



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELCA NO 19 OF 2019**

**FESTUS NJUGUNA KAMAU.....APPELLANT**

**VERSUS**

**GEORGE GACHIENGO MURAGE.....RESPONDENT**

**J U D G M E N T**

*(Arising from the judgment and decree of the Court of the Principal Magistrate Molo (S M Soita) delivered on 15<sup>th</sup> June 2010 in Molo SRMCC No.354 of 2004).*

1. This appeal is against the judgment and decree of the court of the Principal Magistrate Molo (S M Soita ESq) delivered on 15<sup>th</sup> June 2010 in Molo Senior Resident Magistrate's Civil Suit No.354 of 2004. By his decision the learned trial magistrate dismissed the suit by the plaintiff the appellant in this appeal and allowed the counterclaim by the defendant, the Respondent in this appeal.

2. In the suit in the lower court the appellant claimed ownership of plot No.42 Molo Town by virtue of having been a bonafide purchaser of the same. The Appellant claimed the respondent had trespassed onto the plot claiming to be the owner of the plot. The Appellant sought an order of perpetual injunction and damages for trespass against the Respondent.

3. By way of defence and counterclaim the Respondent in the lower court averred that he was the allottee of plot No. 50 Molo Town and that it was the appellant who was trespassing into his said plot claiming it was plot No.42 which the Respondent stated had ceased to exist following a reorganization of the plots by the Town council. The Respondent sought an order for a permanent injunction restraining the Appellant from trespassing onto his plot No. 50 Molo Town and general damages for trespass.

4. After hearing the parties and their witnesses, the learned trial magistrate rendered a decision dismissing the appellant's suit with costs, decreed the Appellant a trespasser on the Respondent's plot No. 50 Molo Town and ordered the Appellant to be evicted from therefrom.

5. The learned trial Magistrate further granted a perpetual injunction in favour of the Respondent and awarded the Respondent the costs of the counterclaim against the Appellant.

6. The Appellant being dissatisfied with the decision has appealed to this court and has set out 9 grounds of appeal in his memorandum of appeal filed herein as follows:-

*1. That the learned magistrate erred in law and fact in holding that no valid transaction could stand in the absence of a Sale Agreement in favour of the Appellant.*

*2. That the learned magistrate erred in law and fact in failing to appreciate that the Plaintiff had proved that he was the lawful owner of plot No.42 having paid all the requisite transfer fees and having been paying the plot rent and not the Defendant to the Molo Town Council.*

*3. That the learned magistrate erred in law and fact in finding that the Plaintiff failed to demonstrate that he complied with the two key conditions of the offer of allotment despite there being evidence of payment of the requisite fees.*

*4. That the learned magistrate erred in law and fact in holding that the original allottee had no locus standi to transfer plot No.42 thus his subsequent nexus to the Plaintiff is lost.*

*5. That the learned magistrate erred in law and fact in finding that on a balance of probabilities, the Plaintiff had failed to establish his case against the Defendant.*

6. That the learned magistrate erred in law and fact in failing to appreciate that there was no nexus between plot No.50 and plot No.42 as evidenced by the copy of the Green card.

7. The grounds of appeal collectively challenge the learned trial magistrate's findings of fact and law. The appellant argues the learned trial magistrate arrived at a decision that could not be justified on the basis of the evidence adduced and the applicable law.

8. This being a first appeal this court is under a duty and indeed obligated to re appraise and reevaluate the evidence adduced before the lower court in order to determine whether the decision by the trial court was justifiable having regard to the evidence tendered before it and the applicable law. This court is entitled upon reevaluation of the evidence to reach its own findings and conclusions but must be cautious that it never had the advantage of seeing the witnesses in the witness box. The court should generally be slow in interfering with the trial courts findings of fact and /or exercise of discretion unless it is plain that there was no evidence to support the findings and /or that the trial court acted on a misapprehension of the law and or acted upon or applied wrong principles in reaching the findings and/or decision. In the case of *Sell –Vs- Associated Motor Boat Co. Ltd & others (1968) EA 123*, the Court of Appeal enunciated the principle thus:-

*“--- this court is not bound necessarily to accept the findings of fact of the Court--- is by way of retrial and the principles upon which this court acts in such an eflyput they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ---“*

9. The Appeal was argued by the parties by way of written submissions. The appellant's submissions were filed on the 17<sup>th</sup> December 2019 and the respondent's on 16<sup>th</sup> January 2020. The parties in their respective submissions have gone over the evidence adduced before the lower court and the applicable law to justify their positions. The appellant submitted that on the basis of the evidence he adduced he satisfied the threshold of proof of his case on balance of probabilities and ought to have had judgment in his favour. For his part the respondent was of a contrary view that the appellant had failed to establish his claim and that the learned trial magistrate was entitled to come to the conclusions that he did.

10. Before the court considers the merits or otherwise of the appeal it is necessary to set out albeit in brief the facts of the case before the lower court.

#### **The case of the appellant**

11. The appellant's case before the lower Court where he was the plaintiff was that he claimed ownership of plot No.42 Molo Town. It was his case that he purchased the plot No. 42 Molo Town from one Fanice Awinja Waithego and that the original allottee, Patrick Ongoro Nyandisi from whom Fanice Awinja had bought the plot earlier, transferred the plot directly to him. He stated that he had not signed any formal agreement of sale with Fanice Awinja but that after he paid the purchase price he was given by Fanice Awinja the documents relating to the plot including the copy of the original letter of allotment to Patrick Ongoro Nyandisi (PEX3). He stated he paid the necessary charges for survey, transfer fees, plot rent and clearance fees and was issued receipts (PEX4). He stated he was shown the plot beacons by one Laban Anyona, took possession and fenced and that he had continued to pay the plot rent which the council has continued to accept. He further stated he constructed temporary structures in the plot which he had been renting out.

12. He stated that before he bought the plot he had verified with the records held by the council and he was satisfied plot No. A2 existed on the ground where he was shown and denied that the plot No.50 claimed by the defendant was on the same spot where his plot No.42 is situated. The appellant stated that he had no knowledge whether Patrick Nyandisi accepted the allotment in writing or whether he had paid the requisite fees of Kshs300/= to Molo Town Council to be shown the plot as there was no receipt for the amount given to him . The appellant stated that he was not aware that there had been any replanning of the Town council plots and or that the respondent's plot No.50 was located on the same position where his plot No.42 was on the ground. The Appellant stated that he was not a party in Nakuru CMCC No.2595 of 1996 and observed that his plot No.42 was not in issue in that case and hence the decision in the case could not have affected his said plot.

13.The appellant called Patrick Ongoro Nyandisi as a witness (PW2) and he affirmed that he indeed sold his plot No.42 Molo Town to Fanice Awinja Waithego who later sold the plot to the Appellant. PW2 stated as the plot was still in his name when Fanice Awinja sold the plot, he (PW2) signed a transfer form direct to the appellant . PW2 stated that he had duly been allocated the plot and that he had fulfilled all the requirements attaching to allotment before he sold and transferred the plot. PW2 admitted he was a councillor at the time he got the plot in 1991. He stated he was the chairman of the planning committee of Molo Town council from 1988 to 1992. He said he ceased being a councillor in 1992 and from then onwards he affirmed he would not have known whether there had been any replanning of the Township plots.

14. Fanice Awinja Wathegi (PW4) testified that she purchased the suit plot from PW2 in June 1993 though no transfer was effected to her . She sold the same plot to the appellant in 2001 and caused PW2 to effect the transfer to the applicant. PW4 stated when she bought the plot from PW2 they signed an agreement and PW2 passed the allotment letter (PEX3) to her which she gave to the appellant when she sold the plot to him. PW4 testified that she had put some temporary structures on the plot. She stated that the case that had been filed in Nakuru Court by the Respondent together with others did not touch on her plot No.42.

15. Nancy Wanjigo Kinuthia (PW5) owned plot No.43 Molo Town which she stated neighboured plot No.42 owned by the Appellant . The witness stated the Appellant was sold plot No.42 by PW4 and that he became her neighbour from 2000. The witness further affirmed their plots had issues with the Molo County Council which prompted them to institute a suit against the Molo Town Council vide Nakuru CMCC No.2595 of 1996. The Appellant or his predecessor in title was not a party to the suit. The Respondent was a party to the suit as the beneficiary of plot Nos 48 and 50. She affirmed the court decreed they were the lawful allottees of the plots and directed that their allocations be not interfered with. The Court decree was implemented and the council delineated and showed the decree holders their respective plots on the ground. The witness however explained that some of the allottees did not get their plots at the original plot locations.

16. PW7 Peter Njoroge Mwangi a Records clerk at the Town Council testified that plot 42 had been allocated to Mr. Nyandisi but he sold it in 2000 to the appellant. He explained that it was the appellant who had been paying rates for the plot. The witness however did not explain how and when the transfer to the plot 42 was effected to the appellant. He stated though an allotment letter issued to Mr. Nyandisi, there was no evidence of acceptance of the allotment. He acknowledged there was a suit that involved plots 37,38,40,43,44, 48 and 50 where the court ruled the plaintiff's in the case who included the respondent were the lawful allottees of the plots. The town Council implemented the decree issued by the court.

### **The Respondent's case**

17. The Respondent, George Gachiengo Murage, testified as DW2 in the lower court. He stated he was allocated plot No.50 Molo Town Council on 24<sup>th</sup> June 1991. He produced in evidence the letter of allotment and affirmed that he accepted the allotment and paid the requisite charges of Kshs.4,750/=. He stated in 1996 the council threatened to repossess the plots prompting them to file Nakuru CMCC No. 2595 of 1996. He affirmed the Court issued a decree relating to 8 plots No's 37, 38,39,40,43,44,48 and 50 which was implemented with all the affected persons in the decree being shown their respective plots physically on the ground. The respondent stated he took possession of the plot he was shown and while they were awaiting to be furnished by the Town council with the development plan, the appellant entered onto his plot and started constructing on the site. He stated that when he visited the site, he was confronted with a plaintiff and he came to court and subsequently the court ordered the construction to stop. The respondent asserted the appellant was trespassing on his plot No.50 which the council had showed to him following the determination of the case in Nakuru.

18. The Respondent stated he was shown the plot in 2000 and he took possession. He said he did not construct any structure on the plot as he had not obtained approval. He said he got to know the appellant in court and stated at the time the present suit was commenced he was in possession of the plot. He stated he was shown the plot by one Laban Anyona who under cross examination he disclosed to be related to through marriage as his son (respondent's) is married to his aunt.

19. Laban Maranga, works officer Molo Town council testified as DW1. He explained that he advised the council on general town planning issues, approvals of development plans and assisted in project implementations. DW1 explained that plot No. 50 was located at the stadium site and that the same was allocated to the respondent on 24<sup>th</sup> June 1991 though it was shown to him in 2000.

20. DW1 affirmed he was present when the Respondent was shown the plot. He indicated the council had initially planned to do lock ups in the area where the plots were located but after the allottees filed a suit the council was ordered to allocate the allottees who had filed suit plots in the area. There were 8 allottees and the Respondent was one of them. He stated the council complied with and implemented the court order. The council made a resolution to have the court order implemented and the Town clerk appropriately directed the implementation. He testified that on allotment one is supposed to pay Kshs.6890/=. He stated plot No.42 did not exist as it was nullified in 1992. He further explained a transfer required to be tabled before a committee and be approved. He affirmed that plot No.42 and plot No.50 are not the same and he denied the council had an allottee by the name of Festus Njuguna Kamau (appellant). He explained, the council had not approved any developments on plot No.42 at the site. He affirmed the Respondent took possession of the plot that he showed him in 2000.

### **Analysis and determination**

21. Upon evaluation of the foregoing evidence, the trial magistrate arrived at the decision that he did whereby he found the appellant's suit not proved on a balance of probabilities and dismissed the same while he found the Respondent's counter claim established and allowed the same. In this appeal the issue for determination is whether on the evidence tendered the magistrate was entitled to arrive at the finding that he did and/or to reach at the decision that he did.

22. From the evidence adduced before the learned trial magistrate it was the appellant's evidence that he purchased plot No.42 Molo Town council from one Fanice Awinja Wathegi who in turn had purchased the same plot from one Patrick Nyandisi who however had not caused the plot to be transferred to her. The only document that was furnished in evidence to show that Patrick Nyandisi had any proprietary interest in plot No 42 was a copy of letter of allocation dated 24<sup>th</sup> June, 1991 addressed to him whose content was as follows:

*Re :Allocation of plot 42 Molo Town*

*I am pleased to inform you that you have been allocated Business plot No.42 at Molo Township. Other charges in respect of the plot will be communicated to you on acceptance of this offer which should be acknowledged in writing to the undersigned within 30 days from the date hereof.*

*You should also arrange to pay Kshs 300/= so that you can physically be shown your plot.*

*Signed*

*Kenneth Mokua*

*AG Clerk Molo Urban Council.*

23. There was no evidence tendered to demonstrate that Patrick Nyandisi did actually accept the allotment and /or that he paid the other charges that went with allocation. The appellant has submitted that the learned trial magistrate erred in holding that the appellant had not proved and /or demonstrated there was acceptance of the allotment by Patrick Nyandisi and/or that the necessary charges relating to the allotment were paid. The appellant submitted that he had in fact demonstrated through the production of payment receipts received from the Town council of Molo that the required fees were paid. The Court having perused the record of appeal noted that all the receipts produced

by the Appellant were dated as from 7<sup>th</sup> May 2001, the day he allegedly bought the plot No.42 from Fanice Awinja Waithegi. There were no receipts from the Town Council issued either to Patrick Nyandisi or Fanice Awinja to support their ownership of plot No.42 Molo Town. It is noteworthy that Patrick Nyandisi never effected the transfer of the plot to Fanice Awinja and apart from the letter of allotment he did not give Fanice Awinja any other document to support his ownership of plot No.42 Molo Town.

24. The respondent in contrast, in his evidence, he tendered documentary evidence to show that he was allocated plot No.50 Molo town as per the letter of allotment dated 24<sup>th</sup> June 1991. He produced receipts to show that he paid the associated allotment charges on 19<sup>th</sup> November 1992. The respondent also when the Town council in 1996 threatened to repossess the plots allocated to him, he together with 7 other allottees sued the council vide Nakuru CMCC No.2595 of 1996 and obtained orders barring the council from interfering with the plots. The council was ordered to allocate and show the decree holders in the suit their respective plots. The respondent's plot No.50 was delineated on the portion the Appellant claims plot No 42 to be on the ground. Although the appellant in his evidence has stated he was shown his plot No.42 by Laban Anyona (DW1) of the Molo Town council, when DW1 testified he denied ever showing the appellant the said plot. DW1 confirmed that he indeed showed the respondent plot No.50 in implementation of the Court order in Nakuru CMCC No.2595 of 1996. He stated that plot No.42 did not exist and affirmed that all allottees who were not parties in the Nakuru suit lost their plots.

25. The learned trial magistrate upon evaluation of the evidence observed as follows:-

*“I have carefully appraised the evidence on record. It was the testimony of the plaintiff that he bought plot No. 42 from PW4. No sale agreement was exhibited before the court confirming there was such a transaction. Indeed the plaintiff himself and PW4 acknowledged that there was no sale agreement between them. PW4 stated she bought the plot from Patrick Nyandisi (PW2) PW2 was the original allottee. The letter of allotment was produced as PEX3. The letter required the allottee to accept the offer in writing within 30 days and further it required the allottee to pay a sum of Kshs300/= being showing fees. No evidence at all was adduced for acknowledgement of the offer by PW2. PW2 was cross examined on this and he was clear there was no written acknowledgement. He however insisted that he had paid Kshs300/= which was a condition in the letter of offer and asserted that he was issued with a receipt by the council and passed it over to PW4 together with the allotment letter.*

*PW4 contradicted PW2 on the aspect of payment of Kshs300/=. When she was cross examined she was very categorical; she was never shown any receipt for Kshs300/= .PW2 has failed to demonstrate that he complied with the two key conditions of the offer to him. He really had nothing to sell to PW4 and the nexus to the plaintiff is lost here. On a balance of probabilities I find that the plaintiff has failed to establish his case which I dismiss with costs to the defendants”*

26. It is the above finding that aggrieved the appellant prompting the instant appeal. I have made my own assessment and evaluation of the evidence and I find no basis upon which I can fault the learned trial Magistrate respecting the conclusions he reached. On the evidence there is no demonstration that the offer of plot No.42 to PW2 crystallized. There was no evidence of acceptance of the offer of the plot. The acceptance was to be in writing and the allotment charges including a showing fee of Kshs 300/- had to be paid for the offer to crystallize. There was no evidence whatsoever of the acceptance of the offer of payment of allotment charges by PW2. The trial magistrate in the circumstances was entitled to come to a finding that PW2 had no proprietary interest in plot No 42 that he could have sold to PW4, Consequently PW4, therefore acquired nothing from PW2 and consequently had nothing to sell to the appellant.

27. The appellant's suit before the lower court was not founded on any sale agreement but on the fact that the appellant was claiming ownership of plot No.42 Molo Town which he alleged the Respondent was interfering with and sought orders of restraint Section 3(3) of the Law of contract Act had no application to the circumstances of the case. What was in issue was the existence and /or ownership of plot No.42 vis- a- vis plot No.50 Molo Town. Although Pw2 had been issued a letter of allotment for plot No.42 Molo Town the evidence adduced before the lower court established that the allotment was not given effect and that the Molo Town council had sought to replan the area where the plots had been allocated to establish what they termed lock-ups to accommodate squatters who had been caught up in tribal clashes. Only the persons who challenged the council in court in Nakuru CMCC No.2595 OF 1996 had their plots re-allocated and delineated. The appellant was not a party in the suit and by the time he bought the plot in May 2001, the decree in the suit had been issued which obligated the council to allocate the specified plots to the decree/holders. The Respondent's plot No.50 was identified and shown to him. The respondent having acquired the plot pursuant to an allocation and the council having been ordered to delineate the plots pursuant to a court decree which still stands, the trial court lacked the jurisdiction to dislodge the decree of the court in Nakuru which decree had been implemented .It does appear to me the appellant's cause of action if any ought to have been against Molo Town Council or they should at least have been enjoined to the suit as a party, they having been responsible for the allocations.

29. On my own evaluation of the evidence I have come to the conclusion that the trial magistrate was justified to come to the decision that he did and there is no basis to interfere with his findings. I find the appeal to be lacking in merit and the same is dismissed with costs to the Respondent.

30. Orders accordingly.

**Judgment dated signed and delivered electronically at Nakuru this 30<sup>th</sup> day of April 2020.**

**J M MUTUNGI**

**JUDGE**