



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

APPEAL NO. 7 OF 2018

BENSON MWANGI.....APPELLANT

VERSUS

LUCY NJERI MBOGO.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nakuru (Hon. G. H. Oduor, Chief Magistrate) delivered on 16th May 2018 in Nakuru CMCC No. 1137 of 2005 Lucy Njeri Mbogo v Municipal Council of Nakuru & Benson Mwangi)

JUDGMENT

1. Proceedings herein trace their root to a plaint filed on 1st July 2005 in the subordinate court by the respondent herein against the Municipal Council of Nakuru (as first defendant) and the appellant herein (as second defendant). Subsequently, an amended plaint was later on 20th March 2006. The parties remained unchanged. It was averred in the amended plaint that on 7th June 1984 the Municipal Council of Nakuru (hereinafter "the council") allocated to the respondent a parcel of land known as Plot No. 476 Race Track Site and Service Scheme (hereinafter "the suit property") after which the respondent took possession and made payments to the council in respect of infrastructure cost, rates and ground rent. That on 15th November 2002, the council irregularly, fraudulently, without any or any adequate notice purported to repossess the suit property and to reallocate it to the appellant. The respondent therefore sought judgment for general damages, a declaration that she is the lawful proprietor of the suit property, a permanent injunction restraining the appellant and the council from trespassing, selling, disposing of, or in any other way interfering with the her ownership of it, costs of the suit and interest.

2. The council neither entered appearance nor filed statement of defence. As result, interlocutory judgment was entered against it. On his part, the appellant filed statement of defence in which he generally denied the respondent's allegations and added that the respondent would only have a remedy against the council for damages. He therefore urged the subordinate court to dismiss the case with costs to him.

3. After hearing the matter Hon. G. H. Oduor (Chief Magistrate) delivered judgment on 16th May 2018 in favour of the respondent and granted a declaration that she is the lawful proprietor of the suit property, a permanent injunction restraining the appellant and the council from trespassing, selling, disposing of, or in any other way interfering with the her ownership of it and costs of the suit. Aggrieved, the appellant filed the present appeal against the whole judgment. He however excluded the council from the appeal and did not make him a party. The grounds of the appeal are:

1. *THAT the learned trial magistrate erred in law and in fact in finding that the respondent's suit had merit.*
2. *THAT the learned trial magistrate erred in law and in fact in failing to summarize the evidence on record accurately.*
3. *THAT the learned trial magistrate erred in law and in fact in failing to make a finding on the fate of the Certificate of Lease registered in the name of the appellant.*
4. *THAT the learned trial magistrate erred in law and in fact in failing to find that the only remedy available to the respondent was damages as against the 1st defendant in the suit.*
5. *THAT the learned trial magistrate erred in law and in fact in failing to find that he did not have jurisdiction to revoke the Certificate of Lease as a result of which the judgement is moot.*
6. *THAT the learned trial magistrate erred in law and in fact in failing to find that the respondent had not established any or any reasonable cause of action against the appellant.*
7. *THAT the learned trial magistrate erred in law and in fact in failing to make a finding on the implication in law of the appellant being the first registered proprietor of the suit property.*

8. THAT the learned trial magistrate erred in law and in fact in failing to make a finding as to whether repossession of the plot from the respondent was lawful or justified.

9. THAT the learned trial magistrate erred in law and in fact in failing to find that it was fatal for the respondent to have failed to amend her pleadings to replace the 1st defendant in the suit with the County Government of Nakuru.

4. The appeal was canvassed through written submissions. It is argued for the appellant that he was not involved in the repossession, that the only remedy open to the respondent was to pursue the council for compensation and the court is faulted for not giving consideration to that line of argument. It is further argued that since interlocutory judgment was entered against the council the appellant ought not to have been made to suffer for the mistakes of the council. Finally, it is argued that the appellant has a certificate of lease and that it remains intact since no prayer was made for its cancellation. For those reasons, the appellant prayed that the appeal be allowed.

5. For the respondent, it is argued that the appeal is incompetent for failure to include in the record of appeal a certified copy of the decree contrary to Order 42 rules 2 and 13 (4) (f) and further for not including the council as a party to this appeal. The case of **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR** is cited to support those arguments. It is argued in regard to ground 3 of the appeal that in view of the evidence on record which includes a denunciation of the certificate of lease by a land registrar, the learned magistrate did not need to make any express finding on its fate. In regard to ground 4 it is argued that the appellant should have issued a notice of indemnity against the council if he really wished the court to consider whether the council should be found liable in damages for the nullification of the purported repossession and reallocation. As regards ground 9, it is argued that failure to amend the pleadings so as to replace the council with the County Government of Nakuru was not fatal since interlocutory judgment was entered against the council in the year 2007 before the advent of 2010 constitution and the county governments and that **section 59 of the Urban Areas and Cities Act, 2011** makes it clear that such an amendment was not necessary. Additionally, the case of **Lalji Shivji Kerai v Municipal Council of Eldoret [2014] eKLR** is relied on to buttress the arguments. The respondent therefore urged the court to dismiss the appeal with costs.

6. I have considered the grounds of the appeal and the respective submissions of parties. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**.

7. I will begin by considering grounds 3, 4, 5 and 7 of the appeal together. Under these grounds, the learned magistrate is faulted for not upholding the appellant's certificate of lease and for not awarding the respondent damages. From the onset, it must be remembered that parties design the nature of their case as well as the relief they seek. In litigation, pleadings are akin to architectural drawings in construction. While it is true that miracles do happen, a litigant who has built the foundation and structure of his case on the design of a bungalow should hardly be surprised if he does not end up with an apartment block when judgment is pronounced. Simply put, parties are bound by their pleadings through which they set the agenda for the trial. See **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR**. Neither the appellant nor the respondent made any prayer in their pleadings as to the fate of the certificate of lease. Consequently, the appellant cannot fault the learned magistrate for not awarding that which he did not seek. Regarding general damages, although pleaded, no basis was laid for it and the magistrate was therefore right in not awarding it. Even assuming that the claim for general damages was established, an award against the council for general damages is not the same as compensation for the value of the suit property and does not exclude the other awards that the court made. In particular, I note that there was evidence before the learned magistrate from the council's legal manager as well as from a land registrar which cast serious doubts as to the authenticity and validity of the appellant's certificate of lease. I find no merit in grounds 3, 4, 5 and 7 of the appeal and accordingly dismiss them.

8. Under ground 9 of the appeal the learned magistrate is faulted for not finding that it was fatal for the respondent to have failed to amend her pleadings to replace the Municipal Council of Nakuru in the suit with the County Government of Nakuru. The council was a local authority established under the **Local Government Act (Cap. 265) (repealed)**. There was therefore no need to make such an amendment in view of the clear provisions of **sections 18 and 33 of the Transitional and Consequential Provisions** under the Sixth Schedule of the **Constitution of Kenya, 2010**. In particular, **section 33** provides:

33. Succession of institutions, offices, assets and liabilities

An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.

9. Under **section 18** of the aforesaid **Transitional and Consequential Provisions**, all local authorities established under the **Local Government Act (Cap. 265) (repealed)** existing immediately before the effective date of the **Constitution of Kenya, 2010** continued to exist subject to future laws that would be enacted. One such new laws is the **Urban Areas and Cities Act, 2011** section 59 of which provides:

Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.

10. In view of the foregoing, ground 9 of the appeal also fails.

11. It is argued by the appellant under ground 8 that since interlocutory judgment was entered against the council the appellant ought not to have been made to suffer for the mistakes of the council. As correctly pointed out by the respondent, the appellant for some unknown reason decided not to include the council in this appeal despite the council having been a party to the suit. By doing so, the appellant has deprived the council of a hearing and cannot therefore be heard to advance a case against it in this appeal. Further, the interlocutory judgment only

established liability against the council in respect of the case pleaded against it by the respondent. Since the appellant did not plead any case against the council and considering the serious doubts as to the authenticity and validity of the appellant's certificate of lease, the interlocutory judgment did not amount to upholding the appellant's claim to the suit property. Ground 8 therefore fails. Grounds 1, 2 and 6 the appeal generally are to the effect that the learned magistrate erred in finding merit in the appellant's case. These grounds cannot stand in view of the foregoing discussion.

12. In the result, I find no merit in this appeal. I dismiss it with costs to the respondent.

13. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 7th day of May 2020.

D. O. OHUNGO

JUDGE