REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 206 OF 2012

ALEX KIHONGE MUKOMA.....APPELANT

VERSUS

JOSEPH NGUGI MBURU.....1ST RESPONDENT

CHARLES KIRUNDI MAGU.....2ND RESPONDENT

PETER MUNGAI KAGOIYA.....3RD RESPONDENT

(Being an appeal against the judgment of Honourable Teresia Matheka, Senior Principal Magistrate, Nyahururu, delivered on 31 October 2012 in Nyahururu PMCC No. 196 of 2001)

JUDGMENT ON APPEAL

(Suit by appellant claiming that the respondents have encroached into his plots within a township; appellant having been allowed a licence by the Government to occupy the said plots; respondents being issued with allotment letters to part of the appellant's licenced plots and encroaching into them; trial magistrate being of the view that the allotment letters superceded the appellant's licence; appellant's occupation based on an approved plan of 1965; respondent's allotment letter based on a latter plan but no evidence that the said plan passed through the approval process required under the Physical Planning Act; wrong for the new plan to superimpose plots on an already existing and approved plan; new evidence introduced on appeal showing that the appellant has title to the suit plots and a Registry Index Map showing that the survey plan tallies with the appellant's ownership of the suit plots; declaration issued that the respondents have encroached into the appellant's plots and orders of vacant possession or eviction issued; confusion caused by Government departments thus no order on costs made)

1. The judgment contested in this appeal was delivered on 31 October 2012, and this being a first appellate court, I have a duty to make an independent assessment of the pleadings and evidence, and determine whether the trial magistrate came to a correct finding.

2. The appellant, as plaintiff, commenced this suit by way of a plaint filed on 27 July 2001. In the plaint, the plaintiff pleaded that he is the registered proprietor of the Plot Numbers 136 and 137 within Kangui Township, Nyandarua District. He pleaded that in the year 1996, the respondents (the defendants in the suit), trespassed into his said plots and illegally constructed some structures. In the suit, the appellant sought for orders of eviction of the respondents from the said Plots Nos. 136 and 137; a permanent injunction to restrain them from the said Plots; general damages for trespass; mesne profits; costs and interest.

3. The respondents filed a joint statement of defence vide which they denied having trespassed into the appellant's said Plots of land. They indeed contested that the appellant is the registered proprietor of the two Plots in issue. It was pleaded that the 1st respondent is the sole allottee of the Plot Numbers K23 and K24 in Kangui Township; that the 2nd respondent is the sole allottee of the Plot Numbers K19 and K20; and the 3rd respondent, the sole allotee of the Plot Numbers K17 and K20; which plots, it was pleaded, have no relationship with the Plot Numbers 136 and 137 claimed by the appellant.

4. The appellant's first witness was one Joshua Adem Nyabola, a Government Surveyor based in Nyahururu. According to him, the ground had been demarcated following a PDP, and the respondents had fenced the plots K17 to K20, which effect was to encroach on the appellant's Plot No. 136 by about 8 metres. He prepared and produced a report which noted his findings. In his evidence, the appellant testified inter alia that he got an allotment letter for the Plot No. 137 in 1978 and purchased the Plot No. 136 from the previous allottee, one Njenga Gatimu, in 1985. He produced what he believed to be the letters of allotment as exhibits (although they were in fact Temporary Occupation Licences) . He was shown the plots on the ground and he took possession and paid land rates every year. He produced the land rate receipts as exhibits. He stated that he enjoyed vacant possession until the year 2001 when the respondents encroached and erected temporary structures. He testified that he is awaiting titles to the plots.

5. For the respondents, the first respondent testified that he owns the Plot No. K24. He mentioned that in the year 1990, the Provincial Commissioner came to Kangui Secondary School, and ordered its expansion, which meant a relocation of those who owned the plots neighbouring the school. These people were allocated some plots, and since there were extra plots, he and others were allowed to apply for them. He applied for the plot in the year 1992 and was allocated the Plot No. K24. He got a Temporary Occupation Licence (TOL) dated 8 October 1992 and took possession. He testified that in the year 1996, the Nyandarua County Council, wrote a letter to the Commissioner for Lands for them to be considered for an allotment on a long term basis, and the Commissioner acceded to the request, and on 5 December 1996, he was issued with an allotment letter. He stated that the TOL was converted to a 99 year old lease. He produced his TOL and Allotment Letter as exhibits. He stated that he has built his residential house on the plot and this is where he lives. He denied having trespassed into the appellant's plots and stated that they are not even neighbours. Cross-examined, he stated that he was shown his plot in the year 1995 by officers from Nyandarua County Council. He accepted that one of the terms of allotment was development within 12 months of the date of allotment, which he did not do. He was also not given a beacon certificate.

6. The second defence witness was Charles Kirundi Magu, the 2nd respondent. He testified inter alia that he was given the Plots No. K19 and K20 by the Nyandarua County Council although the Plot No. K19 is in the name of his wife, one Leah Njeri. He stated that they got the plots after being relocated from near Kangui Secondary School although he did not have any letter of relocation. He testified that they were issued with TOLs in the year 1992, which he produced as exhibits, and he also produced an Allotment Letter for the Plot K-19 dated 5 December 1996, in the name of his wife. Cross-examined, he was questioned on whether he had a beacon certificate but he did not know anything about it. He was not aware of the existence of Plots No. 136 and 137 claimed by the appellant, which he believed did not exist.

7. The third defence witness was the 3rd respondent. He testified that he applied for land to the Council and was allocated the Plot No. K18. He had a TOL dated 8 October 1992 which he stated was later converted into a 99 year tenancy. He produced an Allotment Letter dated 5 December 1996. He stated that he was shown the plot by the County Council Surveyor and took possession in the year 1995. He later constructed a residential house. Under cross-examination, he stated that he was allocated the plot in the year 1995 and that he also owns the neighbouring Plot No. K17, which he said that he purchased later.

8. DW-4 was one Mutahi Wa Wahiu, a surveyor of the County Council of Nyandarua. His evidence was that in the year 1991 Kangui Secondary School sought extension by approximately 4 acres into Kangui Township. It was then decided, that the persons resident there, would be compensated by land elsewhere in the Township. The District Planner was mandated to come up with a PDP for an alternative site for these person to be relocated and this was done. Plots were then allocated through TOLs by the County Council of Nyandarua. He stated that the respondents were affected by the relocation but not the appellant. The allottees later applied to have their TOLs converted into long term leases, and their applications were allowed, and he stated that the Commissioner of lands has converted their TOLs into long term leases of 99 years. He testified that the land where they were relocated was vacant there before and that a PDP was done. He testified that the appellant was granted a TOL to grow flowers on 1/2 acre plot but he has not seen the plot under cultivation. He stated that the Government phased out all TOLs in the County in the year 1993 and that a Letter of Allotment is given before the lease is prepared. He produced a letter from the County Council dated 23 November 2011 wherein it was stated that the Council has no objection to TOLs being converted to 99 year old leases. Cross-examined, he had no document to show that Kangui School sought extension of their land. He also did not have the minutes approving this extension. He however had a PDP to show the extension of the school. He did mention that there before there was a PDP of 1965 and stated that a new PDP supercedes the previous one. He however did state that a PDP cannot be done on a previous allocation. He acknowledged that the plots in the original PDP were owned by the Government and were Government land and that the Commissioner of Lands had authority to allocate it and gave TOLs. He acknowledged the appellant's TOL as being one of such. He did state that the K-plots were not in the Registry Index Map (RIM) which is amended after issuance of a lease. He testified that the appellant's plots No. 136 and 137 are Government land and that the plots No. 35 and 36 are affected by the K-plots. He did mention that the whole area is settled by the K plots.

9. DW-5 was William Kiprotich Chepkwony, the District Physical Planning Officer of Nyandarua County. His evidence was that Kangui Township was planned in the year 1965 through the Plan No. 50/65/51 approved on 12 March 1966. The parcel numbers go upto 142 and Kangui Secondary School is located in plot No.3. He testified of two PDPs, one of April 1990 (NYA/C50/90/2) for expansion of the school which would affect 26 plots and an open space, and another done on 22 July 1991, for compensation of the 26 affected plots. He did state that these PDPs were however not approved and are therefore not legal documents. The school nevertheless, did take some of the plots, and some people relocated, following the PDPs. He testified that on the basis of a PDP, the Commissioner of Lands issues Letters of Allotment but the Commissioner of Lands cannot issue Letters of Allotment based on an unapproved PDP. He further stated that the PDPs annexed in the respondents' Letters of Allotment, according to the records in his office, are not approved. He did state that the Council could not issue a TOL on Government land which could only be done by the Commissioner of Lands. The County could however do so on Trust Land.

10. In her judgment, the learned trial Magistrate was of opinion that the appellant has not proved that he is the registered proprietor of the Plot Nos. 136 and 137, as in her view, the documents he produced were TOLs which were for 9 months only. She did not believe that these TOLs were elevated to Allotment Letters or Leases. She further held the view that the respondents had produced evidence that their TOLs were elevated into Allotment Letters and they therefore held superior rights to the appellant since he only held a TOL. She however made findings that the litigants were victims of the Government not following the laid down procedures while allocating land and she thought that the parties need to find alternative means to resolve their dispute. She did find that the appellant has failed to prove his case and dismissed his case with costs.

11. In his Memorandum of Appeal, the appellant has raised five grounds being :-

(i) The learned trial magistrate erred in law and in fact in failing to consider, analyse and evaluate the evidence adduced.

(ii) The learned magistrate erred in fact and in law by ruling that the appellant had not proved his case despite overwhelming evidence to the contrary.

(iii) The learned trial magistrate erred in law and in fact by relying on letter of allotment (sic) and disregarding the appellant's allocation and subsequent payment for rent and rate (sic).

(iv) The learned magistrate erred in law and in fact by disregarding evidence of the physical planner.

(v) The learned magistrate erred in law and in fact by making a decision which glorified land grabbers and condemned genuine land owner (sic).

12. The appellant has asked that his appeal be allowed and the judgment of the trial magistrate be set aside and that judgment be entered in his favour as he had prayed in the plaint. He has also asked for costs.

13. Before the appeal could commence, the appellant filed an application inter alia under Section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, for leave to adduce additional evidence. In his said application, the applicant did state that he has additional evidence which was not available for production during trial before the magistrate. The additional evidence was comprised of two leases, and two certificates of leases, to the two plots in dispute; certificates of official search; and the Registry Index Map for Kangui Township. I heard the application and allowed it through my ruling of 27 September 2018. The appellant gave evidence that at the time of trial, the title documents were in the process of being prepared, and that in the year 2013, he obtained the lease and certificates of lease to the two plots. He produced the leases, certificates of lease and official search as additional exhibits. The appellant also called Mr. Joshua Adel Nyabola, the same surveyor who testified at the trial. He produced the Registry Index map (RIM) for Kangui Township. His evidence was that the K plots are physical planning numbers, which are given when a town is planned but before survey is done. A survey plan is then done. He testified that Kangui Township was officially surveyed in the year 2014 and the RIM prepared. He testified that the K plots of the respondents do not exist on the RIM. He mentioned that the PDP which produced the K plots was imposed on an already existing map. His evidence was that the RIM is the superior document to the PDP.

14. Both Mr. Gordon Ogola, learned counsel for the appellant, and Mr. D.K Kaburu, learned counsel for the respondents, filed written submissions which I have considered in arriving at my judgment.

15. I will start my analysis of this appeal, by going back to the prayers that the appellant sought in the plaint. He did aver that he was the proprietor of the Plot Nos. 136 and 137 in Kangui Township, and he claimed that the respondents had encroached into his plots and developed structures. That is why he wished to have them evicted and permanently restrained from the two plots. From the evidence adduced by PW-1 and his annexed report, there can be no doubt that indeed the appellant's plots were partly encroached by about 8 meters from the neigbouring K-plots. The plots that encroached in the appellant's two plots are the plot numbers K17, K18, K19, and K20 which abut the plot No. 136 on one side. The plot No. 137 follows the Plot No. 136 and does not abut the K-plots meaning that the actual encroachment is on the plot No. 136 and not the Plot No. 137. This Plot No. 136 had initially been licenced to one Gatimu Njenga, who transferred his interest to the appellant on 5 August 1985. This is discernible from the TOL to the Plot No. 136 which was produced as the appellant's exhibit number 3.

16. These two plots No. 136 and 137 were fairly old plots as they are recognized in the PDP of 1965 which was produced as an exhibit. The age of the plots is also apparent from the dates in the TOLs, which are of the years 1970 and 1978 respectively, and there is actually no dispute that the appellant had a TOL to the two plots. I have seen from the appellant's exhibit No. 7, a letter dated 6 December 1993, which is a letter from the District Land Officer of Nyandarua/Samburu Districts, over the conversion of the various TOLs granted in Kangui Township. I believe the aim was to convert these TOLs to longer term leases, and among the plots mentioned in the letter, are the Plot Nos. 136 and 137 owned by the appellant. Thus, there was indeed every intention to convert the two plots to a more permanent interest, and I do observe that in his evidence before the trial magistrate, the appellant did state that his titles are under process. It has emerged that he now actually has leases to the two plots and has been issued with Certificates of Leases.

17. There would be no problem with the appellant's two plots if it was not for a new plan to relocate some people who had plots near Kangui Secondary School as there was a proposal to expand the said school. The people who owned these plots had to be moved, and upon being moved, they were allocated the K-plots. Ideally, there would be nothing wrong in this move, only that part of the K-plots, as plotted in the PDP, have encroached into the appellant's plots.

18. It is therefore apparent that what the authorities did, and I am not too clear which authority was most culpable, between the County Council of Nyandarua, the Physical Planning Department and the Commissioner of Lands, was to superimpose some of the K-plots on an already existing survey plan and this is what has led to the encroachment of the appellant's Plot No. 136 by the four K-plots number K17, K18, K19 and K20.

19. After analyzing the original and new evidence, I must conclude that the trial magistrate erred in finding that the respondents had justifiable cause to be on the K-plots that encroached into the appellant's plot No. 136. Although during trial, the trial magistrate thought that the letters of allotment were superior to the TOL then displayed by the appellant, the trial magistrate did not note that the allotment letters were to unsurveyed plots, yet there already existed an approved plan for the area, where the K-plots had been superimposed. The superimposition cannot be said to have been regularly done, because you cannot superimpose one plot on another, unless first, the earlier PDP and survey plan is superceded as required by law. The owners of the K-plots had to undergo a survey process for the dimensions of their plots to be identifiable which the respondents had not done. The respondents having not undergone a survey process, could not therefore assert that they were not illegally on another person's land. They in fact acknowledged that they did not have beacon certificates, and they could not therefore with precision, point to the boundaries of their allotted plots. If they had first asked for a survey to be done before encroaching into the already existing plots, this litigation would probably have been avoided.

20. The allotment letters that the respondents displayed are based on a PDP No. NYA/C50/95/7 which is annexed to the said allotment letters. There would be nothing untoward with this PDP, only that it goes against the 1965 PDP, and there is no evidence that this new PDP went through the process outlined in the Physical Planning Act, before it was put into effect. Under the Physical Planning Act, the planning of Kangui Township would fall under a regional physical plan, given that a regional physical plan is defined in Section 2 of the said statute as *"a plan for the area or part thereof of a county council."* Section 19 of the Act is operative and it provides as follows :-

19. Objections

(1) The Director shall, not later than thirty days after the preparation of a regional physical development plan, notify in writing to the local authority who's area is affected by the plan to make representation in respect of the plan and publish a notice in the Gazette and in such other manner as he deems expedient to the effect that the plan is open for inspection at the place or places and the times specified in the notice.

(2) The notice shall request any interested person who desires to make any representations against, or objections to the plan, shall write to the Director not later than sixty days after the date of the first publication of the notice or such date as is specified in the notice.

(3) The Director may in his discretion accommodate or decline to accommodate such representations or objections to the plan, and in either case, shall within thirty days of his decision, notify the petitioner in writing accordingly, and shall give reasons in the case of decline.

(4) If the petitioner is aggrieved by the decision of the Director he may appeal to the relevant liaison committee under section 13 against such decision and to the National Liaison Committee under section 15 if he is aggrieved by the decision of the respective liaison committee.

(5) A person who is aggrieved by a decision of the National Liaison Committee may appeal against such decision to the High Court in accordance with the rules of procedure for the time being applicable in the High Court.

21. It will be seen from the above that a 30 days notice was required to be made so that any person aggrieved by the proposed new plan would be heard on any objections. I have no evidence of any publication of the Plan used to modify the 1965 physical plan, and which introduced the K-plots. I also have no evidence that the plan for the K-plots was ever gazetted as required by Section 21 of the same statute.

22. Moreover, what the new evidence has revealed is that there has now been done a proper survey of Kangui Township and the appellant's plots are recognized in the RIM. I have taken note of the submissions of Mr. Kaburu, for the respondents, that the lease of the appellant has been fraudulently acquired and that this is now the subject of another case, being Nyahururu ELC No. 298 of 2017. However, what is before me is to determine whether there has been encroachment by the respondents, and I am clear in my mind, that there is encroachment of the plots owned by the appellant. I do not want to want to talk any more of Nyahururu ELC No. 298 of 2017, which is not before me, and I am not moved by the allegations made in that case, for they have not yet been decided.

23. It was in my view wrong for the trial magistrate to give preference to the allotment letters which were pegged on a physical plan for which there was no evidence of proper approval as required by the Physical Planning Act. I therefore fault the trial magistrate for not finding for the appellant, at least in so far as his prayers for eviction and permanent injunction against the 2nd and 3rd respondents, who admitted being in possession of the plots No. K-17 to K-20 were concerned. These plots as I have mentioned before, abut the appellant's Plot No. 136 and there was encroachment by about 8 meters. From the evidence, the 1st respondent is occupying the plot No. K-24, which has not encroached into the appellant's plots, as the said plot does not abut any of the plots owned by the appellant. I do not therefore believe that the 1st respondent had encroached into the appellant's plots in any way. In so far as the encroachment by the 2nd and 3rd respondents is concerned, they have 30 days to remove all their structures (if any) and give vacant possession of the 8 meters or any other portion of the appellant's plot No. 136 that they have encroached. I also issue an order of permanent injunction restraining them from entering, occupying, building or in any other way, making use of the appellant's plots No. 136 and 137.

24. On the orders for mesne profits and general damages made by the appellant, I cannot fault the trial magistrate for not making any award for these, as no evidence of actual pecuniary loss, to provide a basis for the award of mesne profits was led by the appellant. I also do agree with the trial magistrate that the confusion was brought about by Government authorities who ought to have done better than they did in the circumstances of this case, and in my discretion, I opt not to make any award for general damages for trespass. In as much as I am of the view that the appellant must succeed, given that the Government authorities were the genesis of the problem, I am unable to make any award for costs, and each party will bear their own costs of this appeal, and the costs of the trial before the magistrate's court.

25. Having taken all factors into consideration, I now make the following final orders :-

(i) That it is hereby declared that the 2nd and 3rd respondents, as occupants of the Plots identified as K-17 to K-20, have encroached by about 8 meters into the appellant's Plots No. 136 and 137 situated at Kangui Township and now registered as Nyandarua/Kangui Township/136 and 137.

(ii) That an order is hereby issued requiring the 2nd and 3rd respondents to, within 30 days of this judgment, give vacant possession of any area that they occupy, or use, of the appellant's Plots No.136 and 137 now registered as Nyandarua/Kangui Township/136 and 137, and in default, an order of eviction be issued and be executed at the cost of the respondent/s in default.

(iii) That I make no award for mesne profits or general damages for trespass.

(iv) That each party will bear the costs of this appeal and of the trial before the Magistrate Court.

26. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 3RD day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Gordon Ogola for the appellant.

Ms. Nancy Njoroge holding brief for the respondents.

Court Assistant : Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU