



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 5 OF 2018

KENNETH LITSWA.....APPELLANT

VERSUS

NATIONAL HOUSING CORPORATION

VIHIGA MUNICIPAL COUNCIL.....RESPONDENTS

JUDGEMENT

The appellant being aggrieved by the judgement of Hon. J.O. Orwa in Vihiga Principal Magistrate's Court Civil Case No. 85 of 2011 delivered on 3rd July 2018 appeals against the said decision on the following grounds;

1. The trial magistrate erred in law and fact in failing to appreciate that there was no notice to have the plot in issue repossessed by the 2nd respondent.
2. The trial magistrate erred in law and fact in failing to appreciate that the appellant had been allocated the plot in issue and had been allowed to carry out developments and was repaying the amount as per the terms and conditions of the allocation.
3. The trial magistrate erred in law and fact in failing to appreciate that the 1st respondent was an employee of the 2nd respondent and the two conspired to defraud the appellant of plot No. 1 USAID situated at Mbale Town.
4. The trial magistrate erred in law and fact in failing to appreciate that the 1st respondent had conflict of interest in the said plot as he was an employee of the 2nd respondent.
5. The trial magistrate erred in law and fact in finding that the 3rd respondent was not the custodial of the land in question.
6. The trial magistrate erred in law and fact that the plot was lawfully repossessed when there was no evidence at all.
7. The trial magistrate erred in law and fact in holding that the appellant had not complied with the terms of offer and was in arrears, when the court ought not to do so, as doing so made the court to enter the arena of litigation when it was not a party to the suit.
8. The trial magistrate erred in law and fact in failing to appreciate that the 1st and 2nd respondent never gave any evidence to controvert the plaintiff's case.
9. The trial magistrate erred in law and fact in failing to appreciate that the 1st respondent had two appointment letters for the same plot, no proof of payment or title.
10. The trial magistrate erred in law and fact in failing to appreciate that the allegation by the 2nd respondent that title was processed during the pendency of the suit was a clear indication of conspiracy and fraud on the part of the 1st and 2nd respondents to grab the said plot.
11. The judgment was against the weight of evidence on record.

The appellant prays that the appeal be allowed, judgment be set aside and the appellant case be allowed as prayed in the plaint.

The appellant submitted that it was clear from the evidence that both the appellant and the 1st respondent were allocated the plot in issue

albeit at different times. From the time of the reallocation up to the time this suit was instituted, both the appellant and the 1st respondent had equitable interests to the plot in issue. Had that status quo been maintained, the first interest in time (the appellant's) would have prevailed. That processing the title during the pendency of the suit was a ploy by the 1st and 2nd respondents to defeat the appellant's claim. They referred to the case of *Rose Wakanyi Karanja & 3 Others* (suing as the legal representatives of the Estate of the Late Walter Karanja Muigai) vs. *Geoffrey Chege Kirundi Civil Appeal No. 172 of 2010*, where the court observed that parties should not deal with the suit property when it is the subject of contentious litigation pending in court. The court referred to the case of *Bellamy vs. Sabince IDeG & J 566* where it was held that;

“expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party”

They submitted that the judgment was against the weight of the evidence on record. The appellant's evidence on having been allocated the plot in issue, being allowed to develop it and having complied with the terms and conditions of the tenant purchase scheme remained uncontroverted. That the joint statement of defence contains mere denials. At the hearing, the 2nd and 3rd respondents did not give any evidence in rebuttal of the appellant's case and as such, it remains undisputed and/or unchallenged. That when the evidence adduced by the appellant is balanced against that adduced by the respondents, the trial court's judgment in favour of the respondents cannot be supported. The inferences drawn based on the evidence therein cannot be justified.

That this is a first appeal, it is therefore the duty of this court, imposed by law, to evaluate afresh by way of a retrial, the evidence recorded before the trial court in order for it to reach its own independent conclusion. The principals within which the court acts in a retrial were set out in *Selle & Another vs. Associated Motor Boat company Limited & others (1968) 1 EA 123* as:-

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions. Though it should bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

They submitted that the court erred both in law and fact in not allowing the appellant's case as had been prayed in the plaint.

This court has considered the appeal and the submissions therein. The respondents were served but failed to file any response. PW1 the appellant testified in the trial court that he had been allocated the plot in issue and had been allowed to carry out developments and was repaying the amount as per the terms and conditions of the allocation. That the 1st respondent was an employee of the 2nd respondent and the two conspired to defraud the appellant of plot No. 1 USAID situated at Mbale Town. That there was no notice to have the plot in issue repossessed by the 2nd respondent. The appellant produced a letter of offer and approved building plans from the 3rd defendant. Also annexed in his affidavits were a few receipts of payment to the 2nd and 3rd defendants. No evidence has been adduced to prove that the appellant was upto date with his repayments. Indeed I concur with the trial magistrate when she stated that;

“.....even if the court were to deem the receipts annexed to the plaint or affidavit dated 29.1.2013 filed in court on the 15.11.2011 and 31.1.2013 respectively as evidence of payment by PW1 he had paid a total of kshs 17,100 to the 2nd and 3rd defendants as at 11.10.2005 at the close of the proceedings there is no prima facie proof that at the time of repossession of TP plot 1 USAID on 1.4.2011 by 2nd defendant PW1 had fully complied with the terms of offer dated 6.5.1994.”

Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya) provides that:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

There is the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence this was held in the case of *Isca Adhiambo Okayo vs Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 (2016) eKLR*. This is found in **sections 109** and **112** of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

In law he who asserts must prove. In the case of *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR* the court held as follows;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

In **William Kabogo Gitau vs. George Thuo & 2 Others** (2010) 1 KLR 526 the court stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

This being the first Appellate Court my duty is to re-evaluate the evidence, assess it and come to my own conclusion bearing in mind the fact that I did not have the opportunity of seeing or hearing witnesses who testified at trial. This was so in the cases of **Selle vs. Associated Motor Boat Company Ltd (1968) EA 123** and **Williamson Diamonds Ltd vs. Brown (1970) EA 1**. **DW1 testified that in 2010 he saw the suit house advertised in the newspaper and that the plaintiff had arrears of Kshs. 277,000/=.** He made an application, received an offer and paid the purchase price of Kshs. 330,000/=. He entered into a sale agreement with the 2nd defendant and received an allotment letter. He received rent for two years until 2014. DW1 produced all the relevant documents. I find that he is a bonafide purchaser for value. I find that the appellant failed to prove his case on a balance of probabilities. I see no reason to interfere with the decision of the Trial Magistrate. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 16TH DECEMBER 2020.

N.A. MATHEKA

JUDGE