



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII

APPEAL NO. 126 OF 2014

FRANCIS OBAE MACHOKA APPELLANT

VERSUS

TELECOM KENYA LIMITED RESPONDENT

J U D G M E N T

(Being an appeal from the Judgment and Decree of Hon. S. N. Makila, Resident Magistrate dated and delivered on 13th day of October, 2014 in the original Kisii CMCC No. 660 of 2009)

1. The Appellant herein Francis Obae Machoka was the plaintiff in Kisii CMCC No. 660 of 2009. Telkom Kenya Limited, the respondent herein was the defendant in the suit. In the suit the plaintiff had interalia sought orders as follows:-

(i) A permanent injunction against the respondent in regard to a leasehold unsurveyed plot reference No. TP/37/XV/60 File No. 241827 within Kisii Municipality which the applicant claimed had been allocated to him.

(ii) An order of eviction against the respondent from the said suit plot.

2. The appellant as per the plaint dated 11th November 2009 filed on 13th November 2009 averred he was the allottee of the unsurveyed commercial plot in Kisii and that the respondent on or about October 2009 without his consent or authority entered onto the plot and started excavating and erecting structures thereon precipitating the filing of the suit before the subordinate court.

3. The respondent by a defence dated 2nd December 2009 denied that it had entered onto the appellant's unsurveyed commercial plot and started any excavations and/or erecting any structures thereon as alleged by the appellant. The respondent stated that it was the registered owner of land parcel number **Kisii Municipality/Block III/478** formerly grant No. IRN 2095 and that it was constructing a telephone mast and that the appellant had no proprietary interest in the said plot.

4. The matter was heard before Hon. M. N. Gicheru Chief Magistrate, although the judgment was prepared by Hon. S. N Makila Resident Magistrate. The appellant, Francis Obae Machoka who was the plaintiff, testified and was the sole witness in support of the claim by plaintiff/ appellant in the lower court. A Mr. Godfrey Migwi Theuri testified as the only witness for the defendant/respondent.

5. The appellant testified that in 1999 he applied to be allocated a plot and that he was allocated a plot near Posta building Kisii and was issued with a letter of allotment dated 15th August 1999 and a copy of the allotment letter was marked for identification as **"MFIPI"**. The appellant stated that the original letter

of allotment was lost but that he had paid the sum of KShs. 33,730/00 required to be paid as per the letter of offer. A copy of the receipt was produced as “PEX.2”. The appellant stated that the plot allotted to him was near the post office, Kisii Town and that Telkom Kenya Ltd trespassed onto his plot and started excavating thereon without his consent and/or authority. The appellant testified that a surveyor’s report filed in court had shown that the respondent had trespassed onto his plot.

6. The respondent’s witness Godfrey Migwi Theuri, was the respondent’s property manager before he retired in 2006. The witness testified the portion the plaintiff was claiming was part of the respondent’s parcel **Kisii Municipality/Block III/478** which the respondent had fenced since 1999. The witness averred that the plot the appellant/plaintiff was claiming was not reflected in the Part Development Plan (PDP) produced as “DEx.1”.

7. On 13th October 2014 the trial court delivered judgment holding that the appellant had failed to prove his case and ordered the dismissal of the plaintiff’s suit with costs to the defendant. It is against that judgment that the present appeal is preferred. The appellant has set out 8 grounds of appeal in the memorandum of appeal dated 12th November 2014 and filed in court on the same day. The grounds of appeal are reproduced hereunder:-

1. That the learned Trial Magistrate erred in law in finding and holding that the appellant herein had not laid credible evidence to establish and/ or confirm ownership over and in respect of Plot Reference Number TP/37/XV/60 File Number 241827 within Kisii Municipality (hereinafter referred to as suit plot) contrary to and in disregard of the overwhelming evidence tendered by the appellant.

2. The learned Trial Magistrate erred in law in finding and holding that the failure by the appellant to submit and/ or show the Letter of allotment to the National Land Commission as opposed to the Trial Court, negated the authenticity of the allotment of the suit plot.

3. The learned Trial Magistrate erred in law in failing to take into account and/ or consider the consequence and tenor of a letter of allotment issued by or on behalf of the Commissioner of Land, who is Authorised on behalf of the Government of Kenya.

4. In finding and holding that the Appellant herein had not proved his case on a balance of probabilities, the learned Trial Magistrate ignored, disregarded or failed to consider the Import, consequence and tenor of the Surveyor's report, which had been filed and thereby formed part of the record of the Honourable Court.

5. The learned Trial magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and in particular the evidence by the Appellant and surveyor and thereby the Learned Trial Magistrate reached at an erroneous conclusion contrary to the weight of evidence in the record.

6. The learned trial magistrate erred in law in ignoring, disregarding or failing to consider the appellant's submissions on record. Consequently, the judgment of the learnt Trial Magistrate has occasioned a miscarriage of justice.

7. Owing to the manner in which the Learned Trial Magistrate crafted the judgment, the learned Trial magistrate failed to appreciate the salient features of the Appellant's case. Consequently, the Learned Trial magistrate failed to apprehend the crux of the appellant's claim and there by rendered a perfunctory judgment which has the appellant of his rights pursuant to the provisions of Article 40 of the Constitution 2010.

8. The judgment of the learnt trial magistrate is deficient and does not comply with the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010. Consequently, the judgment rendered by the trial magistrate is invalid.

8. The parties agreed to canvass the appeal by way of written submissions. Both appellant and the respondent filed their respective submissions on 18th January 2016. Broadly, the appellants appeal as can be deduced from the grounds of appeal challenge the trial magistrate's over all evaluation of the evidence and the gist of the appeal is that the trial magistrate failed to properly evaluate and consider the evidence placed before the court consequently leading her to arrive at the wrong findings of law and fact to the prejudice of the appellant. The appellant's contention is that had the learned trial magistrate properly evaluated and appreciated the evidence adduced and the documents tendered in evidence in support of the appellant's case she would have arrived at a different finding and/or decision. The appellant in particular avers that the trial magistrate failed to consider and evaluate the evidence of the surveyor's report which would have led her to find the respondent was in trespass of the appellant's plot.

9. This being a first appeal, this court is obliged to re-evaluate the evidence presented before the trial court to ascertain whether the court properly assessed and evaluated the evidence and whether the court was justified in coming to the conclusions and decision that it did. The court will not interfere with the findings of fact by the trial court unless it is evident that the court applied wrong principles and/or the trial magistrate's findings were against the weight of the evidence and as a consequence there was injustice. The appellate court has always to be cautious that it did not have the opportunity to see the witnesses testify and hence a trial court's assessment of a witness's demeanour may not lightly be faulted by the appellate court.

10. Having made the above basic observations, I turn to consider and review the evidence that was presented before the trial court by the parties with a view of determining whether the magistrate arrived at the correct findings and decision and/or whether the magistrate's decision was justified.

11. The appellant testified that in 1999 he applied to be allocated a plot located near postal building in Kisii town following which he was issued with a letter of allotment dated 15th August 1999. The plot was an unsurveyed commercial plot and that he paid the sum of Kshs. 33,730/00 as itemised in the letter of offer. The appellant stated that his original letter of offer got lost and all he had was a copy which he tendered in evidence. The appellant testified he later received information that Telkom Kenya Ltd had encroached onto and excavated on his plot which led the appellant to institute the suit before the subordinate court seeking orders of eviction and permanent injunction. The appellant further testified that a surveyor's report prepared at the instance of the court had confirmed the respondent had encroached on the empty plot adjacent to its plot. The appellant under cross examination conceded that the allotment letter did not identify where the plot was and that the plot was not shown on the Part Development Plan (PDP). The appellant stated that at the time of allocation the plot was vacant and that the respondent fenced off the plot and erected a Telephone Tower after he had been allocated the plot.

12. The respondent through Godfrey Migiri Theuri testified that it owns land parcel **Kisii/Block III/478** and that the portion the appellant claimed formed part of the respondent's land. The respondent stated its plot has a perimeter fence which was erected in 1999. The respondent testified that the area claimed by the appellant is zoned for Telkom use and produced a Part Development Plan (PDP) as **DEX.1** which it stated did not show such a plot as claimed by the appellant. The respondent stated that the plot allegedly allocated to the appellant was not identified and could not have been approved since it was not shown in the Part Development Plan (PDP). The respondent stated that the Telkom Tower stands on the portion of land claimed by the appellant and is adjacent to the respondent's land parcel **Kisii Municipality/Block III/478**.

13. The trial magistrate after analysing the evidence held that the appellant had failed to prove ownership of the unsurveyed commercial plot he claimed and further held that the letter of allotment cannot confer ownership rights over the unsurveyed plot to the appellant unless it is demonstrated the terms of the allotment were complied with. See the cases of **Dr. Joseph N. K. Arap Ng'onk –vs- Justice Moiwo Ole Keiuwa & Others CACA No. 60 of 1997 (Unreported)** and **Bubaki Investment Company Ltd –vs- National Land Commission & 2 Others [2015] eKLR**.

14. Though not directly canvassed in the lower court the validity of the letter of allotment that the appellant relies upon to stake claim to the said **“unsurveyed commercial plot”** is a relevant issue for this

court to deal with. The respondent in its evidence challenged the validity of the letter of allotment. The respondent stated that the unsurveyed plot allegedly allocated to the appellant was not identified and no part development plan (PDP) was produced with the letter of allotment to identify the location of the plot.

15. The copy of letter of allotment dated 15th August 1999 produced by the appellant did not identify the unsurveyed plot the appellant was allocated and was referenced **“Re: UNS COMMERCIAL PLOT – KISII”** and in part stated:

“I have the honour to inform you that the Government, on behalf of County Council, hereby offers you a grant of the above plot shown edged red on the attached plan No. subject to your formal written acceptance of the following conditions and to the payment of the charges as prescribed hereunder:-

The letter of allotment was issued under the provisions of the Government Lands Act (Cap 280 Laws of Kenya). The letter of allotment provided that acceptance of the offer and payment was to be made within 30 days of the offer. The letter of offer further provided as follows:-

“If acceptance and payment respectively are not received within the said thirty (30) days from the date hereof the offer herein contained will be considered to have lapsed.”

16. No evidence was adduced of the appellant having applied to be allocated a plot and the letter of allotment did not attach any sketch plan identifying the plot allocated to the appellant as required although it referred to a sketch plan. There was no evidence that the appellant made a written acceptance of the offer within thirty (30) days of the letter of offer as required. As per the receipt for payment of kshs. 33,730/= the payment was made on 11th November 2002 well over three (3) years after the letter of offer was issued.

17. While the Commissioner of Lands under the repealed Government Lands Act, Cap 280 Laws of Kenya had delegated authority from the President under Section 3 of the Act to alienate government land, such alienation had to be in conformity with the law. Section 3 (a) of the government Lands Act provided as follows:-

3. The president, in addition to, but without limiting any other right, power or authority vested in him under this Act, may-

(a) Subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land.

18. Under the Government Lands Act, the Commissioner of Lands could only alienate land within Townships in compliance with Sections 9, 10, 11, 12 and 13 of the Act which lay an elaborate procedure to be followed in alienating land within townships such as the plot the subject matter of the suit before the subordinate court. Section 9 of the Act provides thus:-

9. 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 (emphasis mine).

19. Section 11 (1) of the Act provides as follows:-

11 (1) Before any town plot is disposed off under Section 12, the Commissioner shall determine-

(a) The upset value at which the lease of the plot will be sold;

(b) The building conditions to be inserted in the lease of the plot;

(c) The special covenants, if any, which shall be inserted in the lease; and

(d) The periods into which the term is to be divided and the annual rent to be paid in respect of each period.

Section 12 of the Act provides:-

12. Leases of town plots shall, unless the President otherwise orders in any particular case or cases, be sold by auction.

Section 13 of the Act provides inter alia as follows:-

13. The place and time of the sale shall be notified in the Kenya Gazette not less than four weeks nor more than three months before the day of sale and the notice shall state:-

(a) the number of plots and the situation and area of each plot;

(b)

(c)

(d)

(e)

Provided that the lease of any plot may be withdrawn from sale by Commissioner at any time before it is offered for sale.

20. I have set out the above legal provisions to illustrate that the Commissioner of Lands was required under the law to follow an elaborate process and procedure before he could alienate any unalienated government land. The applicant testified before the lower court that he applied to be allocated a plot next to Kisii Post Office. He did not tender in evidence his application and there was no evidence that the Commissioner had set aside the said plot or any plots in Kisii for alienation as required under Section 9 of the Act and/or that Section 11 (1), Section 12 and Section 13 of the Act had been complied with before the alleged letter of allotment dated 15th August 1999 was issued to the appellant.

21. It is not lost to the court that during the period between 1980 and 2000 there was unprecedented alienation of public land through land grabbing by sheer abuse of office by land registry officers working in concert with members of the public commonly referred to as private developers. It was during that period when many plots reserved for public use or purposes were alienated or **“grabbed”**, road reserves were alienated for private purposes. This was the genesis of the Ndungu Land Commission of 2003/2004 and the precursor to the 2010 Constitution which decidedly sought to deal with the menace of land grabbing of public land and hence the establishment of the National Land Commission under Article 67 of the Constitution 2010 which was mandated to manage and oversee the administration and alienation of all public land.

22. My view is that there was no lawful allotment of the subject plot of the suit to the appellant. The approved part development plan (PDP) produced by the defendant as **“DEX1”** shows that the entire plot marked as plot No. 144 on the plan and which includes the portion claimed by the appellant was reserved for **“Telkoms”**. The part development plan was approved by the Director of Physical Planning on 15th July 2002 and the Minister for Lands on 24th July 2002. The appellant even though the letter of offer/allotment was dated 15th August 1999 stated in cross examination that he received the letter in August 2002 and per his receipt of payment he made payment on 11th November 2002. The offer letter lapsed after expiry of 30 days from the date of its issue. There was therefore no valid offer letter on 11th November 2002 when the appellant purported to pay for the allocation.

23. It appears to me that the appellant’s case was a classical case of land grabbing where the appellant saw what appeared to be an empty and vacant plot and set in motion the process of having the “**empty/vacant**” plot allocated to him without due process of the law. The process and procedure of alienating unalienated government land set out under the Government Lands Act, Cap 280 was not followed in making the allotment and hence the allotment of the plot to the appellant was unlawful. The appellant wanted to use the court process to legitimise what was otherwise unlawful allocation.

24. The magistrate was right in holding that the appellant had failed to prove legal ownership of the suit property and/or that he had a legal interest in the property deserving protection. The appellant did not prove he was entitled to ownership of the suit plot. I see no basis to interfere with the learned magistrate’s decision and my holding is that this appeal lacks any merit and the same is ordered dismissed with costs to the respondent.

Judgment dated, signed and delivered at Kisii this 17th day of March, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the appellant

..... for the respondent

..... Court assistant

J. M. MUTUNGI

JUDGE