



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC APPEAL NO. 5 OF 2017

JUSTINE MAWEU MAILU..... APPELLANT

VERSUS

KITHAE WAMBUA.....RESPONDENT

JUDGMENT

1. This is an appeal from the judgement of the learned Principal Magistrate's Court in Makueni PMCC No.100 of 2009 delivered on the 9th October, 2012.

2. In his plaint filed at the Subordinate Court, the Appellant sought the following orders against the Respondent;

a) An order that the Plaintiff is sole proprietor of Emali Market plot number 570 and is solely entitled to possession and occupation.

b) An order that the Defendant, his agents and servants are trespassers to the plot (sic) Emali No. 570 and further order for the Defendant to deliver vacant possession thereof in default to be evicted by court bailiff of the Court at the Defendants costs.

c) General damages.

d) Costs of the suit.

e) Interest of the suit.

3. The Respondent filed his defence where he denied the Appellant's claim.

4. Upon conclusion of the trial at the Subordinate Court, the learned Principal Magistrate in his judgment found in favour of the Respondent. Aggrieved by the judgement of the learned Principal Magistrate, the Appellant filed this appeal where he raised the following grounds:-

That the learned Principal Magistrate erred in law and in fact by holding that the Appellant plot was repossessed by the Makueni County Council and the only remedy the Appellant had was for compensation by the Makueni County Council while it was the Respondent who should have such remedy, that the learned Principal Magistrate erred in law and in fact by failing to hold that the Appellant was the first to be allocated the plot and since the process in accordance with the plot to repossess the plot was not followed, then the first allocation was the only valid allocation and the second allocation was illegal, that the learned Principal Magistrate erred in law and in fact by failing to hold that since the Appellant had developed the plot with the approval of the Makueni County Council, then the said Council could not be allowed to make another allocation to the Respondent and that the first allocation was valid and the second allocation was a nullity, that the learned Principal Magistrate erred in law and in fact by accepting the minutes done by the Makueni County Council wherein the Appellant was not given a chance to defend himself and that the learned Principal Magistrate erred in law and in fact by making a decision that was against the weight of the evidence.

5. I have carefully read the submissions that were filed by the parties herein.

6. This being a first appeal, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect (see **Selle V Associated Motor Boat Co. Ltd [1968] EA 123 at page 126 letter H and Williamson Diamonds Ltd V Brown [1970] EA 1 at pages 15 and 16 letters i to c).**

7. In his evidence before the Subordinate Court, the Appellant who was PW 1 told the Court that plot number Emali Market number 570

measuring 100 x 100 feet was allocated to him by Makueni County Council. He went on to say that he was issued with an allotment letter and that he paid all the necessary fees and rates that were required of him by the County Council. That he was authorized to utilize the plot whereupon he commenced construction of a building. Plans were approved and stamped by Physical Planning Officer and the County Council. That on the 13th January, 2009 he went to the plot and found that it had been divided into two and fenced off.

8. He said that on enquiry, he learnt that the Respondent was claiming the plot to be his. He said that the two plot numbers 483 and 604 of 50 x 100 feet which the defendant claimed to own were not adjacent to his and as such, the Defendant had no right over his property.

9. The Appellant produced receipt No.T378112, a certified copy of the allotment letter, bundle of receipts in respect of rates paid to Makueni County Council as PEX Nos. 1, 2 and 3.

10. In his evidence in cross-examination, the Appellant told the trial court that the plot was allocated and not sold to him, an issue he reiterated in his evidence in re-examination.

11. The Appellant called Musau Kingoo (PW2) as his witness. PW 2 in his evidence in chief told the trial court that he was present when the Appellant was shown plot number 570 Emali by the Council. He went on to say that he dug a foundation all around the plot. That when he went to the plot in January, 2009, he found the plot having been subdivided and fenced off. He said that the Appellant told him that it was the Respondent who had done so. Like the Appellant, PW2 told the trial court that the size of the Appellant's plot was 100 x 100 feet.

12. His evidence in cross-examination was that he was invited to the site when the Appellant was shown the plot as he was an elder and a mason. He said that the Appellant was given the plot by the County Council.

13. On the other hand, the Respondent who testified as DW1 told the trial court that he was given two (2) plots being 483 and 604 by Makueni County Council. He said that there were two applications for the two plots, the first one being his while the second one being that of his wife. He said that the applications were entered in the minutes of Town Planning Committee of 1999. He produced the two applications as DEX Nos.1 and 2 respectively.

14. In his evidence in cross-examination, the Respondent told the trial court that even though in the papers plots numbers 570 and 483 were different, they were the same on the ground. He said that he would have been shocked if the Appellant was still paying rates and had approval for his building plans. He said that he had seen a building on plot number 570 but could not tell if the Appellant had been stopped from building. He reiterated in his evidence in re-examination that plots number 483 and 570 were the same.

15. Robert Mwilu Musyoka (DW 2), the Deputy - County Clerk of Makueni County Council told the trial court that the Respondent was the owner of plot numbers 483 and 604 at Emali Township which were allocated to him by the County Council. He said that the Respondent applied for the two plots and the same were approved by the Town Planning and Markets Committee vide its minutes of 6th November, 1999 which he produced as DEX No. 3 and 4 respectively. He said that on the 26th June, 2000 the Appellant's application for plot of 100 x 100 feet was nullified and proceeded to produce the minutes of 21st March, 2006 as DEX No.7. He said that the legally registered owner of plot number 483 is one Philomena Wambua.

16. DW 2 in his evidence in cross-examination told the trial court that plot number 570 was the site of the registered plot number 483. He said that the Appellant's plot was cancelled on the 13th March, 2003 but admitted that the Council had nothing to show that it revoked the plot.

17. His evidence in re-examination was that there was no plot number 570.

18. In his judgement, the learned Principal Magistrate held that **"it is clear that there were double allocations made by the County Council of Makueni as regards plots and (sic) Emali."** He went on to state that plot known as 570 and 483 fell into the said category and that the former was revoked by the Council. With respect to the learned Principal Magistrate, there was no such evidence before him. DW 2 did not proffer any cogent evidence on double allocation.

19. I am in agreement with the Counsel for the Appellant that the judgement of the trial court is not based on the evidence on record since DW 2 who was the custodian of the records held by the County Council admitted that they had nothing to show that the County Council had revoked the allocation of plot number 570 Emali Market to the Appellant. The Appellant in his evidence before the trial court said that he had his building plans approved by Makueni County Council and continued to pay rates which evidence remained uncontroverted. The appeal by the Appellant must therefore succeed. None of the Counsel herein made any submissions in the lower Court on whether or not the Appellant was entitled to damages. I will say no more on this issue.

20. Arising from the foregoing, I hold that the learned trial Magistrate erred when he made a finding that the Appellant's plot was repossessed by Makueni County Council. In the circumstances, I set aside the judgement of the learned Principal Magistrate and substitute it with an order allowing the Appellant's suit in terms of prayers (a), (b), (d) and (e) of the plaint dated 15th May, 2009. The Respondent shall also bear the cost of this appeal.

21. It is so ordered.

Signed, dated and delivered at Makueni this 12th day of November, 2018

MBOGO C. G.,

JUDGE.

IN THE PRESENCE OF;

Mr. Loki holding brief for Mr. Mulei for the Respondent

Mr. Hassan holding brief for Mr. E. K. Mutua for the Appellant

Mr. Kwemboi – Court Assistant

MBOGO C. G.,

JUDGE.