



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC. APPEAL NO. 30 OF 2017 (FORMERLY HCCA NO. 146 OF 2012)**

**RICHARD OLOO ONONO.....APPELLANT**

**VERSUS**

**SYLVANUS ODONGO NYAMORI.....RESPONDENT**

**JUDGMENT**

1. Richard Oloo Onono, the Appellant, being aggrieved by the judgment of Hon. P.L. Shinyada, Senior Resident Magistrate, in Kisumu C.M. Civil Case No. 332 of 2011 delivered on the 16<sup>th</sup> November 2012, filed this appeal setting out five (5) grounds on the Memorandum of Appeal dated 10<sup>th</sup> December 2012. The grounds are as follows;

**1. “The trial Magistrate erred in law and fact in holding that the court had the jurisdiction to hear and determine this suit by virtue of Article 162 (2) of the Constitution of Kenya 2010 as read with Section 132 (2) and 30 (1) of the Environment And Land Court Act No. 19 of 2011 and Legal Notice No. 1617 of 9<sup>th</sup> February 2012 and paragraph 7 (1) of the 6<sup>th</sup> schedule to the Constitution of Kenya 2010 and Section 159 of the Registered Land Act Cap 300.**

**2. The trial magistrate erred in law and fact in holding that the plaintiff had proved legal ownership of the suit land and his case on a balance of probability in view of the evidence on record and more particularly in view of the evidence that the council file concerning the issue had disappeared and or that some fishy deals were played by the council officials to allocate the defendant the suit land.**

**3. The trial magistrate failed to appreciate that the suit land being trust land, the plaintiff lacked the necessary locus standi to institute recovery proceedings thereof under the Trust Land Act.**

**4. The trial magistrate erred in law and fact in disregarding established legal precedent that a letter of allotment does not confer on any person land rights capable of protection by way of injunction, eviction or any other relief.**

**5. The trial magistrate erred in law and fact in failing to appreciate that the plaintiff’s claim to the suit land was time barred by virtue of the provisions of the Limitation of Actions Act, premature and untenable by virtue of the provisions of the Trust Land Act.”**

2. The appeal came up for hearing on the 8<sup>th</sup> May 2018 when Mr. Nyanga for the Appellant and Mr. Onyango for Silvanus Odongo Nyamori, the Respondent, made their submissions for and against the appeal. The Learned Counsel’s submissions are as summarized herein below;

**A. APPELLANT CONSEL’S SUBMISSIONS:**

- **That by the time the Respondent filed the suit through the Complaint dated 7<sup>th</sup> September 2011, the trial court did not have jurisdiction. That the trial court ought to have struck out or dismissed the suit.**
- **That the trial court misapprehended the law by accepting the letter of allotment availed by the Respondent, which was not having the document containing the conditions attached, as sufficient proof of ownership. That the trial court failed to note and hold that the Respondent had failed to submit his development plans for approval in six months and commence the development in two years as required.**
- **That as the Appellant had developed the property in 2011 after buying it from Silvanus Odongo Rukiri, who was the genuine owner, then the learned trial magistrate erred to hold that the land belonged to the Respondent.**
- **That as the Respondent had not had a lease over the suit property processed and registered, he had no capacity to**

- file the suit against the Appellant. That the Respondent should have accepted the alternative plot offered by the Council in place of the suit property on which the Appellant had carried out his development.
- That the Respondent was without capacity to seek for injunction orders against the Appellant on the basis of being the holder of a letter of allotment over the suit property. That further, the Respondent only paid the stand premium in 1993 after getting the allotment letter in 1991.
  - That the Respondent's claim was time barred in terms of the Limitations of Actions Act and as no development had been carried out by the Respondent within 24 months, the suit contravened the Trust Lands Act.
  - That the trial court had no jurisdiction to hear and determine the suit filed by the Respondent against the Appellant at the time it was filed.
  - That the trial court's judgment should be set aside with costs and the Respondent's suit dismissed with costs to the Appellant.

#### **B. RESPONDENT COUNSEL'S SUBMISSIONS**

- That in view of the Malindi Court of Appeal decision of 2017 on the Magistrate's jurisdiction, the issue raised on ground one on the trial court's jurisdiction should not arise. That by the time the suit was filed in 2011, the Chief Magistrates court had pecuniary jurisdiction to hear and determine the suit. That the Environment and Land court was only operationalized through the Environment and Land Court Act No. 19 of 2011, that was assented to on the 27<sup>th</sup> August 2011, with a commencement date of 30<sup>th</sup> August 2011. That by the time the suit was filed in September 2012, the Environment and Land Court Judges had not been appointed.
- That the Respondent had capacity to initiate the proceedings against the Appellant as he was the allottee of L.R. 9341/34, Maseno Township, the suit property, and had accepted the offer and paid the rates as demanded. That the Appellant's claim to the suit property is through a sale agreement in respect of Kisumu/Ojola/206 which had discrepancies and alterations on the purchase price.
- That the trial court correctly made a finding that the identity card of the person who sold the property to the Appellant was a forgery.
- That the development on the suit property had not reached the level it is by the time the injunction order was issued. That the Appellant continued with the development in spite of the court order to the contrary.
- That the land having been allocated to the Respondent became private land and the Respondent had capacity to sue on it.
- That the allotment letter conferred the Respondent with ownership rights over the suit property and hence he had capacity to commence the suit over it.
- That the Respondent had been in possession of the property since 1991 and only noted that the Appellant had encroached onto it in 2010. That by the time the suit was filed in 2011, only one year had lapsed since the encroachment and hence cannot be statutory time barred.
- That the failure to comply with the conditions requiring building plans to be approved in six months and development in 24 months are matters that could only have been raised by County Council or Commissioner of Lands and not the Appellant.
- That the County Council had continued to receive rates payments from the Respondent every year. That the appeal has no merit and should be dismissed with costs.

3. The following are the issues for determinations;

**a Whether the trial court had jurisdiction to hear and determine the case.**

**b. Whether the Appellant has established a reasonable case for this court to set aside the trial court's finding in the judgment of 16<sup>th</sup> November 2012.**

**c. Who pays the costs in this appeal.**

4. The court has carefully considered the five grounds of appeal, the submissions by both counsel, the record of appeal, the original trial court record, and come to the following findings;

a. That this being a first appeal, the court is obliged to consider and evaluate the evidence tendered before the trial court and find whether it would have come to a different conclusion. That in doing that, the court is aware that it did not see or hear the parties and their witnesses testify.

b. That the court has perused the trial court's judgment which is between folios 193 to 199 of the record of appeal. That it is clear at page 4 of the judgment, that the Learned Trial Magistrates set out the three broad issues for determination and thereafter proceeded to analyze the facts and the law in relation to each one of them and the court's finding thereof. That as properly held by the Learned Trial Magistrate, the courts before which environment and land related cases were pending before the establishment and operationalization of the **Environment and Land Court had the jurisdiction under Section 22 of the Sixth Schedule of the Constitution on Transitional Provisions and Section 30 of the Environment and Land Court Act No. 19 of 2011**. That pursuant to the said legal provisions, the Chief Justice has issued several practice directions on the matter. That obviously the Respondent's suit against the Appellant having been filed in September 2011 when the Environment and Land Court had not been operationalized fell in the category of the matters to continue being heard and determined before the trial court where it had been filed. That whatever doubts that may have been there on the subordinate court's jurisdiction has now been settled through the enactment of the

Magistrates Courts Act, amendment to the Environment and Land Court Act and the Court of Appeal decision in Civil Appeal No. 83 of 2016. That accordingly, this court finds no merit on ground one of appeal.

c. That grounds 2 and 4 of the appeal are related as they raise the question as to who between the parties is the owner of the suit land. That the court has noted that the Learned Trial Magistrate dealt with the issue of ownership of the plot between pages 5 and 6 of the judgment. The Learned Trial Magistrate considered the evidence tendered by the Respondent and Appellant who had testified as PW1 and DW1 respectively and that of the Council administrative officer who testified as DW2. The Learned Trial Magistrate observed that while the Respondent had produced the letter of allotment to the suit land issued in his favour by the Commissioner of Lands among other documents, the Appellant's claim to the land is a sale agreement which had alterations. That the court further observed that the person who had allegedly sold the plot to the Appellant was not availed as a witness and that the County Council had after investigating the dispute confirmed that the plot had been allocated to the Respondent. The Appellant has faulted the learned trial magistrate for taking the letter of allotment as evidence of ownership of the plot. That this line of attacking the Respondent's claim to the plot on the basis of a letter of allotment is itself self-defeating to the Appellant whose claim to the plot is based on a copy of letter of allotment allegedly handed over to him by the seller, the sale agreement and unregistered application for transfer of ownership in his favour. That in the absence of the testimony of Silvanus Odongo Lukidi, who allegedly sold the plot described in the sale agreement as Kisumu/Ojola/206 while the letter of allotment is for L.R. No. 9341/34 Maseno Township, the Court finds the Learned Trial Magistrate came to the correct conclusion when she found as follows;

**“I am satisfied that the Plaintiff has proved his case on a balance of probabilities that he owns the plot in issue going by the documents he has produced in court. It is crystal clear that the alleged Sylvanus Odongo Lukidi who allegedly sold the defendant the suit plot was either a conman or some fishy deals were played by the Council Officials to allocate the defendant the plot herein. No wonder the said seller could not even be found to tell the court how he acquired the plot in issue and this leaves many doubts as to whether the defendant's seller acquired the plot legally.”**

d. That the suit property was converted to private property the moment it was allocated through the letter of allotment dated 4<sup>th</sup> April 1991. That the offer was accepted and the requisite payments made. That the rates have continued being paid as they became due. That accordingly, the Respondent had the capacity on the basis of the letter of allotment to file suit against the Appellant over the plot described therein.

e. That from the evidence tendered by the Respondent before the trial court and confirmed by the council administrative officer, the County Council of Kisumu recognized the plots allocation to the Respondent. That the County Council of Kisumu who was the lessor had not initiated any steps to revoke the allotment of the plot to the Respondent for failure to comply with any of the conditions on development. That the Appellant has no capacity to challenge the Respondent's right to the plot on the basis of failure to comply with any of the conditions in the letter of allotment.

f. That the evidence tendered before the trial court is to the effect that the Appellant acquired the suit property through the sale agreement dated 14<sup>th</sup> September 2010 and the suit was filed in September 2011. That there is no evidence tendered to suggest that the Appellant had taken possession or occupied the plot before the date in the said sale agreement. That as the Respondent claim that he **“took possession of the plot...”** after it was shown to him by the surveyor was not disputed, then the ground 5 to the effect that the suit was **“time barred by virtue of the provisions of the Limitations of Actions Act”**, fails as the Appellant had only been on the plot for about one year by the time of filing of the suit.

5. That flowing from the foregoing, the court finds no merit in the appeal and the same is dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF OCTOBER 2018**

**In the presence of:**

Appellant Present

Respondent Absent

Counsel Mr. Myanga for Appellant

Mr. Olel for the Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

JUDGE