



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 1 OF 2018

(Formerly Machakos ELC Appeal No. 197 of 2012)

SUSAN WANJIRU.....1ST APPELLANT

MIRIAM WANJIRU.....2ND APPELLANT

VERSUS

TITUS TITO.....1ST RESPONDENT

LUCY GATHONI.....2ND RESPONDENT

MELICA NDUNGE.....3RD RESPONDENT

JUDGEMENT

(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Kajiado made by Hon. S. O Temu on 30th October, 2011 in Kajiado CMCC No. 110 of 2008)

Introduction

By a Memorandum of Appeal dated the 12th November, 2012, the Appellants appeal against the whole of the Judgment delivered by Hon. S. O Temu, Senior Resident Magistrate at Kajiado on the 30th October, 2012. The genesis of this appeal is the Judgement of the Senior Resident Magistrate Hon. S. O Temu in the Kajiado CMCC No. 110 of 2008 where he dismissed the Appellants' suit and entered judgment for the Respondents. In the said suit the Appellants had sought for the following orders:

- a) Declaration that the residential plot No. 342 situate at Ongata Rongai Trading Centre Kware belongs to the Plaintiffs.
- b) Eviction of the Defendants from the suit property.
- c) Mesne profits.
- d) Injunction directed to the Defendants by themselves, their agents, servants and/or agents or any other persons so authorized by them from encroaching and in any way alienating plot No. 342 situate at Ongata Rongai Trading Centre Kware.
- e) Costs of this suit.
- f) Interest at court rates from the date of filing suit.
- g) Any further relief as this Honourable Court may deem just and fit to grant.

The appellant being dissatisfied by the whole Judgement filed an appeal at the Environment and Land Court of Kenya in Machakos on 12th November, 2012.

The Memorandum of Appeal contained the following grounds;

1. The learned trial Magistrate erred in law and in fact in failing to find that the Appellants were 'bona fide' holders of letters of

allotment for plot No. 342 Ongata Rongai Trading Centre.

2. The learned Magistrate erred in law and in fact in failing to appreciate that the Appellants were the first allottees of the suit property.
3. The learned Magistrate erred in law and in fact in failing to appreciate that the Respondents did not tender any evidence of how they acquired their Letter of Allotment.
4. That the learned Magistrate erred in law and in fact in failing to find that the County Council of Ol Kejuado had not done any validation exercise to authenticate the ownership of the property in dispute.
5. The learned Magistrate erred in law and in fact in failing to find that the Appellant had adhered to all the conditions in the Letters of Allotment and paid rates in full to date.
6. The learned Magistrate erred in law and in fact by ordering for eviction of the Appellants and where no such prayers existed.
7. The learned Magistrate erred in law and in fact in making orders in favour of the Respondents in absence of a counterclaim.
8. The learned Magistrate erred in law and in fact in failing to find that the Respondents were trespassers to the suit property.

The Appellants pray that the Appeal be allowed and the judgement dated the 30th October, 2012 be set aside with costs and interest to the Appellants.

The Appellants and Respondents filed their respective submissions to canvass the Appeal.

Submissions

The Appellants in their submissions reiterated their claim and contended that they were the bona fide holders of the Letters of Allotment for plot No. 342 Ongata Rongai. They relied on section 24(a) of the Land Registration Act and the decision of **Willy Kipsongok Morogo Vs Albert K. Morogo (2017) eKLR** to support this argument. They insist they were the first Allottees of the suit property vide a transfer dated the 27th September, 2005 unlike the Respondents' Letter of Allotment for plot number 888 which is dated the 4th February, 2011. They submit that their claim dates back to 1972. They relied on the decision of **Gitwany Investment Ltd Vs Taj Mall Ltd & 3 Others, HCC No. 1114 of 2002** to support this averment. They further submitted that the Respondents never tendered any evidence on how they acquired their Letter of Allotment and relied on the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No. 239 of 2009**. They reiterated that they had adhered to all the conditions in the Letters of Allotment and paid rates in full. Further, that the Learned Magistrate erred by ordering for their eviction from the suit land and failed to consider their property rights under Article 40 of the Constitution. To buttress this averment, they relied on the case of **Kenya Airports Authority V Mitu Bell Welfare Society & 2 Others (2016) eKLR**. They claimed the Respondents acts of trespass has led to their suffering loss and damage, hence their Appeal is merited.

The Respondents opposed the Appeal and submitted that they are the bona fide allottees of the disputed plot since 1972. They contend that the Ol Kejuado County Council recognized them as bona fide allottees entitled to continue occupying the suit plot. They claim to have effectively taken possession on the thrust of their Letter of Allotment and erected structures thereon vide a letter of authorization dated the 29th August, 2005. They insist that they complied with the terms of the allotment and paid rent and rates as required. Further, that their ownership and possession should not suffer disruption. To buttress this argument, they relied on section 26(1) of the Land Registration Act and the decision of **Daudi Kiptugen Vs Commissioner of Lands & 4 others (2015) eKLR**. They further submitted that they were the first allottees in 2005 when the Ol Kejuado County Council embarked on the exercise of settling occupants of land in the informal settlements vide a letter dated 29th August, 2005 and relied on the decision of **Dr. Joseph N. K. arap Ngok V Justice Moijo Ole Keiwua and 4 Others Civil Application No. NAI 60 of 1997** to support the averment. They reiterated that they were bona fide owners of the suit property having obtained their Letters of Allotment from the Ol Kejuado County Council. Further, their Letters of Allotment satisfies the legal criteria and its legal consequences should not be demeaned. They further submitted that the orders of eviction granted by the Magistrate were justified. They denied being trespassers on the disputed plot and relied on the case of **Wreck Motor Enterprises Vs Commissioner of Lands & 3 Others (1997) eKLR** to support this averment.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Who is the owner of the disputed suit plot.
- Who is the first allottee for the disputed suit plot.
- Whether the Appeal is merited.

As to who is the owner of the disputed suit plot and who was its first Allottee. The Appellants claim ownership of the disputed plot which they purchased from one David Baswati. They contended that the suit plot is number 342 Residential Ongata Rongai Trading Centre. The Appellants in the lower court stated that they took ownership of the plot in 2005 but the Respondents had encroached thereon and built on it. The Respondents on the other hand insist the disputed plot is No. 888 and they have stayed thereon since 1972 but given Letters of Allotment

on 6th December, 2005 when the Ol Kejuado County Council was settling informal settlers. The Defense witness DW3 Stanley Mwangi confirmed knowing both the Appellants and the Respondents. It was his testimony that he was a member of the Plots Committee at Rongai and confirmed that the Respondents had resided on the disputed plot since childhood. Further, he denied knowledge of the location of plot No. 342. DW4 testified that they were given the plot by Ol Kejuado County Council whose representative identified the same and placed beacons thereon. She confirmed that they were later given Letters of Allotment and they started paying rates in 2005. She insisted they were the first Allottees of the disputed plot. Further, that the Appellants are their neighbour. From a perusal of the documents that the Appellants had furnished in the lower court, I note that they were not the original allottees of the plot No. 342 Residential Ongata Rongai Trading centre as claimed but obtained a Transfer in 2005. They produced a Transfer Letter dated the 27th September, 2005 which indicated that the plot was initially allocated to Tita Tipaiwua and Samparua Mutuakoto. The Defendants however were the original allottees of their plot No. 888 Kware Ongata Rongai as per the Letter of Allotment which they had produced as an exhibit. The Appellants and the Respondents all confirmed paying rates for their respective plot as evident in the receipts produced as exhibits. From the evidence in the lower court, I note the Appellants did not sue the County Government of Kajiado that was the Allotting Authority to confirm the site of their plot. I further note that they did not present the vendor in court to confirm he was initially allotted the disputed plot which he transferred to them. PW1 in her testimony explained that the plot was sold to them by David Baswati but the name in the Transfer is different as it indicates Tita Tipaiwua and Samparua Mutuakoto. The Respondents on the other hand furnished court with a witness (DW3) who had been in the Committee allocating plots in Ongata Rongai to confirm that they had been on the disputed plot since 1972. I opine that the burden of proof was upon the Appellants to furnish court with evidence from an allotting authority or vendor to prove they indeed purchased the disputed plot which was No. 342 but from the evidence in the lower court, this was missing. As per the Letter dated the 4th April, 2008 from the Clerk to Council which was addressed to the Appellants, I note the Council indicated that they were indeed encroaching on plot No. 888 which belonged to the Respondents and they were given seven (7) days' notice to remove their structures therefrom. Further the local Administrative Assistant was directed to pave way for demolition. As per the Letter dated the 17th March, 2008 from the Local Assistant Chief of Kandisi Sublocation where the disputed plot is situated, he too confirmed plot No. 888 belonged to the Respondents. From the respective Certificates of Official Searches produced by the Appellants and the Respondents, it confirms the Appellants are owners of plot No. 342 while Respondents are owners of plot No. 888. As per the map which was produced in court, it clearly shows the location of plot No 888 and not No. 342. In the search dated the 26th October, 2009 furnished by the Respondents, it indicates that they were allocated plot No. 888 on 29th November, 2005. PW1 confirmed in her testimony that when they conducted a search on 23rd March, 2011 they realized there was another plot on top of their plot No. 342. With this information, they still failed to summon a representative from the County Government of Kajiado nor sue them as they were responsible for the confusion. The Respondents produced their Letter of Allotment for plot No. 888; Receipts for payment of rates; Map confirming position of plot No. 888 which was given to them by the County Surveyor. From the evidence in the lower court, it is evident to me that the confusion was created by the County Council that let the Appellants pay rates for a plot that was non-existent as per the map. In the case of **Benja Properties Limited V Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR**, the Court of Appeal in dealing with a dispute over an Allotment held thus: **' In arriving at our decision, we note an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land.'** Which position was reaffirmed in the case of **Embakasi Properties Limited & Another V Commissioner of Lands & Another (2019) eKLR**.

Further, in the case of **Dr. Joseph N. K arap Ngok V Justice Moiyo Ole Keiwua and 4 Others Civil Application No. NAI 60 of 1997, the Court held that: 'title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter of allotment and actual issuance thereafter of title document pursuant to provisions held. '**

While in the case of **Mwangi & Another Vs Mwangi KLR 328 quoted in Henry Muthee Kathurima Vs Commissioner of Lands & Another (2015) eKLR** the rights of a person in possession or occupation of land are equitable and binding on the land.

Yet in the case of **Mathew Nduu Kiambati v James Gichuki Magondu & another [2018] eKLR** Justice Okongo while dealing with an Appeal with facts similar as this suit held that, **' I am in agreement with the Appellant that the 1st Respondent had the burden of proof. I am satisfied that the 1st Respondent discharged this burden on a balance of probabilities. He proved that he was the owner of the suit properties and that he was in possession of the same. He also proved that he had fenced the properties and that the Appellant had destroyed a portion of his fence and had threatened to bring down the whole fence. The Appellant has contended that the lower court ignored the corroborative evidence of Jack K. Wachira (DW2). I have already commented on the evidence of this witness. In my view the evidence of this witness was not helpful at all to the Appellant. A part from confirming a fact that was not in dispute that the Appellant was allocated the Appellants' properties, DW2 placed nothing more of value before the court on the dispute. The Appellant has amplified DW2's statement that "the plots are the same on the ground" to mean that the Appellant's properties as they appeared on the map that DW2 produced were as they were on the ground. The issue that the witness did not answer was, which ground? DW 2 did not answer this critical question which only he could answer. I find the case of Gitwany Investments Ltd. vs. Jajmal Limited and others (2006)2 E.A 76(HCK) that was cited by the appellant distinguishable. That was a case of double allocation of land. As I have mentioned earlier in this judgment the dispute here was not about double allocation of land but the physical location of the various parcels of land claimed by the Appellant and the 1st Respondent.'**

In the current case, the burden of proof was upon the Appellants to prove that the Respondents unlawfully took the disputed plot land and constructed thereon. The Appellants relied on the decision of **Gitwany Investments Ltd. vs. Jajmal Limited and others (2006)2 E.A 76(HCK)** which I wish to distinguish from this Appeal as it concerned a case of double allocation of land which is dissimilar to the circumstances at hand. In associating myself with the decisions cited above and based on the evidence before me, insofar as the Appellants had been paying land rates, I opine that the same was for a non-existent plot. Further, except for the Transfer Letter, the Appellants did not produce a map to show the location of their plot, the vendor who sold them their plot, and an Official from the Allotting Authority to confirm the site of their plot. It is against the foregoing that I find that the Respondents are indeed the owners of the disputed plot and will proceed to uphold their Letter of Allotment for plot No. 888. I further find that they were indeed the first Allottees of the suit plot as the Appellants only had a Transfer. In the circumstance, I do not find that the learned trial Magistrate erred in law and in fact in failing to find that the Appellants were 'bona fide' holders of letters of allotment for plot No. 342 Ongata Rongai Trading Centre as they were holding documents for a plot that was not indicated in the map. Further, I find that the Learned Magistrate did not err in law and in fact in failing to appreciate that the Appellants were the first allottees of the suit property. I beg to differ with the Appellants and find that the Respondents indeed demonstrated how they acquired the suit plot and even brought a witness to confirm this position. Insofar as the Appellants produced receipts to confirm they were paying rates and rent for plot No. 342, but they did not confirm if the Allocating Authority had indeed pointed out the plot to them

nor fixed beacons thereon. Since it clearly emerged that the Respondents were already on the plot and put up structures thereon, I do not find that the Learned Magistrate erred by directing the Appellants to be evicted therefrom.

It is against the foregoing that I find this Appeal unmerited and will proceed to dismiss it with costs to the Respondents.

Dated Signed and delivered via email this 18th Day of May, 2020.

CHRISTINE OCHIENG

JUDGE