REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 12 OF 2019

ADAN HASSAN.....1ST APPELLANT

ABDI ADAN SORA.....2ND APPELLANT

VERSUS

AH (suing on his own behalf and that of FA-minor).....RESPONDENT

(Being an appeal from the judgement of the Hon. S.M. Mungai –CM

delivered on 14/12/2018 in Isiolo Cmcc No. 5 of 2009)

JUDGMENT

1. The Respondents herein sued the appellants in the trial Court and sought an order of permanent injunction restraining the Appellants by themselves their agents, assigns and or legal representatives or anyone else claiming under them from encroaching, entering, trespassing putting any structure, building or in any other way whatsoever interfering with **Isiolo residential Plots No.s 76 and 79.**

2. AHH averred that he is the registered owner of **Plot No. 79** while FA (minor) is the owner of **Plot No. 76** both within Isiolo County at Tullubora Area and that the plots were allocated to them by the Commissioner of lands on behalf of Isiolo County Council in the year **1993.** The plaintiff claimed that on 4th March 2009, the 1st Appellant without any colour of right or justification wrongly encroached on **Plot No, 79** and started to put up a temporary structure thereon, while on the same date, the 2nd Appellant wrongly encroached on **Plot No.76.**

3. The appellants filed a joint defence on 3rd April 2009 denying the particulars set out in the plaint. They also averred that they are the owners and occupants of the suit premises.

4. The trial court found that the appellants did not tender sufficient evidence to establish that they own the suit plots and that the suit is time barred and therefore entered judgement in favour of the respondents herein.

5. Aggrieved by the said decision the appellants filed this appeal raising eight (8) grounds of appeal which are set forth as follows:

(i) That the learned trial magistrate erred in law and in fact by finding that the respondent was the owner of the suit plots and had been paying rates for the same whereas no evidence was tendered to that effect.

(ii) The learned trial magistrate erred in law and in fact by finding that the appellants had encroached onto the respondent's plots in the absence of a surveyor's report to that effect.

(iii) That the learned trial magistrate erred in law and in fact by failing to appreciate the current position on the ground as was established by the Isiolo county clerk, an expert and therefore ended at an erroneous decision.

(iv) That the learned trial magistrate erred in law and in fact by totally disregarding the report filed by the Isiolo county clerk with regard to the matter before him despite the said report having explained the proper position taken by the county council of Isiolo, which is the authority that allocated the subject plots.

(v) That the learned trial magistrate erred in law and in fact by failing to appreciate that the dispute before him had already been determined through a resolution by the county council of Isiolo, which allocated the subject plots and a binding decision was already

in force.

(vi) That the learned trial magistrate erred in law and in fact by arriving at a decision that contradicted the resolution passed by the county council of Isiolo with respect to the subject plots and which decision has never been set aside.

(vii) That the learned trial magistrate erred in law and in fact by failing to appreciate that the suit presented before him was wanting with respect to the parties cited by the respondent and ended up at a decision that contravened the appellant's constitutional rights to ownership of property.

(viii) That the judgment of the learned trial magistrate is against the law and weight of the evidence on record.

6. On 8/7/2019 this court directed parties to canvass the appeal through written submissions. Both parties have filed their respective submissions which I have dully considered.

Determination

7. It is to be noted that this is a first appeal. Ordinarily, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123.**

8. **Pw1** testified that he got the suit premises through public balloting which was conducted in the year 1993. He became the owner of **plot no. 79** while his daughter was allotted plot **no. 76**. The allotment directed him to make payment to the commissioner of Land which he did and got a receipt on 5/4/1992. That he paid Kshs. 880/= then Kshs. 4860/= to the county council. At the time he acquired the same, his daughter was one (1) year old. He fenced the plots and put up a gate.

9. He further stated that the 1st and 2nd Appellants encroached on the suit plots from the year 2009 by breaking their fence. He denied being aware that his allotment had been revoked and the appellants registered as the owners of the Plots No. 110 and Plot No. 99. He told the court that they had entered into an Agreement with the Appellant to fill back the toilet he had built to which respondent paid him Kshs 30,000/= but the appellant reneged on this agreement in the year 2011.

10. PW 1 produced the following documents in support of his claim. **Allotment letter dated 22/1/11 Pexh 1, Sketch Map of Plots No. 76 & 79 Pexh 2, letter dated 14/4/1993 pexh3, Bundle of receipts of rent fees and other fees Pexh 4 (a) (b) (c).**

11. **Pw2 Bishar Maalim's** evidence corroborates that of the respondent in so far as the agreement of removal of the toilet is concerned. He stated that he was there when the Respondent paid to the 2nd Appellant Kshs. 30,000/= to enable the latter to vacate the land. By then, there was a small house, nothing else. That when the agreement was signed the mother of the 2nd Appellant witnessed the same.

12. **Dw1 Adan Hassan** testified that he has been in occupation of the suit premises since the year 2001. That his mother was allocated the same vide minutes dated 13/10/1998 produced as **Dexh 1** (note that Dexh 1 is dated 15.1.1999)**.** That the Respondent approached his mother and gave her Kshs. 30,000/= to vacate the plot whereby, they entered into an agreement so as to settle the matter out of court. That he had been paying rates for the suit premises. He produced the following documents in support case**; The minutes of 15.1.1999 DExh - 1, Letter from Frontier Engineering Dexh 2, Sketch Plan Dexh 3, Agreement in respect of the Ksh 30,000- Dexh4, Rate payment Receipts Dexh 5 (a) (b) (c).**

13. In cross-examination he averred that the minutes giving rise to allotment refer to Manyatta squatter occupants being allocated the plot and his name is not there, that Frontier Engineering conducted survey on behalf of the County after the minutes were passed and that in the sketch map Tulla Bora is not mentioned. He also stated that the minutes are not certified by the County Council of Isiolo. In re-exam he stated that he started to pay rates from the year 2013 since from the year 2000, no demand had been made.

14. **Dw2 Hawo Oda** testified that she entered the suit premises in the year 1990 and at that time no documents were issued for the area Residents. That at the time it was bushy and no one was claiming it. She gave the land to her son Dw1 in the year 2000 and Dw1 got the relevant documents for the Plot. She has never seen the Respondents occupying the suit premises.

15. **Dw3 Abdi Hassan Sora** testified that he was the 2nd defendant. He averred that the **plot no 79** belonged to one Sora Ali Adan who is a son of DW3'S late brother who bought the same from Gubelow Tutane Danbi. This witness stated that he held this plot in trust for this son of his brother who was aged 16 years as at the time of the testimony. He was shown the plot but at the time the land did not have a number. That the seller did not have any ownership documentations but the elders of the Manyatta confirmed his ownership.

16. In support of his case, DW3 had produced the following documents; **Copy of agreement Dexh-6, Letter from frontier engineering Dexh-7 A & B, council minutes of 23.11.2009 Dexh-9, and seven Rate payment receipts Dexh-10.**

17. In cross examination, this witness stated that he entered the land in the year 2006 and started paying rates in the year 2013 after re-planning, that he was referred to Frontier Surveyors to give him a PDP. That they prepared a sketch map and re-planning was done. That he started paying for the rates using the new number i.e. Plot No. 91.

18. **Dw4 Kabola Totale Dambi** testified that he is the one who sold the plot to Abdi Adan Sora (2nd appellant) for a sum of Kshs. 130,000/= in year 2006. By then, the plot was vacant and had bushes. The 2nd appellant then took over the plot.

19. In his judgement the trial Magistrate held as follows;

"The defendants tendered minutes of the County Council of Isiolo dated 19/10/2009 as Dexh 1 & 8 respectively to buttress their claim that the suit plots were allocated to them. However, the minutes do not make any reference to the suit plots. The Defendants did not tender any evidence to prove that Frontier Engineering who were authors of Dexh 2 &7 had authority from the County Council of isiolo to direct them to pay the rates mentioned therein. Further although the two exhibits were typed, the names, plot numbers and the dates are written by hand and the authenticity of the document is therefore questionable. The same applies to the agreement Dexh 6 which is typed by hand and it bears many cancellations. Of note is the fact that it does not define the land which is the subject of the stated sale. The property rate receipts which the defendants tendered refer to plots Tullu Roba 88, 91 and 110 and none of it is for the suit plots."

20. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in **Section 107(1) (2) of the Evidence Act** as follows:

"(1) whoever desires any court to give judgment as to any legal right or liability dependent on 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."

21. Section 112 of the **Evidence Act** provides thus:

"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."

22. I have looked at the proceedings and the documents presented by the appellants and the Respondents in the trial Court. The rates paid by the 1st Appellant relate to plot number Tulu Roba 110, while the rates paid by the 2nd Appellant relate to Tullu Roba 88 & 91 in the name of Abdi Adan Sora but two documents for plot 91 have hand cancellation to reflect name as Ali Adan Sora. The letter of 5.8.2006 authored by Frontier Engineering is addressed to the Clerk Isiolo County and requests that the 1st Appellant be allowed to pay statutory fees in relation to **Plot No. 76**. The wordings of the letter clearly shows that the instructions to Frontier Surveyors were made by the appellants as opposed to the County Council.

23. In the minutes marked as Dexh 9, the same grants squatters' in Tulle Roba plots on condition that there was to be an advertisement informing those with allotment letters to submit them. There was no evidence that the advertisement was done. I also agree with the trial Magistrate that the minutes did not make specific mention to the suit plots.

24. I have also looked at the alleged sale agreements of the appellants and the same do not make any reference to the specific land which was sold. The date and measurements of the land sold has also been rectified by had without appending signatures to confirm the rectification. The appellant did not also conduct due diligence before entering into the Sale Agreement. Dw4 clearly stated that he entered into the Sale Agreement when he did not have any documents to prove his ownership. He acquired the suit plot by just clearing the bushes and occupying it.

25. On the other hand, the Respondents claim was supported by sufficient evidence. They proved that the suit premises were allocated to them way back in the year 1993. The mode to which they were allocated the land was credible and was corroborated by the evidence of PW2. In the case of **Waas Enterprises Ltd versus City Council of Nairobi & Another, (2014)Eklr,** the court was dealing with a situation whereby a 2nd defendant had been on the suit property from 2000 yet the plaintiff was allotted the suit property in 1999. The court declared the 2nd defendant a trespasser while stating thus:

"The law to my understanding is that once the suit property has been allotted to someone it is not available to another person unless the allotting body cancels the allotment. This is supported by the case of Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004 where Warsame J. [as he then was] stated that, "….once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest .In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled." It is therefore my opinion that the suit property was not available at all for the 2nd defendant because by the time the licence was issued to the 2nd defendant, an allotment letter had already been issued to the plaintiff. To my understanding since the 2nd defendant has been in the suit property illegally, she is a trespasser."

26. Had the tussle been one where the respondents were the registered owners of the suit plots via the now repealed statutes of registration (Registration of Titles Act, Registered Lands Act etc..), then certainly I would have gone further to inquire as to whether the respondent satisfied the criteria set out in the allotment -see **John Mukora Wachichi & Others versus Minister of Lands & Others High Court Petition No. 82 of 2010**, where the court had this to say on this issue:

"… the court observed that the distinction is based on the fact that the right to property under the law and Constitution is afforded to the registered owners of land, that a letter of allotment is not proof of title as it is only a step in the process of allocation of land."

27. Thus as far as this suit is concerned, the respondent had commenced the step of acquisition of the suit land, and there is no evidence to show that such allotment in fovour of the respondent was unlawful or that it was ever revoked.

28. I will now mention something about the reports from the council. One of the issues raised by the appellants in this appeal is that the trial magistrate failed to consider what the expert from the county council had established on the ground. However, the record clearly shows the endeavours made to have the matter settled through the input of the council. This led to not one, not two but three reports being filed from the council. Whereas the first two were abandoned by consent of the parties, the final report dated 4.10.11 was actually expunged from the record through an application. How was the magistrate supposed to consider the council report dated 4.10.2011 (filed in court on 6.10.2011- the one which appear to favour the appellants) after delivering his ruling on 22.5.2012 where the said report was set aside? The issue of the reports was abandoned rightly so by the magistrate who delivered the ruling after it emerged that each party was bent on opposing or accepting the same depending on how favourable the report was to them.

29. **The upshot of this judgement therefore is that the appeal herein lacks merits and the same is therefore dismissed with costs to the Respondent.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Muriuki holding brief for M. Kariuki for appellant

Matiangi for respondent

1st appellant

HON. LUCY. N. MBUGUA

ELC JUDGE