



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 21 OF 2019**

**DENIS GITONGA.....1<sup>ST</sup> APPELLANT**

**LUCY MWONJARU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MANYARA DELAMARE KIRANJI.....RESPONDENT**

*(An appeal arising from the decision of Hon. E. Ngigi SRM.*

*Delivered on 14/12/2018 in Isiolo CMCC No. 52 of 2014)*

**JUDGMENT**

1. Vide a plaint dated 5.6.2013, the respondent filed a suit before this court as MERU ELC NO.141 OF 2013 seeking orders to be declared as the owner of Plot No. KIWANJANI K45 and a permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants (now appellants) by themselves their agents servants or assigns from trespassing into, entering, developing, putting any structures, alienating, dealing with or in any other manner whatsoever interfering with the respondents use, occupation and ownership of Plot No. Kiwanjani K45. Sometime in the year 2014, the suit was transferred to Isiolo Chief Magistrate's court where it was registered as ISIOLO CMCC No. 52 of 2014.

2. The appellants in their statement of defence opposed the suit adding that the 2<sup>nd</sup> appellant owns plot no KIWANJA K 603 which is different from plot no. KIWANJA K 45.

3. During the hearing of the case before the trial court **PW1 Manyara Delamare Kiranji**, the respondent herein adopted his recorded statement as his evidence. He averred that he got Plot No. 45 Kiwanjani through balloting in 2005. He produced a letter he got after balloting and was required to pay administration fees. He also produced the report appertaining to the issue of balloting where his name is captured as no.45 where the beneficiaries are 450 in total. He has been paying rent every year and produced receipts for the same. He averred that before balloting, he was living elsewhere but in the same locality. He was moved from where he was living in order to pave way for the expansion of the Airport.

4. In the year 2013 he started fencing his plot and was later called by 2<sup>nd</sup> appellant who claimed that the plot was hers after being allocated the same by the County Government of Isiolo. The 2<sup>nd</sup> appellant later uprooted his post and took them to AP Kiwanjani. He reported the matter to the police vide OB No. 41/23/5/2013. Since then he has not seen her back at the plot. He went on to construct a toilet and he intends to put up a house. He produced the photographs of his removed posts as well as receipts for demarcation and rent payments as exhibits.

5. **PW2 Samuel Kaheria M'Imanyara** adopted his recorded statement as his evidence. His testimony is that he knows the respondent as his long time friend from primary school. He has known that the suit plot belonged to the respondent from 2008. He assisted the respondent in estimating the number of fencing posts the latter would require in fencing the land of which they fenced the land for the very first time in year 2008. He is the one who has been taking care of the suit plot on behalf of the respondent. In 2013, him, the respondent and one Kinoti went to the plot and fenced the land again and no one questioned them. On 23/5/2013 he was informed that there were people on respondent's land. They went to the suit parcel with respondent and found 3 men and one lady having demolished the fence of the suit plot.

6. **DW1 Lucy Mwanjaru** is the 2<sup>nd</sup> appellant and she adopted her recorded statement as her evidence. She stated that the 1<sup>st</sup> appellant is the registered owner of the parcel no. Kiwanja K 603 and not Kiwanja K45, who followed due process and paid the requisite fees to acquire the said land. The allocation process was done above board by an independent team. In 2012 the County Government of Isiolo declared its intention to put beacon and in 2013 a committee and a surveyor came to the land. She told them that the land should be given to her son who is the 1<sup>st</sup> appellant herein. They have been paying rates for Plot No. 603 and produced the receipts as proof thereof.

7. **DW2 Dennis Mugambi Gitonga** also adopted his recorded statement as his evidence. He told the court that when he was acquiring the land, they were told that the plot could not be given to all of them, so his mother suggested that it be registered in his name. They followed due procedure in acquiring the said plot and therefore, he has never trespassed on Plot No. 45 as claimed by the respondent. He claims that plot 603 is different from plot 45 and that plot 603 can be seen on the map. The defence also produced the documents in their list as exhibit 1-4.

8. After the testimony of DW2, a scene visit exercise was conducted on 12.9.2018 culminating in a joint report by the County Physical Planner Mr. Kimutai Cheruiyot and County Surveyor, Mr. Joshua Rume. At the scene, the physical planner stated that his office has 3 different plans (development plan, ballot scheme and plan) that do not tally, but all the plans relate to the same area. They (physical planner and surveyor) were to pick the coordinates as per the way the two parties were to point out the plot. They would then use the data given by the parties to relate the same to the plans they had. The appellants indicated that they own LR K.603 and the Defendant LR K.45 but when asked to identify their land they all identified the same plot on the ground.

9. The content of the full scene visit report is as follows;

*“This report has been prepared jointly by the County surveyor-Isiolo, and County physical planner-Isiolo.*

*Reference is made to the above mentioned subject.*

*Several plans exist with respect to the contested area. The plans are:*

*I. Isiolo Development Plan (can only be used for general visual land use but does not identify individual ownership, except for public utilities).*

*II. A balloting plan, numbered and used as the basis for making an offer to the public, and was the basis upon which implementation by the contracted surveyor (Geomeasure Surveys Ltd) was to be follow, unless proven otherwise by the contractual agreement between County Council of Isiolo (defunct) and Geomeasure Surveys Ltd.*

*III. A plan submitted by the contracted surveyor, significantly differs from the ballot plan, and the parcel number is not consistent. The County Government of Isiolo has previously indicated that the parcel numbering, need not be consistent and thus not entirely binding. This is premised on the fact that;*

- There were some people already in ground occupation at the time of implementation of the plan by the contracted surveyor, thus alternate parcel identities were used whenever it became practicable.*
- Implementation was also a subject to fulfilling other conditions that the County Council had put forth before awarding of plots e.g proof of payment statutory fees and submissions of acceptance letters (forms) to clerk to the assembly.*

#### Conclusion.

*a) The plan by the Geomeasure Survey Ltd significantly identifies with what has been implemented on the ground.*

*b) The area has only been surveyed for the purposes of identifying would be beneficiaries, and payment of rates to the County Government of Isiolo. (There is no published registered survey plan nor Registry Index Map published for the area, thus is the parcels are termed as unsurveyed).*

*c) Both litigants have not applied for Part Development Plan (PDP) as required, for formalization of their claims, and ultimately, recognition of their claims via issuance of a letter of allotment (As provided for by the Land Act 2012, and the land (allocation of public land) regulations 2017. A PDP at this stage can only be the element of reference as far as generally identifying the land. Legally, both are claimants whose ownership rights are pegged on payment of rates to the County Government of Isiolo.*

*d) Of interest, the plan by Geomeasure survey Ltd shows both parcel 603 and 45 are distinct from each other. The balloting plan only shows parcel 45.*

*e) The disputed plot as per the Geomeasure plan is parcel 603, whereas as per the balloting plan, a significant approximation by measurements shows the disputed parcel of land as parcel 45.*

#### Way forward

*While it is simplistic and practicable to identify the disputed parcel as parcel 603 based on the current operable plan, and prior evidence of occupation by the claimant, other legal factors inclusive of the laws currently enforced may be overlooked (of particular is legal notice no. 284 of 2017). Say for example, parcel 45 seems to be placed on a wetland, going by the contours shown on Geomeasure Ltd plan.*

*The case is also an example of the various cases before Isiolo Law Courts, arising from unprocedural allocation or double allocation. We strongly suggest that the courts to have a meeting with the National Land Commission, to activate Alternative Dispute Resolution Mechanisms (ADR), as provided for, in order to give a holistic approach for proper management and*

*conversion of public land to private use.*

*Such approaches have worked before, including those being spearheaded by the Ministry of Lands in Nairobi's settlement areas, like Embakasi Ranch.*

*Attached are copies of the plans mentioned".*

10. On 14/12/18 the learned Magistrate Hon E. Ngigi (SRM) entered judgement in favour of the respondent. He found that there was double allocation of the same parcel and found that the appellants could not have been allocated land in 2012 as it was already allocated to the plaintiff way back in 2005. He consequently declared the respondent as owner of Plot No. Kiwanjani K45 and granted the permanent injunction against the appellants herein.

11. Having been aggrieved by the said decision, the appellant has appealed to this court on 6 grounds as follows;

**1. "The Learned Senior Resident Magistrate erred in both Law and fact in declaring that the ground position in dispute was for Plot No. KIWANJANI K45 and not KIWANJANI K603 as per the documents presented by the Appellants.**

**2. The Learned Senior Resident Magistrate erred in Law and fact in issuing an order for a Permanent Injunction against the Appellants on a plot in which they were in actual, possession, occupation and use since the year 2013.**

**3. The Learned Senior Resident Magistrate misdirected himself into considering extraneous issues and in arriving at a decision and judgment that was biased and against the weight of evidence tendered before the Court.**

**4. The Learned Senior Resident Magistrate misdirected himself into arriving at a decision and judgment that was obviously erroneous.**

**5. The Learned Senior Resident Magistrate erred in Law and fact in dismissing and/or failing to consider the evidence of ownership of the Plot as given by the Appellants.**

**6. The Learned Senior Resident Magistrate erred in the Law and fact in making a factual finding that the Appellants were the owners of the Plot No. KIWANJANI K603 but then failing to offer them any remedy available in Law.**

**REASONS WHEREFORE the Appellants prays for ORDERS;-**

**a) THAT the Appeal herein be allowed and the decision and Judgment of the Chief Magistrate's Court in Isiolo CMCC (ELC) CASE NO. 52 OF 2014 be set aside and be substituted with an order for dismissal of the Respondent's suit.**

**b) THAT the Costs of the Appeal herein and the Suit in the Court below be awarded to the Appellants."**

#### **Appellants' submissions**

12. It was the appellant's argument in their submissions that the magistrate erred in indicating that the suit land was Plot Kiwanjani K45 and not Kiwanjani K603. The said declaration was done without conclusive and concrete evidence. The report presented by the County Physical Planning Officer dated 26/9/2018 identified the parcel to be Plot No. Kiwanjani K603 and further stated that Kiwanjani K45 seems to be placed on wetlands going by the contours shown by the surveyors who were mapping the said plot on behalf of the county Council of Isiolo.

#### **Respondent Submissions**

13. On the other hand the respondent argued that the county Physical Planer's report found that Isiolo County Government had a balloting plan dating back to 2005 which it used to resettle all the people displaced by the expansion of the Isiolo Airport. The report was specific that the balloting plan was to be the bases used by the Geomeasure Surveys Limited, Private consultants who were contracted by the County Government. Therefore the fact that the plan by Geomeasure Surveys Limited significantly differs from the original ballot plan in terms of inconsistencies in parcel numberings should not be visited upon by the respondent herein.

14. The respondents added that what came out during the trial was that the respondent was shown land in 2008 after he was allocated land through balloting which was done by the county government in 2005. If anything, appellants claim lies with the county government for allocating them a parcel that had already been allocated to the respondent.

#### **Analysis and Determination**

15. This is a case whereby the parties have been claiming one plot on the ground but each has a different number, whereby the appellants identify their plot as 603 while respondent identifies the plot as 45. They have both been paying rates to the County Government of Isiolo using their respective plot numbers. The pertinent issue for determination is whether the trial magistrate erred in law and fact in determining that the dispute was one of double allocation in which the appellants could not have gotten the land which had already been allocated to the respondent.

16. In **Ali Gadaffi & another v Francis Muhia Mutungu & 2 others [2017] eKLR** the court cited the Court of Appeal case of **Dr. Joseph N.K. Arap Ng'ok -vs- Moiwo Ole Kiewua & 4 Others Nairobi Civil Appeal No. 60 of 1997(unreported)** as follows;

***“Title to landed property normally comes into existence after issuance of a letter of allotment meeting the conditions stated in such a letter and actual issuance thereafter of the title document pursuant to provisions held.”***

17. In the instant dispute, none of the parties has an allotment letter let alone a title deed. However, this is a common phenomenon in the county of Isiolo. Thus a court of law has to analyse the material evidence presented before it in order to determine the nature of interest of a claimant.

18. In the report by the physical planning officer, it was noted that the balloting plan was to be used as the basis for making an offer to the public. However, the plan submitted by the contracted surveyor, Geomeasure Surveys Ltd significantly differed from the ballot plan and the parcel numbering was not consistent. It was concluded that the disputed plot as per the Geomeasure plan was parcel 603 while as per the balloting plan it was parcel 45.

19. In my view this clearly confirmed that this was a case of double allocation. During trial it came out that the Respondent was allocated the suit parcel in 2005 and the 1<sup>st</sup> appellant was allocated the suit parcel in 2012.

20. **In Gitwany Investment Ltd vs. Tajmal Ltd & 3 Others, Nairobi HCC No.1114 of 2002**, the Court relied in the words of the Court of Appeal in **Wreck Motors Enterprises..Vs..Commissioner of Land C.A No.71/1997** where it was held that:-

***“.....like equity keeps teaching us, first in time prevails so that in the event such as this one, unlike by mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity”.***

21. I am therefore inclined to find that the respondent was the one entitled to the suit property since his allocation came about years earlier before that of the appellants.

22. The court has further established that the respondent gave a plausible account as to how he came to be given the land. He was in the list of other persons who had been affected by the Isiolo airport project and his name is number 45 in that list. The appellants do not have a tangible history of why and how they were being given the land by the county council.

23. Finally, it has emerged that respondent is the one who was in possession of the suit plot until that time in the year 2013, when the fence was uprooted. The 2<sup>nd</sup> appellant was rather evasive on how and who removed the fence, but her son, 1<sup>st</sup> appellant was more forthright as he stated that he was part of the group which removed the fence. He did so because the fence was on plot 603.

24. As I conclude this matter, I must express my dismay in the manner this appeal has been lodged. The record of appeal is haphazardly prepared with some crucial documents missing. For instance, the witnesses who testified did adopt their statements as evidence in court, but the statement of PW2, Samuel Kaheria and that of DW2, Dennis Mugambi are not in the Record of Appeal. The documents relied on by the plaintiff are in a list to be found on page 20 of the main record of appeal (6 items) but only two documents, the notice dated 24.5.2013 (item 1) and the photograph of the dumped posts ( item 6) are availed in that bundle. The supplementary record of appeal does not contain the rest of the respondent's documents including the report by the clerk of the county council of year 2005 containing particulars of the settlement and balloting plans. This document is however availed on page 58 of the main record of appeal but it's incomplete as the list of beneficiaries has been left out. Another glaring factor is the way the proceedings were bundled in the record of appeal. Since I have the original record, I was able to peruse the same to discern the sequence in which evidence was taken whereby pw1 testified followed by pw2, then dw1 and finally dw2. However, the testimony of the witnesses in the record of appeal starts at page 89 somehow going backward up to page 83.

25. All in all, I am in agreement with the decision of the trial court and consequently, I find that the appeal herein lacks merits and is therefore dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given on 25.6.2020 in the presence of counsel for the appellant. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**