



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**APPEAL NO. 40 OF 2008**

**NICHOLAS OCHIENG ONYONY.....APPELLANT**

**VERSUS**

**KENNEDY OKWANYO OJWANG.....RESPONDENT**

**J U D G M E N T**

**(Being an appeal from the Judgment and Decree of Hon. Bildad Ochieng, SRM issued in Homa Bay SRMCC No. 12 of 200 dated on 19<sup>th</sup> March 2008)**

1. The appellant, Nicholas Ochieng Onyony, who was the 1<sup>st</sup> defendant in the suit before the lower court has filed the instant appeal against the judgment of Hon. Bildad Ochieng Senior Resident Magistrate Homa Bay SRMCC No. 12 of 2003 dated 19<sup>th</sup> March 2008. In the judgment the learned Senior Resident Magistrate entered judgment in favour of the respondent who was the plaintiff in the original suit. The learned magistrate made a declaration that the respondent was the licensed allottee of Plot No. **156‘A’** Rangwe Market and ruled that all developments and erections effected by the appellant were illegal. The learned magistrate made an order for the eviction of the appellant and the demolition of the structures erected by the appellant on the said Plot No. **156‘A’** Rangwe Market.

2. The appellant being dissatisfied and aggrieved by the judgment and decision of the learned trial magistrate preferred an appeal against the judgment of the learned trial magistrate to this court. The appellant has set out the following grounds of appeal in his Memorandum of Appeal dated 14<sup>th</sup> April 2008 and filed in court in 15<sup>th</sup> April 2008.

**1. The learned trial magistrate erred in law and in fact in not finding that the evidence of PW3 an expert evidence was binding and he could not make a finding to the contrary.**

**2. The learned trial magistrate erred in law and in fact in failing to appreciate and analyze the evidence adduced before him in a judicial manner and hence he exercised his discretionary powers erroneously by failing to dismiss the respondent’s case with costs to the appellant.**

**3. The learned trial magistrate erred in law and facts by failing to give a proper and reasoned judgment as required by law.**

The appellant seeks orders from this court:

**(a) The order granting the said judgment in favour of the plaintiff/ respondent be set aside.**

**(b) The respondent's case be dismissed with costs to the appellant.**

**(c) The costs of this court and the lower court be for the appellant.**

3. In the lower court the plaintiff vide the amended plaint dated 10<sup>th</sup> April 2003 contended that he had been lawfully allocated Plot No. **156'A'** within Rangwe Market by the County Council of Homa Bay in 1994 which allocation he stated had been approved by a full council meeting. The plaintiff stated he was issued with a Plot Card No. 002782 in 1998 and that he had since 1994 been paying plot rent to the council. The plaintiff averred that in or about the year 1998 when he wanted to start developing the plot the 1<sup>st</sup> defendant unlawfully moved onto his said plot claiming ownership and commenced erecting structures thereon. The plaintiff's contention was that the 1<sup>st</sup> defendant has no right to enter onto his said plot and neither could the 2<sup>nd</sup> defendant purport to allocate to the said 1<sup>st</sup> defendant the same plot that they had allocated to him (the plaintiff). The plaintiff prayed for a declaratory order that he is the allottee of Plot No. **156'A'** Rangwe Market and that the structures thereon by the 1<sup>st</sup> defendant were illegal and further an order for the eviction of the 1<sup>st</sup> defendant from the said plot. The plaintiff additionally prayed for general damages for trespass to land, fraud and negligence.

4. The 1<sup>st</sup> defendant through his defence dated 4<sup>th</sup> March 2003, amended on 12<sup>th</sup> March and further amended on 12<sup>th</sup> May 2003 denied that he had trespassed on Plot No. **156'A'** as alleged by the plaintiff. Instead the 1<sup>st</sup> defendant stated that he was allocated by the 2<sup>nd</sup> defendant Plot No. **38'A'** Rangwe Market in 1985 and maintained that it was on this plot that he had erected the structures complained about by the plaintiff. The 1<sup>st</sup> defendant denied all the allegations of fraud attributed to him by the plaintiff and further averred that the plaintiff's suit was time barred and therefore not maintainable in law.

5. At the trial the learned trial magistrate took evidence from the plaintiff who additionally called two other witnesses in support of his case. The plaintiff who testified as PW1 stated that he applied to be allocated a plot at Rangwe Trading Centre and that his application was successful and he was allocated Plot No. **156'A'** (**PEX.3**) and that he was issued with a plot card for the plot in 1998. He stated that the plot was pointed out to him by a surveyor one Constantine Okumu from the council (2<sup>nd</sup> defendant). The plaintiff stated he prepared building plans for the plot which were duly approved by the council (**PEX.4**). The plaintiff stated at the time he was shown the plot, there were some temporary kiosks at the front of the plot but the rear was vacant. The temporary kiosks belonged to the 1<sup>st</sup> defendant who the plaintiff stated subsequently went on to put a permanent structure on the plot. The plaintiff stated that although he reported the transgression to the council officers they did not take action to stop the 1<sup>st</sup> defendant.

6. The plaintiff further stated that he had been paying land rent for the plot from 1994 to 2000 but had been prevented from developing his plot by the actions of the 1<sup>st</sup> defendant who had trespassed thereon. The plaintiff stated that he was allocated Plot No. **156'A'** by the council and that the allotment was approved by the Homa Bay County Council works, Town Planning and Markets Committee meeting held on 17<sup>th</sup> May 1994 ("**PEX.6**"). PW2, Constantine Okumu was stood down before she could complete giving her testimony and was not recalled. The trial magistrate properly discounted her evidence.

7. PW3, Steven Charlie was the Physical Planning Officer Homa Bay and Suba Districts and was in charge of Rangwe Market which he stated fell under his jurisdiction. The witness stated in his evidence thus:-

**"The 2 plots in issue are situated at Rangwe Market. I did visit the plots and observed that the 2 plots are off the junction of Rangwe Rodi Kopany at Orero Secondary School. Plot No. 38A is partly developed. Measurement equal to ½ plot. There is 8m of space not fully developed (abandoned development). The same does not form part of Plot 38 'A'. It is the partly developed space that is off the road leading to Orero Secondary School. It is enough to form another ½ plot and can therefore be allocated by the council."**

The witness was not cross examined on this evidence and hence the same must be taken as not

contraverted.

8. The 1<sup>st</sup> defendant, Nicholas Ochieng Onyony testified he was allocated Plot No. **38'A** in 1986 and was issued with a plot card in respect of the same and has been paying rent since then as per receipts produced as ("**DEx.1** and **2**"). He stated his building plans on the plot were approved by the council ("**DEx.2**"). He denied being in occupation of Plot No. **156'A**. In cross examination the witness intimated he extended his building on Plot No. **38'A** onto Plot No. **38'B** and both measure 50feet by 100feet. The 1<sup>st</sup> defendant stated he did not have approved plans for the extension and also did not have documents to show Plot No. **38'A** was extended.

9. The learned trial magistrate after considering and reviewing the evidence adduced by the parties found and held that the plaintiff had established his claim against the defendants on a balance of probabilities and entered judgment in favour of the plaintiff on 19<sup>th</sup> March 2008. It is that judgment that has provoked the instant appeal. I have set out in outline the pleadings and the evidence adduced in the lower court to contextualize the consideration of the present appeal. This being a first appeal, the appellate court is under an obligation to reevaluate the evidence tendered before the lower court to determine whether the trial court made a sound decision on the basis of the facts and evidence before it. An appellate court will only interfere with the trial court's findings on facts and exercise of discretion if it is shown the findings of fact on the basis of the evidence were manifestly wrong and/or that in the exercise of discretion the court misdirected itself and/or acted on wrong principles leading to miscarriage of justice or prejudice to a party.

10. In the case of **Mbogo & Another –vs- Shah [1968] E.A 93** the Court of Appeal as per **Newbold, P.** held thus:

**“a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some manner and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”**

11. In the premises therefore, the court in considering the appeal will reexamine and reevaluate the evidence presented before the trial magistrate to determine whether or not the learned trial magistrate arrived at the right decision taking the totality of all the evidence.

12. The parties argued the appeal by way of written submissions. The appellant's submissions were filed on 9<sup>th</sup> November 2012 while the respondent's submissions were filed on 22<sup>nd</sup> August 2014. I have reviewed the filed written submissions by the parties which largely reiterate the evidence presented by the parties before the learned trial magistrate and offer their analysis of the evidence from their respective perspectives.

13. The appellant's grounds of appeal set out earlier in this judgment basically are challenging the findings of the trial magistrate on the facts and the evidence. The appellant's argument is that the learned trial magistrate failed to properly analyze and/or evaluate the evidence adduced before him with the result that he arrived at the wrong findings on the facts and the law to the prejudice of the appellant. In the determination of this appeal, I will consider the grounds together.

14. There is indisputable and uncontroverted evidence on record that the appellant was allocated Plot No. **38A** in 1985 or thereabouts and the respondent Plot No. **156'A** in 1994. This passage in the judgment of the learned trial magistrate sums up his view in this regard:-

**“From the evidence on record it is not in dispute that there exist two plots Nos. 156A and 38A Rangwe Market which were allocated by the 2<sup>nd</sup> defendant to the plaintiff and the 1<sup>st</sup> defendant respectively. Both parties produced their respective plot cards and bundle of receipts issued by the 2<sup>nd</sup> defendant to confirm the allotments and payment of requisite fees and it appears they both fulfilled the conditions of allotment which to date have not been**

**revoked. PW3 (Physical Planning Officer, Homa Bay) confirmed the existence of the plots and explained that Plot No. 156A was created on the space between Plot No. 38A and the road leading to the DO's office and Orero Secondary School. Taking into consideration the foregoing, I am satisfied and find that the plaintiff is the rightful owner of Plot No. 156A".**

15. On the evidence presented before the learned trial magistrate, the learned trial magistrate was justified in making the above findings. The evidence was in abundance that the respondent was properly and validly allocated Plot No. **156'A'** by the 2<sup>nd</sup> defendant and there was a proper minute of the council to support the allocation as per the council Minute No. 21/94 of the Council Works, Town Planning and Markets Committee held on 17<sup>th</sup> May, 1994 (**PEx.6**). the respondent following this allotment was issued with a rent card No. 002782 for Plot No. **156'A'** on 17<sup>th</sup> August 1998 which clearly quoted the authority pursuant to which the allotment was made **"WTP 21/94 A 435 of 17<sup>th</sup> May 1994"** (**"PEx.3"**). The respondent further had her building plans on Plot No. **156'A'** approved by the Council (**"PEx.4"**).

16. There was further evidence that the appellant had developed a permanent building on Plot **38'A'** and that he had started making extensions on the development that may have encroached onto parcel **156'A'**. the record of the lower court shows the court made a site visit and the court's observations at the site are captured in the learned magistrate's judgment thus:-

**"This court did make a locus in pro quo on 1<sup>st</sup> April 2004 observed that Plot No. 38A was a fully developed plot with shops at the front and rooms at the rear. Behind it on the space between it and the road leading to the DO's office, lies Plot No. 156A where upon a foundation had been laid out and construction was going on which the plaintiff attributed to the 1<sup>st</sup> defendant. The observation made by the court at the scene leaves no doubt that the 1<sup>st</sup> defendant has encroached into the plaintiff's plot without any colour of right or consent and is busy developing the scene to the detriment of the plaintiff who has been denied use of the same."**

17. The court therefore had a visual impression of the location of the two plots on the ground and its findings were well founded. The appellant in his evidence states that he did not have any approved plans for the extension that he was making to his building on Plot **38'A'**. He did not tender any evidence to show that his Plot No. **38'A'** was extended to include the area he was building the extension. The physical planning officer Homa Bay PW3 in his evidence was clear that Plot No. **38'A'** is equivalent to ½ plot while the partly developed plot was equivalent to ½ plot and was not part of plot No. **38'A'** belonging to the appellant. The physical planning officer was categorical that the partly developed portion was sufficient for allocation of ½ plot. The respondent for her part stated that this was the portion which he had been showed as Plot No. **156'A'** but had been unable to develop the same owing to the encroachment by the appellant.

18. Having evaluated the evidence tendered by the parties before the lower court I find no basis on which the learned trial magistrate can be faulted. He appropriately evaluated the evidence adduced before him and he was in my view justified to come to the decision that he did. However as the issue between the parties was whether the appellant had encroached onto the respondent's Plot No. **156'A'** there was necessity for parcels **156'A'** and **38'A'** to be identified and delineated physically on the ground so that their respective boundaries are clear. It would have helped if the physical planning officer, Homa Bay (PW3) would have physically delineated the two plots on the ground but unfortunately there is no evidence that was done. The witness stated he visited the site and confirmed the existence of the two plots.

19. Thus while I find no merit in the appeal and order that the same be dismissed, it is my view that the order for the removal of the illegal developments on Plot No. **156'A'** and/or for the order of eviction to be effectuated, it is necessary for Plot Nos. **38'A'** and **156'A'** Rangwe Market to be clearly delineated. I accordingly in addition to ordering the dismissal of the appeal, direct that the Homa Bay County Physical Planner and the County Surveyor to physically visit Plot Nos. **38'A'** and **156'A'** and fix and delineate their respective boundaries. In case any of the appellant's developments/structures are on Plot No.

**156'A'** as found by the learned trial magistrate the appellant to remove the structures/developments within 30 days of the plot boundaries being fixed. In default an eviction order to issue for the forcible removal of the appellant's structures/developments on Plot No. **156'A'** on application by the respondent.

20. I make no order for costs for the appeal before this court. Each party will bear their own costs.

21. Orders accordingly.

**Judgment dated, signed and delivered at Kisii this 28<sup>th</sup> day of July, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Mireri for Onyony for the appellant

N/A for the respondent

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**