had to establish how she got the land either through allocation, purchase, gift or any other lawful means.

33. In support of her claim the appellant produced receipts and minutes for full Bouncy council of Isiolo meeting held on 20.9.1997 as PMFI 5. Other than the documents she based her claim on her long occupation and developments on the land since 1990. Her witnesses also supported her occupation and improvements of the plot.

34. Turning to the source of her plot as the County council of Isiolo, the **onus** once was on the appellant to bring authentic documents showing the date, time and particulars of her plot right from the minutes of allocation in line with the requirements and procedures obtaining at the time. PMFI 5 was never produced as evidence. See *Des Raj Sharma –vs- Reginam [1953]19 EACA 310*.

35. Unfortunately the documents she produced had missing links, inconsistencies and hence her chain of allocation acquisition, and adherence to the known processes as per the testimony of Abdikadir Guyo was below the burden of proof as per **Sections 107 and 109 of the Evidence Act**. She lacked the basic documents as held in *Markaba Abdullahi Alasow –vs- Amina Abdi Rahoy & Subau Abdullahi [2017] eKLR*.

36. Whereas the appellant had been paying rates, her plot No. 427 could not be placed on the ground and more particularly wherever she was living. Once she established and was brought to her knowledge she was occupying the respondents' plot, her only recourse was to visit the offices of the allocating authority for an authentication of her papers of ownership. She did not produce certified copies of those documents to support her case and as held in *Kenneth Nyaga Mwige –vs- Austin Kiguta & 2 Others [2015] eKLR* documents marked for identification do not form part of any evidence the court can rely on in **Mokinya** determination.

37. Further, she did not enjoin the County council its successor in title the County Government of Isiolo if at all she held genuine documents and it was a case of double allocation.

38. In *M'Ikiara N'Rinkanya & Another –vs- Gilbert Kabaare M'Mbijiwe [1982-89] 1KAR 196* the court held where there is double allocation, the first allotment prevails since there is no power to allot the same property again. The respondents produced documents showing they had followed the correct procedure though not finalized regarding allocation of their plot. They made payments on time and with a plot number tallying with what was on the ground unlike the appellant whose rents and rates receipts lacked a plot number.

39. The appellant did not plead any double allocation or fraudulent or illegal allocation of the plot she occupied on the ground at all. Even when it became evident after the trial court ordered for survey reports to be filed and a scene visit to place the plots on the ground, the appellant did not amend her claim to reflect the trajectory the case was taking.

40. The appellant made no complaint to the allocating authority and or demand to be shown the exact place where her plot ought to be in spite the County council continuing to collect rents, rates as survey and planning fees from her.

41. Further the appellant's documents did not reflect the exact measurement of her plot. The appellant's theory was that plot No. 427 was situate is on where she occupied on the ground and by virtue of her long occupation, use and developments, the court ought to have declared her the genuine owner.

42. As stated above, parties are bound by their pleadings. The appellant did not plead any adverse possession or revocation of plot No's 457 A and B and or registration in her favour as against the respondents or the allocating authority. She did not produce any exhibits to show that **Plot No. 427 and Plot No's 457 A & B** referred to one and the same plot and hence since she was on occupation for long it could not have been available for allocation to the respondents.

43. With the evidence on record, I am unable to find the two plot numbers referred to one and the same plot. The allocating authority together with the district surveyor and the physical planner were able to trace the **Plot No. 457 A and B** but unable to trace **Plot No. 427** on the ground.

44. In absence of any contrary evidence, from the appellant I am unable to find any alleged inconsistencies or missing material facts on the evidence and documents produced by the County surveyor. See *David Were Wafula –vs- Titus Kipkisgei [2019] eKLR, Ramadhan Mashua Mavumba –vs- George Kamau [2021] eKLR*.

45. In the premises I find the appeal lacking merits. The same is dismissed with costs. And the lower court file decision upheld.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20TH DAY OF DECEMBER, 2021

In presence of:

Miss Gikundi for respondents

Mugira holding brief for Mbaabu Inoti for appellant

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE