

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELC CASE NO. E014 OF 2024

GAUDENSIA MSHAI FUMBU.....

APPELLANT

=VERSUS=

HUSSEIN IBRAHIM

COUNTY EXECUTIVE MEMBER FOR LANDS -

TAITA TAVETA COUNTY

RESPONDENTS

JUDGMENT

Introduction

1. This is an appeal arising from the judgment of **Hon. A. M. Obura (Mrs.) CM** delivered on 23rd May 2024 in respect to **Voi CMC ELC Case No. 1 of 2021 Gaudensia Mshai Fumbu =Versus= Hussein Ibrahim and County Registrar of Lands Taita Taveta** where the Learned magistrate dismissed the Appellant's suit and allowed the 1st Respondent's Counterclaim declaring the 1st Respondent as the owner of the suit parcel Plot No. 32 Voi.

The trial court also directed the Appellant to bear costs of the suit.

2. The Appellant being dissatisfied with the judgment filed the present appeal challenging the trial court's finding on ownership of the suit property and evaluation of evidence.

Directions on Disposal of the Appeal

3. The Appeal was admitted for hearing on 21st January 2026. The court directed that the same be canvassed by way of written submissions. Timelines were given to both parties to file and exchange written submissions. The matter was later reserved for judgment but as at the time the Court retired to write its judgment, none of the parties had filed written submissions in compliance with the Court's directions.
4. Be that as it may it is noteworthy that failure to file written submissions is not fatal to the appeal. Written submissions are merely meant to assist the Court in crystallizing the issues and appreciating the parties arguments. However, submissions are not evidence. They are merely arguments based on record.
5. In the case of **Wreck Motor's Enterprises =Versus= The Commissioner of Lands & Others (1997) eKLR**

the Court of Appeal emphasized that the duty of a Court is to determine disputes based on the pleadings and evidence placed before it.

6. Similarly, in the case of **Daniel Toroitich Arap Moi =Versus= Mwangi Stephen Muthui & Another (2014) KLR**, the Court of Appeal held that submissions cannot take the place of evidence and that a Court may determine a matter on the basis of the record even in the absence of submissions.

7. This Court is also guided by **Article 159(2)(d) of the Constitution** of Kenya which enjoins this Court to administer justice without undue regard to procedural technicalities. Accordingly, the failure by the parties to file written submissions does not automatically render the appeal abandoned. This Court shall proceed to determine the appeal on the basis of the Record of Appeal and the applicable provisions of the law.

Duty of the First Appellate Court

8. **Section 78(2) of the Civil Procedure Act** and **Order 42 Rule 32 of the Civil Procedure Rules** mandates this court sitting as the first Appellate Court to evaluate the evidence afresh and make own conclusions albeit bearing

in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. This was also the position taken in **Ciero & Another -vs- Njanja & Others Civil Appeal 111 of 2022 [2025] KECA 1541 KLR (3rd October 2025) (Judgment)**, where the court stated that the mandate of the appellate court of first instance is to analyze and re-assess the evidence on record and reach its own conclusion also noting the holding in the case of **Gitobu Imanyara -vs- Attorney General [2006] eKLR**, that it has to give credit to the trial court, which saw and heard the witnesses testify.

Analysis of the Parties evidence before the lower Court

9. It was the Appellant's case before the lower court that she was allotted Plot Number 32 Voi sometimes in 1994. She made all the requisite payments and followed up with the Ministry of Lands Offices at Wundanyi for issuance of the title documents for the plot. Sometimes in May 2016, she visited the suit plot and was shocked to learn that the 1st Appellant was constructing on her land without her

consent. She then filed a suit vide her plaint dated 18th May 2016 seeking the following reliefs:-

(a) Vacant possession of Residential Plot No. 32

Voi.

(b) An order of injunction restraining the Defendants, either by themselves, their employees and any other person on their behalf whomsoever and howsoever from alienating, selling, entering into, trespassing into, constructing on, dealing in any way whatsoever and howsoever with Residential Plot No. 32 Voi.

(c) Costs of and incidental of the suit.

10. During trial before the subordinate court, she testified as the sole witness in support of her case. It was her testimony that she was issued with an allotment letter and made payment of Kshs. 19,690 and subsequently continued paying annual rates of Kshs. 2,400/= . Later in 2014 when passing by the property, she saw a building under construction and on inquiring who was responsible for the same, she noted that it was the 1st Appellant. She later complained to the lands office in Wundanyi and NLC and both parties were directed to avail their documents of

ownership for verification. The 1st Appellant never availed any documents and the lands office confirmed that the same belongs to her. She also produced several documents during her evidence in chief including the following; letter dated 19th March 2019 to NLC, payment slip to KRA dated 3rd March 2023 among others.

11. On cross-examination, she stated that she does not know the 1st Appellant. Verification of the plot was done sometimes in 2015 before she started paying land rents. She was not aware of any title deed issued in respect to the same. She was requested to take alternative land.

12. When re-examined, she stated that she was given an allotment letter in Nairobi and all her documentation transferred to NLC Wundanyi office. She also stated that she wrote to NLC Wundanyi office seeking to know who between her and the 1st Respondent owns the land but no response was received. She also stated that she only started paying rates after verification. She was not shown any title and neither has she seen any documents from the 1st Respondent.

13. The 1st Respondent filed a Statement of Defence and Counterclaim dated 28th October 2016. It was his case

that he bought the suit plot from one Hassan Huri Ibrahim who had purchased it from Sorofina Mwamburi Mkawughanga. He denied trespassing upon the Appellant's property and maintained that he did due diligence before purchase. The Appellant's name never featured anywhere. He also denied any fraud and sought for the dismissal of the suit. He sought the following reliefs in his Counterclaim:-

- (a) A declaration that unsurveyed residential Plot No. 32 Voi Municipality measuring approximately 0.2 Ha suit property herein belongs to the 1st Respondent.**
- (b) Costs and interest.**
- (c) Such further or other reliefs as the Court may deem appropriate.**

14. During trial before the subordinate court, he testified as the sole witness in support of his case. It was his testimony that he owns the suit property and the same is registered in his name and he produced a copy of title as DExhibit 8. It was also his testimony that he has developed the same, it has a self-contained 2 bedroom house, an extension with one room and guard house. He

also stated that he found the house with the development when he bought it from Hassan in 2014. He has lived there uninterrupted. The Appellant has never been there.

15. When re-examined, he stated that he bought the land in 2014. He had a written agreement. He also saw the letter of allotment from Sorofina who had sold the property to Hassan who later sold to him.

16. He also stated that he has been paying land rates and rent. He acquired title in 2019 though he could not remember when he started paying. he also stated that the property was sold to him for Kshs. 2Million. He denied acquiring the same fraudulently.

17. When re-examined, he stated that his documents were genuine. The property was initially allocated to Sorofina Mkanganga in 1996.

18. From the Record of Appeal, the Learned Magistrate upon considering the evidence dismissed the Appellant's claim and allowed the 1st Respondent's Counterclaim wherein it was held that the 1st Respondent was the legitimate owner of the suit land.

Issues for determination

19. Having considered the entire record of appeal together with the memorandum of appeal and the grounds raised therein, the two issues falling for determination in this appeal are as follows;

(i) Whether the trial court erred in its finding on ownership of Plot No. 32 Voi.

(ii) Whether the appeal is merited.

Analysis and determination

20. The record of appeal shows that both parties laid ownership to Plot No. 32 Voi Municipality. The Appellant laid her claim on the basis of having been allocated a letter of allotment sometimes in 1994 while the 1st Respondent laid a claim vide having purchased the same from Hassan Huri Ibrahim and had a title to the same.

21. It is trite law that It is trite law that he who alleges must prove. This is set out under **Section 107(1)(2)** of the **Evidence Act**, which provides as follows:

“(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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the same Act states;

“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.”

22. Equally a counterclaim just like a suit ought to be proved to the required standard and it is trite law that whoever alleges must prove and equally any party desiring and or seeking any relief before the court must prove that he is entitled to the same.

23. It is settled that whenever a title to property is challenged the owner has to demonstrate how he or she acquired the same and the court must equally examine the root and history of its acquisition. It is not sufficient to merely waive the title and claim ownership of the property in dispute.

24. In respect to allotment letters, the debate pertaining to whether or not a letter of allotment whose terms have not been complied with and or adhered to, survives the expiry of the stipulated timelines was addressed, highlighted, elaborated and settled by the Supreme Court of Kenya being the Apex Court, in the case of **Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment).**

"[58]So, can an Allotment Letter pass good title? It is settled law that an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein..."

25. By dint of the provisions of **Article 163(7) of the Constitution 2010**, which provisions underscores the

doctrine of stare decisis, the decisions of the Supreme Court of Kenya being the apex court are binding on all the other courts save for the Supreme Court itself.

26. In the instant case and from the evidence that was tendered during trial, the Appellant was allotted the suit parcel vide an allotment dated 2nd February 1996. The terms were that she was required to pay Kshs. 19,690 as stand premium within 30 days failing which the offer lapse. From the evidence on record, she made payment of Kshs. 19,690 vide a copy of cheque dated 12th April 1996. This was demonstrated through the receipt dated 22nd April 1996 which was after the stipulated time. In the circumstances the Appellant cannot claim to have any interest on the land which was deemed to have lapsed upon failure to comply with the terms of the allotment.

27. Notably, once the terms of a letter of allotment are not complied within the stipulated timelines, like in the instant case by the Appellant, the same lapses and becomes extinct. Subsequently, the allottee cannot purport to act on the basis of a dead letter of allotment.

28. Pertinently, the position as pertains to the fate of a Letter of allotment whose terms have not been complied

with is now settled to the effect that such Letter of allotment is rendered otiose.

29. The 1st Respondent was able to tender evidence that he had a title to the suit property. The property was transferred to him on 14th August 2019 vide a transfer dated 29th July 2019.

30. In the circumstances it is the finding of this Court that the Appellant's claim before the trial court was not proved to the required standard. Upon re-evaluating the evidence on record, this court finds no error in the trial court's conclusion that the 1st Respondent had established a better claim to the suit property. The Appellant has not demonstrated that the trial court misdirected itself on the law or facts or that it considered irrelevant matters or failed to consider relevant ones. The appeal therefore lacks merit.

31. In respect costs, it is trite law that costs follow the event and awarded to the successful party unless otherwise stated by the Court. In this particular matter, while the 1st Respondent is the successful party, he never filed any submissions in respect to the appeal and in the

circumstances the court directs each party to bear own costs of the appeal.

Conclusion

32. In the premises and for the reasons alluded to, the final orders that commend themselves to the court are as hereunder:-

- (i) The Appeal be and is hereby dismissed.**
- (ii) The judgment of the trial court and the consequential decree arising therefrom be and is hereby affirmed.**
- (iii) Each party to bear own costs of this Appeal.**

It is so ordered.

**Dated, Signed and Delivered in Virtually at Voi this
5th day of March 2026.**

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Maveke h/b for Mr. Akida for the Appellant.

Mr. Omollo for the 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant: Mary Ngoira.

ORIGINAL