



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELCA NO. 34 OF 2015**

**ABDIA DABASO.....APPELLANT**

**VS**

**SANGAB KALICHA HUKA.....RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the decision and Judgment of the Chief Magistrate's Court at Isiolo by Hon. Irura – SRM delivered on 22/6/15 in Isiolo CMCC NO. 19/13.

2. The grounds of the appeal are summarized as below:-

- a. The learned trial Magistrate erred in law and fact in declaring that the land parcel described as plot No.5 ZONE 'B' Destiny (residential) Kiwanjani in Isiolo County belongs to the Respondent when there was no such evidence tendered before Court.
- b. The learned trial Magistrate erred in law and fact in failing to consider the evidence tendered by the Appellant as to the ownership, possession, occupation and use of the said plot No.5 zone 'B' Destiny (residential) Kiwanjani in Isiolo County.
- c. The learned trial Magistrate misdirected herself into arriving at a decision and judgment that is obviously against the weight of evidence tendered at the hearing.
- d. The learned trial Magistrate misdirected herself into considering extraneous issues which were not raised before her and arriving at a wrong and erroneous decision and judgment.

3. The honourable Magistrate decreed and ordered as follows: -

- a. That an order be and is hereby issued for eviction of the Appellant from the suit plot No.5 zone 'B' Destiny (residential) Kiwanjani in Isiolo County.
- b. That an order be and is hereby issued directing the Appellant to remove all the structures illegally constructed on the Plaintiff's plot.
- c. That the Respondent be and is hereby awarded costs of the suit.

4. Brief facts of the case before the trial Court were that the Respondent through a plaint dated 24/5/13 sued the Appellant seeking eviction orders against the Appellant and removal of all structures erected by the Appellant on parcel of land described as plot No.5 Zone B Destiny (residential) Kiwanjani in Isiolo County herein referred to as the "suit premises", mesne profits and general damages for trespass.

5. The Plaintiff's case was that she was the rightful allottee of the suit premises having been allocated the same in the year 1993 after successfully balloting for it and was issued with an allotment letter dated 21/1/93 which she produced as exhibit 1. She claims to have paid for the plot but misplaced the receipt and avers that records were retained by the County Council from which she requested for a printout and produced as exhibit 3. She also produced a newspaper extract dated 25/8/95 in which the County Council had published debtors who had land rent arrears with her name listed there under against the suit premises as exhibit 2. She claims to have paid rent arrears totaling to Kshs.25,840/=. She claims to have later learnt in 2012 that someone had encroached on the suit premises and constructed a school thereon. She then went to the County Council officers and complained and the Appellant who is the owner of the school was summoned vide a letter produced as exhibit 5 at their county offices whereupon she asked for time to bring her documentation in proof of her ownership of the suit premises but she never returned. She also identified and produced a plan showing where the suit premises are situated as exhibit 6. Her testimony was consistent through cross examination save for that she didn't know the exact measurements of the suit premises and did not know who had put out the ballot Notice. She claimed that the husband of the Appellant came to Mombasa one time to request her if she

would be agreeably to forfeit her parcel of land to them and be given an alternative parcel of land.

6. The Defendant/Appellant in defence contended that the suit premises was allocated to her after she applied for it in the year 1990 for purposes of constructing a school. She claims that her application was allowed on the 3/10/90 by the County Council of Isiolo and minuted under minute 8/90 which was referenced as lands for various projects and produced minutes for the full council dated 3/10/90 marked as Dex-1. She claims to have been later issued with an allotment letter dated 21/1/93 in her name which she produced as Dex-2. She averred to have constructed a one timber house on the suit premises in 1993 then added 2 more rooms on the said plot in 1997 and started living there. That she later in the year 2010 constructed a school. She produced documents for the registration of the school. She claims to have met the Respondent in the year 2012 when the Respondent came to her school claiming ownership of the land. The Appellant claims to have informed the Respondent that she too had documents of ownership and had lived on the suit land for long. That she was later on 20/5/13 summoned through a letter to the County Council offices on 23/5/13. On arrival she met the Plaintiff/Respondent with another person namely Abdikadir who had only carried some newspaper extract. She claims to have left her copy of the allotment letter at the County offices and suspects that the allotment letter produced by the Respondent in Court was a carbon copy manipulated from her original letter she had left behind at the county offices. She further testified that at the time she supposedly applied for the plot she was aged 21 years and a student at a teacher's training college.

7. It is only the Respondent and the Appellant that testified before the trial Court.

8. The Appellant in her submissions faults the trial Magistrate for making a verdict that the Respondent was the rightful owner of the suit premises while both the Appellant and Respondent presented before the trial Court allotment letters all issued in the year 1993. She is of the view that there was no sufficient evidence presented by the Respondent to support a verdict in her favour. She also faults the Magistrate for failing to pay attention to her evidence of being in actual possession and use of the suit premises for a long period and making substantial developments thereon including constructing a school that has been allegedly in operation for over 10 years.

9. The Respondent was initially represented by the firm of Charles Kariuki & Company Advocates thereafter the firm of Ndubi Ondubi & Associates and on the 17/10/18 the firm of Kaume & Co Advocates filed a notice of appointment on behalf of the Respondent but did not file any submissions despite directions issued by the Court on the 18/10/18. By the time of writing this judgment only the Appellant had complied with the directions.

10. This being the first appellate Court my role will be to re-examine the evidence placed before the trial Court and see if I would have arrived at a different verdict, however I must take into account that the trial Court had the opportunity to examine and assess the witnesses appearing before it, which advantage I do not have.

11. This case relates to two competing interests of ownership over one plot (Plot 5 Zone B-Kiwanjani , Isiolo County Council, (as it was then called). Both the Respondent and the Appellant are staking claim to the land by way of allotment. Both have presented allotment letters with exactly the same details in form of land reference, size, tenure, date of allotment, payments in terms of stand premiums and other disclosed payments, terms and conditions with the exceptions of the names of the parties in this suit. This Appeal will therefore turn on prove of ownership based on documentary evidence.

12. The two letters of allotments being wielded by the parties are expressed to be issued as follows;

“This letter of allotment is subject to, and the grant will be made under the provisions of the Government Lands Act, ( CAP 280 of the revised edition of the laws of Kenya) and title will be issued under the Registration of Lands Act CAP 281”.

13. I have reviewed the relevant sections of the two Acts and under Section 9 of Government Lands Act (GLA) (now repealed), the Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner. The GLA provides the manner in which the allocations are done, the terms and conditions including covenants on construction of the plots, payment of rents and land rent to the Commissioner of lands and the local authority to which the plot is situate. Further provisions are given under section 69 – 77 of GLA in respect to implied covenants and conditions attached to the allotment of plots by the Government being the head lessor.

14. Similarly, the Registration of Lands Act Cap 281 (now repealed) provided for the mode of registration of lands under sections 20-24. This includes land allocated by the Government to an allottee and provides the requirements the allottee must meet so as to satisfy the registration of the land in the allottees' name.

15. Allotment of land between the Government or local authority for that matter takes the form of a contract. The allottee applies for the land and if he meets the set requirements, the Commissioner of Lands issues a letter of allotment which is an offer detailing the nature of the land, user, tenure, consideration in form of stand premium and other outgoings, covenants including default and or non-compliance of the said covenants. If the allottee is happy with the terms he accepts in writing and encloses the disclosed payments to the Commissioner of lands who then will facilitate the survey of the plots (if unsurveyed) and final issuance of titles.

16. Having laid the background, I will then delve into the issues that in my view will dispose of the appeal.

17. I have reviewed and carefully considered the pleadings of the parties, the witness statements and the evidence tendered at the trial. I have also looked at the detailed judgment of the honorable trial Magistrate and the reasons given thereunder for his verdict. I have also looked at the grounds of appeal as stated in the Memorandum of appeal which can be summarized as; whether the trial learned Magistrate based his decision arrived in the judgement delivered on the 23.5.15 on the evidence presented before him. The Court will also look at the twin issue of whether the Respondent proved her ownership of the suit land.

18. The learned trial Magistrate framed the following issues in his judgement; who is the rightful owner of the plot; would the Appellant be evicted; is the Respondent entitled to mesne profits and general damages; who meets the costs of the suit. In his judgement he based his decision on a number of grounds; he faulted the evidence of the Appellant that she got allocated the plot at 21 years whilst still a student. Evidence before the trial Court showed that she was allocated the land at the age of 21 years. There was no challenge on this evidence by the Respondent and even if there was, I find nothing legally wrong in a person who has attained the age of majority (contractual age) in being allocated land. In my view this was a non-issue and I find that the trial Magistrate fell in error in basing his decision on this.

19. The trial Magistrate found in evidence that the Respondent paid rates to the council and even though she stated that she had lost the receipts, she produced in evidence. The Respondent's name appeared in the list placed in the newspaper of defaulters but the name of the Appellant was missing. He placed reliance on the newspaper. In the said newspaper the allottees of plots were asked to attend to the offices of the council with their proof of ownership, payment receipts so that their plots may be registered in the register. The advert was carried out in the Kenya Times Newspaper of 25/8/95. It gave the plot allottees a deadline of the 25/9/1996 within which time they were to comply. The learned trial Magistrate was right to hold that the name of the Appellant was missing on the list of defaulters which cast doubt as to whether she indeed owned the plot.

20. I have evaluated the evidence and I have seen on record a document presented by the Respondent in evidence receipt dated the 24/2/2010 in the sum of Kshs 25,840/- received from the Respondent by the County Council of Isiolo (receipt No 3120470) in respect for stand premium, for 1993-2006 and 15% penalty all totaling Kshs 25,840/-. The amount of stand premium is Kshs 5600/- expressed in the letters of allotments given to the two parties in the appeal. In addition, the Respondent presented a receipt of payment of rates in the sum of Kshs 7425/- to the county council of Isiolo in Dec 2012.

21. The documentary evidence produced by the Respondent included the allotment letter in her name, a print out of payments done by the list of allottees from the County Council, a Kenya Times Newspaper extract with a list of debtors with land rent arrears with her name against the suit premises. In those two lists the name of the Appellant is missing. A complaint letter from the Isiolo County Council addressed to the Appellant and a plan showing the location of the suit premises. She also claimed to have paid land rent totaling to Ksh.25,840/=. I find that the respondent's evidence of ownership is properly corroborated in form of documentary evidence. I also note that she moved with speed to institute her claim against the Appellant when she learnt of the encroachment.

22. The Appellant produced the allotment letter and the minutes of the County Council. She claims to have been paying the land rent for the suit premises since the year of allotment but she produced no receipts of the said payments. I note that her name is missing from the Newspaper extract in respect to the suit land or any other plot. She explained that when she was summoned to the county offices she went with her allotment letter which she left there and suspects that the Respondent made a carbon copy of the same and later manipulated it. The Appellant does not say when she ever went back for her original allotment letter from the county offices if at all. I consider that to be a weighty issue that would have caused the Appellant to ensure she presented weighty evidence before the trial Court in order to corroborate her documentary evidence. The Appellant ought to have produced evidence of the alleged payments from the County Council even if in form of duplicates or even called an official from the Council to testify in her favour. The Respondent was categorical that the Appellant never came with any documents in prove of her ownership at the County Council's offices when she was summoned. The question then is where then did she find the allotment letter thereafter? She also does not state if at all she showed the Respondent her documents of ownership while the Respondent visited her at the school claiming ownership.

23. There is nowhere in the evidence that the Appellant demonstrated any payment of the plot to the allotting authorities, neither did she demonstrate payment of rents or rates for the plot. The county of Isiolo should have been summoned to explain the circumstances of allotment letters in respect of one plot issued to two persons (if indeed they were issued). During the proceedings the Advocates for the parties applied for witness summons against the County Secretary of the Isiolo County to testify but it would appear that it was not followed through.

24. The Court agrees with the trial Magistrate that the Respondent proved ownership of the plot by the allotment letter, the payments made thereof and also her name appearing in the list of defaulters posted by the County Council. The actions of the Respondent are consistent with Para 14 above. It is prima facie evidence of ownership of the land.

25. The appellant has raised issues with the failure on the part of the trial Court to pay attention to the fact that she was in occupation of the suit premises. According to her evidence she took possession of the plot in 1993 and built one room and started living in it. In 1997 she testified that she added two more rooms and in 2010 she constructed a school on the plot. The Respondent challenged this evidence and stated that she was informed by her sister that the Appellant started encroaching on her land in 2010. She took steps by reporting the complaint to the county offices whereupon the county summoned the two parties on 20/5/2015 for a meeting scheduled for the 22/5/15. The fact of the period of occupation and possession of the Appellants plot was not proved in evidence. She did not call any witnesses. I have noted that she did not file any counterclaim in her statement of defense to claim any prescriptive rights or any rights related to possession of the plot. The trial Magistrate cannot be faulted for not finding for the Appellant based on the alleged occupation of the plot which claim was not pleaded. It is trite law that parties are bound by their pleadings.

26. I do not find that the Appellant has provided sufficient reasons to interfere with the findings of the trial Court. The appeal is not merited. It is dismissed.

27. The Appellant shall pay the costs of this appeal as well as the lower Court case.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MERU THIS 8<sup>TH</sup> DAY APRIL, 2019.**

**J G KEMEI**

**JUDGE**

**In presence of;**

C/A Mutwiri

Ms. Mbijiwe for Appellant

Maheli holding brief for Ndubi