



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA CASE NO 63 OF 2018**

**ABDI HASSAN ABDULLAHI.....APPELLANT**

**VERSUS**

**BATULA MOHAMMED ALIAS BATULA ABDULLAHI BUBICHA .....RESPONDENT**

**(Being an appeal from the Judgment and orders of the Honourable S.M Mungai delivered on 14.12.2018 in Isiolo ELC No. 32 of 2013)**

**JUDGMENT**

1. The appellant herein was the defendant while the respondent was the plaintiff in Isiolo ELC No. 32 of 2013. Vide a plaint filed in court on 2.7.2013, the respondent/plaintiff filed a suit against the defendant claiming ownership of the plots No's 133A and 133B at Isiolo Kiwanjani area. She sought for an order of permanent injunction restraining the defendant from entering into the suit plots or in anyway interfering with plaintiffs proprietary rights over the aforementioned suit plots.

2. Apparently, no statement of defence was filed though appellant has presented one. However, defendant proceeded to file statements of witnesses and list of documents in support of his case. He adduced evidence and was fully cross examined. In the course of the trial there was a scene visit conducted by a surveyor who filed a report accordingly.

3. In the judgment delivered on 14.12.2018, the trial magistrate made a finding that the plaintiff's evidence was unchallenged and was corroborated by her exhibits, as defendant had failed to respond to plaintiff's claim by way of a defence. Thus, plaintiff's claim was allowed.

4. That decision triggered the appeal herein where the appellant filed a memorandum of appeal on 19.12.2018 citing 6 grounds as follows:

- i. The learned magistrate erred in law and fact in failing to consider the defence filed by the appellant.
- ii. The learned magistrate erred in law and fact in finding that no defence was filed by the appellant when as a fact, a defence was filed and received in court on 9<sup>th</sup> July 2013.
- iii. The learned magistrate erred in law and in fact in failing to consider the report filed by the surveyor.
- iv. The learned magistrate erred in law and in fact by failing to consider that the appellant was in possession of the suit land having purchased the same since 27<sup>th</sup> September 2010.
- v. The learned magistrate erred in law and in fact by failing to consider the appellant's documentary evidence.
- vi. The honourable magistrate erred in law and fact in misleading himself that the respondent's averments in the plaint were not challenged when indeed the same was challenged.

4. This being a first appeal, it is the duty of this court to re-evaluate the evidence, assess it and make its own conclusions but remembering that it neither saw nor heard the witnesses and making allowances for that. – *See Selle vs Associated Motor boat Company Ltd (1968) E.A 123.*

6. I have carefully considered the record as well as the submissions of the parties. I summarize the issues for determination as follows:

- 1. Whether the magistrate erred in law and fact in failing to consider the defence of the appellant.**

**2. Whether the magistrate erred in failing to consider the surveyor's report.**

**3. Whether the magistrate erred in failing to consider that appellant was in possession of the suit land.**

7. Before delving into the main issues for determination, I find it necessary to address some preliminary issues regarding the hearing of the case. On 16.7.2019, the court gave directions that the appellant was to file and serve his submissions by 8.8.2019 failure to which the appeal was to stand as expunged. The submissions were filed on 7.8.2019, however, the respondent in her submissions contends that they were not served as directed by the court. The respondent therefore urged the court to expunge the said submissions. He also urged the court to expunge the submissions which had been filed on 20.5.2019. The court was therefore urged to dismiss the appeal,

8. I find that on 16.7.2019 when the court gave directions on how the appeal was to be heard, the court gave a mention date on 8.10.2019 of which the purpose was to ascertain that there was compliance with courts directions so as to give a date for judgment. On 8.10.2019, Mr. Ndubi appeared before me and addressed the court as follows:

**“Date was taken by consent. Parties have filed their submissions so we can have a date for judgment”.**

9. That was the opportune time for the respondent to state that the submissions of the appellants were not served upon them. They didn't raise the issue of lack of service. I therefore consider that the submissions of the appellants filed on 7.8.2019 are properly on record.

10. As regards the submissions of 20.5.19, the same were not filed under the directions of this court, nor was the court urged to admit the same. As such, the submissions of 20.5.2019 filed by the appellant are hereby expunged from the record.

**APPELLANT'S DEFENCE**

11. The appellant contends that they had indeed filled their statement of defence on 9/7/2013, of which such a document has been availed in the Record of Appeal on page 19. The appellants aver that the said defence was ignored by the trial magistrate. I have thoroughly gone through the lower court original file and I have not seen any statement of defence. It is trite that when documents like pleadings are filled in court, the requisite fees are paid and a receipt is issued. As rightly submitted by the respondent, the appellant has not availed any such receipt. The absence of the statement of defence appears to have been the basis upon which the magistrate concluded that plaintiff's averments were not challenged.

12. However, this is a case where the appellant fully participated in the trial, gave evidence and was cross examined. The appellant has submitted that they were given a go ahead with the hearing of the matter after compliance with order 7 rule 5 of the Civil Procedure Rules. The appellant cited the case of **HCCC No. 1336 of 2001 Nairobi, Commercial Court Rosaline Mary Karambu vs National Bank of Kenya** where **Havelock J.** stated that:

**“In light of the absence of a defence on the file, it follows logically that, the matter would proceed to formal proof.....”**

13. The case of **ELC No. 168 of 2017 Muranga Waithara Kimanda and Julius Kimondo vs Vigilant Auctioneers and 2 others** was also cited to buttress the point that Justice should be administered without undue regard to procedural technicalities.

14. The appellant, having been allowed to fully participate in the trial process had a legitimate expectation that his evidence would be considered. The defence of the appellant as contained in his documents and testimony in court was subjected to cross examination to test its veracity. The presumption giving rise to such proceedings is that appellant was invited into the seat of justice. The issue of the missing statement of defence was not raised during the trial. Appellant was not told “don't talk as you don't have a defence”. It was therefore incumbent upon the trial court to deduce the importance of such evidence and make a finding there of.

15. In order to enhance the administration of justice, it is essential for courts to practice Active Case Management by ensuring that a party's pleadings, statement of witnesses and documents to be relied on are ascertained and are intact in the file. That way, the trial process will be subjected to more transparent and accountable steps. As the matter stands now, I am not able to make a conclusive finding regarding the document availed on page 19 of the record of appeal.

**16. Article 159(2) (d) of the constitution** provide that ***“Justice shall be administered without undue regard to procedural technicalities.*** As the defence evidence of the appellant was not considered, I find it necessary to evaluate the same since ordering for a retrial would also cause further delay in the determination of the dispute.

17. In his evidence the appellant had relied on his statement dated 8.7.2014 where he identifies his plot as No. 101 Kiwanjani area which he bought at a sum of Sh.200,000 from one Andrew Mungatia. He had gone ahead to produce documents (D.Exhibit 1-6) which included the land sale agreement and the land rate payment receipts.

18. It emerged during the trial that the suit land is not registered hence none of the two parties have title deeds. Both defendant and plaintiff also do not have allotment letters but both paid rates to the then county council of Isiolo. Thus, in terms of documentary evidence, the two litigants appear to have been at par in their claim of the suit plot. Thus, there is a need to interrogate the claims further to determine who on a balance of probability owns or should own the suit land.

**THE SURVEYOR'S REPORT**

19. The appellant has submitted that the surveyor's report indicated that the suit plot belonged to one Andrew M.Anjuri which was

transferred to the appellant. It was also submitted that the said report had indicated that the suit plot is on the ground referred to as Isiolo Town Block 3/346. However, the respondent avers that the report was clearly analyzed by the trial court in paragraphs 9, 10, and 11 of the judgement. I have read the report vis a vis the judgement. Indeed, the trial court did make reference to the report on paragraph 9,10 and 11 of the judgement. The trial court however stated that the report did not capture plot Nos. 133 A and 133 B, the ones being claimed by the plaintiff.

20. It is quite apparent that plaintiff was paying rates for a plot identified as low density 133 B and 133 A, while defendant was paying rates for a plot No. zone C 101. On the ground, the suit plot was one and the same. How did the parties find themselves in such a mess? Certainly, the county council of Isiolo bears a great responsibility in the creation of this mess. However, none of the parties found it necessary to sue the said council (now The County Government of Isiolo). Against this background, and considering that the land registrar had already indicated that the land was not registered it was very important to avail evidence of experts who are able to identify such plots in maps and on the ground. Thus, the evidence of the surveyors and the physical planner was very crucial.

21. The surveyor's report dated 18.9.2018 identified the disputed plot from the extract of the Registry Index Map where it was referred to as Block 3/246. The parcel appears in the plan 150/49 published by the survey of Kenya based on the attached advisory plan. The trial magistrate disregarded this report ostensibly because it did not mention plot no.133A and 133B.

22. However, I find that the need to have the input of an expert had played a central role throughout the trial particularly because the land was not registered. I will point out some of the instances, when the need for scene visit was raised;

- On 13.8.2013, the court gave directions for the county surveyor and county physical planner to visit the scene on 5.9.2013.
- On 17.3.2015, the court gave directions for the scene visit to be conducted on 30.3.2015.
- On 23.2.2016, the court directed that scene visit be done on 7.3.2016.

All these directions were not fruitful, prompting the parties to make a consent recorded in court on 24.7.2018 in the following terms:

**a. The county surveyor and land registrar do visit the disputed plot i.e. Kiwanjani 133A and 133B and Kiwanjani zone C/101 for purposes of determining their position on the ground and ownership thereof.**

**b. The report be issued and served upon the two counsels.**

23. Thereafter, the court had to issue summons against the county surveyor and the Land Registrar to explain why they could not file their reports. Eventually, the Land Registrar, one Philip Musyoka did appear in court on 12.9 2018 and he explained that from his office, he could not file any report as the Land was not registered. Thus, the earlier consent order was varied in the following terms;

**“The report be submitted by the Land Surveyor as earlier ordered”.** And when the County surveyor filed the report, he noted that ***“the disputed parcel is identified as parcel no. 101 on the advisory plan, which subsequently changed to Isiolo Township Block3/246”.***

24. In **Azzuri Limited v. Pink Properties Limited (2017)Eklr.** the court while dealing with the contents of a surveyors report had stated thus;

**“In his paper, “The Role of the Registry Index Map (RIM) in Land Management in Kenya”, Peter K. Wanyoike has stated that the Registry Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”. The paper defines “General Boundaries” as follows: “A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”**

25. In short, a surveyor's report, especially if it contains the Registry Index Map (RIM) is very important in identifying a parcel on the ground. In the instant case, though the land was not registered, the area had been duly surveyed under a plan which had been published by the Survey of Kenya. All the parties and the court had been anxiously waiting for the scene visit report since year 2013. The fact that the report did not mention plot NO.133 A and B in itself cannot be a ground to disregard the same. It was enough for the surveyor to identify the plot as the disputed one, since this is the plot both litigants were claiming. I therefore find that the trial magistrate erred in law and fact by failing to consider the surveyor's report which placed the defendant ahead of the plaintiff in the claim of ownership of the suit land.

## **OCCUPATION**

26. In her evidence, the respondent had stated that she was allocated the two plots in 1997 and that is when she started to pay rates. However, in 2013 defendant unlawfully invaded the premises, put up structures and leased the same to one Guyo who is running a school known as Sawadi Academy.

27. I find that the respondent availed a document - PEXH 1, which is a letter of 29/4/1997 issued by an acting town clerk to the district physical planner stating that plaintiff is a resident of the area who desperately needed a place to put up a house. That was 1997. 16 years down the line in 2013, the respondent had not occupied the place, nor did she demonstrate having been using the plot for any particular purpose.

28. What is clear is that as early as 13/8/13 when the suit was about one month old, the school was already in existence as appellant's counsel

had brought to the attention of the court that respondent/plaintiff was threatening to burn the school. The logical conclusion to make is that the respondent has never been in occupation and control of the suit plot. On the other hand, the appellant appears to be the one who has been in occupation of the suit plot, which buttress his defence that he bought the suit parcel from one Andrew M'Anjuri.

## **CONCLUSION**

29. It is rather unfortunate that conflicts of great magnitude are rampant in Isiolo county primarily because much of the land remains unregistered. However, a case belongs to the parties and it is incumbent upon claimants to prove their case. In the instant dispute, perhaps suing the allotting authority would have shed some more light on why the council (now county government) was imposing rates on two different plots which turned out to be one and the same on the ground. Nevertheless, I do find that the surveyors report has put the matter to rest since the land being claimed by the litigants is now in the Registry Index Map and belongs to the defendant.

30. The upshot of my finding is as follows;

- 1. The appeal is allowed.**
- 2. The plaintiff/respondent's suit in the lower court is dismissed.**
- 3. As to costs, blame appears to lie on the County Government of Isiolo formerly County Council of Isiolo. In the circumstances, each party is to bear their own costs in the appeal and in the lower court.**
- 4. Any orders of injunction or inhibition that may have been subsiding in this appeal and/ or in the subordinate court are hereby discharged.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 22<sup>ND</sup> JANUARY, 2020 IN THE PRESENCE OF:-**

C/A: Kananu

Onchiri holding brief for Nyamweya for Kiogora Mugambi for appellant

Ayub Anampiu holding brief for Ndubi for respondent

Appellant

Respondent

Defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**