



**REPUBLIC OF KENYA**

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

**ELCA NO.72 OF 2015**

**(FORMERLY HIGH COURT CIVIL APPEAL NO.391 OF 2015)**

**JOSHUA AKEYO OGENDO.....APPELLANT**

**VERSUS**

**1. DAVID ROWLAND MATENDE**

**2.CITY COUNCIL OF NAIROBI.....RESPONDENTS**

**JUDGMENT**

This appeal arises from the ruling (sic) and decree of Hon. M. Chesang R.M made in Milimani Commercial Courts, CMCC No. 5172 of 2011 (hereinafter referred to as “the lower court”). The appellant had instituted a suit in the lower court against the respondents seeking a permanent injunction restraining the respondents from entering, using, repossessing or interfering with the appellant’s possession, occupation and ownership of all that parcel of land known as Plot No. D7904 Dandora Phase 2 Area 4 (hereinafter referred to as “the suit property”) and a declaration that the appellant is the lawful owner of the suit property. In the alternative, the appellant sought compensation from the 2<sup>nd</sup> respondent for the loss of the suit property at market rate. In his amended plaint dated 15<sup>th</sup> June 2012, the appellant averred that on 24<sup>th</sup> December 1987, he purchased the suit property from one, Isaac Waithaka Mugo to whom the 2<sup>nd</sup> respondent had allotted the suit property on 3<sup>rd</sup> May 1982. The appellant averred that on purchasing the suit property from Isaac Waithaka Mugo as aforesaid, he became the beneficial owner thereof and was at all material times entitled possession and occupation thereof. The appellant averred that sometimes in the year 2005, the 1<sup>st</sup> respondent entered the suit property without the appellant’s consent and laid a claim to the property. The appellant averred that following a dispute that ensued following the said act of trespass by the 1<sup>st</sup> respondent, an investigation was carried out by the 2<sup>nd</sup> defendant to verify the validity of the 1<sup>st</sup> respondent’s claim over the suit property. The appellant averred that the said investigation found the 1<sup>st</sup> respondent’s claim to be without any basis. The appellant averred that despite the said finding by the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent entered the suit property once again on 24<sup>th</sup> November 2011 and dug trenches thereon in the process of which he interfered with the building which was in the appellant’s occupation and also blocked his access to the suit property. The appellant averred that the 1<sup>st</sup> respondent failed to heed the demand which was made on him to desist from the said acts of trespass thereby leaving the appellant with no alternative but to file a suit.

The respondents entered appearance to the summons but only the 1<sup>st</sup> respondent filed a defence to the appellant’s claim in the lower court. In its defence dated 2<sup>nd</sup> July 2014, the 1<sup>st</sup> respondent denied the appellant’s claim in its entirety. The 1<sup>st</sup> respondent contended that the suit property was lawfully allotted

to him by the 2<sup>nd</sup> respondent. The lower court heard the appellant's claim and delivered a ruling (judgment) on the matter on 4<sup>th</sup> August 2015. The lower court found that the appellant had failed to prove his claim and dismissed the suit with costs to the respondents. The court was persuaded that the 1<sup>st</sup> respondent who had produced his letter of allotment of the suit property in evidence had a better title to the suit property compared to the appellant. The court was persuaded that the original allottee of the suit property had defaulted in the payment of rates to the 2<sup>nd</sup> respondent which led to the repossession of the property by the 2<sup>nd</sup> respondent and re-allocation of the same to the 1<sup>st</sup> respondent in the year 2002. The court held that the agreement for sale on which the appellant had relied in proof of his case related to a different property and that the appellant did not adduce evidence to show the relationship between that property and the suit property. The court held further that the receipts which the appellant had produced in court to prove his case bore the name of a third party implying that it was the said third party who had made the payment of rates to the 2<sup>nd</sup> respondent. The court held further that the appellant had failed to produce a letter of allotment which could have conclusively established his claim over the suit property. The court held that the appellant having failed to establish legal ownership over the suit property, the reliefs he had sought before the court could not be granted. It is against the said judgment that this appeal was preferred by the appellant. The appellant challenged the judgment of the lower court on the following grounds which are set out in the Memorandum of Appeal dated 18<sup>th</sup> August 2015;

1. *THAT the Learned Magistrate erred in law in rendering a ruling instead of a judgment after hearing the substantive suit.*
2. *THAT the Learned Magistrate erred in law in her holding that the appellant had no proprietary interest over the suit property.*
3. *THAT the Learned Magistrate erred in law and fact in holding that the suit property and Plot No. D047904 were different.*
4. *THAT the Learned Magistrate erred in law and fact by holding that the 2<sup>nd</sup> respondent had repossessed the suit property.*
5. *THAT the Learned Magistrate misdirected herself in law and fact on the principles governing repossession of plots by the then Local Authorities.*
6. *THAT the Learned Magistrate erred in law and fact in holding that the 1<sup>st</sup> respondent had legitimate proprietary interest over the suit property.*
7. *THAT the Learned Magistrate erred in law and fact in holding that the receipts for payment of land rates in respect of the suit property issued in the name of the original allottee Isaac Waithaka Mugo did not relate to the appellant.*

On 7<sup>th</sup> June 2016, the court gave directions that the appeal be argued by way of written submissions and set timelines within which the parties were to exchange submissions. The appellant filed his submissions on 18<sup>th</sup> October 2016 while the 1<sup>st</sup> respondent filed his submissions on 5<sup>th</sup> September 2017. I have perused the proceedings of the lower court and the ruling (judgement) of that court which is the subject of this appeal. I have also considered the appellant's grounds of appeal and the submissions on record. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of Verani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle vs. Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.

An appellate court will not ordinarily interfere with findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter vs. Sunday Post Ltd. [1958] E.A 424 and

As I have mentioned earlier, the appellant challenged the decision of the lower court on seven grounds which I have set out above. In his submissions, the appellant argued grounds 1 and 3 of appeal together and the remaining grounds 2, 4, 5, 6 and 7 also together. On my part, I will consider ground 1 of appeal alone and grounds 2, 3, 4, 5, 6 and 7 together. On ground 1 of appeal, I am in agreement with the submission by the appellant that the lower court fell into error by rendering a ruling instead of a judgment after substantively hearing the suit. By rendering a ruling instead of a judgment, the court acted contrary to the provisions of section 25 of the Civil Procedure Act and Order 21 rule 1 of the Civil Procedure Rules 2010. That said, I have noted that the decision of the lower court was in all material respects a judgment. The court considered the pleadings, the evidence that was tendered, the issues which arose for determination and determined the same in favour of the respondents. The lower court found the appellant's case not proved and dismissed the same with costs to the respondents. The error that the lower court fell into was in the heading of its decision which it referred to as "Ruling" instead of "Judgment". I am of the view that this was an accidental slip which could be corrected by the court under section 99 of the Civil Procedure Act. Since the error did not go to the jurisdiction of the court and did not affect the decision of the court in any material respect, it does not render the decision of the court fatally defective as submitted by the appellant. Section 79A of the Civil Procedure Act bars this court from reversing or varying a decree on account of any error, defect or irregularity in any proceedings in the suit which does not affect the merit of the case or jurisdiction of the court.

As mentioned above, the remaining grounds of appeal would be considered together. I am in agreement with the appellant that the lower court erred in law and fact in its finding that the appellant had no proprietary interest in the suit property, that the property which the appellant purchased was different from the suit property and that the suit property had been repossessed by the 2<sup>nd</sup> respondent and lawfully allocated to the 1<sup>st</sup> respondent. It was not disputed in the lower court that the original allottee of the suit property was one, Isaac Waithaka Mugo (hereinafter referred to as "Mugo") to whom the property was allocated on 3<sup>rd</sup> May 1982 by the 2<sup>nd</sup> respondent. It was also not disputed that Mugo accepted the allotment and paid the requisite fees and charges. The letter of allotment of the suit property to Mugo and Mugo's letter of acceptance were produced as exhibits in the lower court. It was not contested before the lower court that Mugo had sold his interest in the suit property to the appellant on 24<sup>th</sup> December 1987. A copy of the agreement for sale between Mugo and the appellant was produced in evidence as an exhibit. I am in agreement with the submission by the appellant that the issue as to whether the suit property and Plot No. D047904 mentioned in the agreement for sale was one and the same parcel of land was not raised in the pleadings and was not before the lower court for determination. The parties were in agreement that their dispute was over the same parcel of land, namely, Plot No. D7904 Dandora Phase 2 Area 4 ("the suit property"). A perusal of the letter of allotment that was issued to Mugo shows that that was the plot that was allocated to him. When he sold the plot to the appellant, he could not have sold any other plot. A perusal of the receipts which were produced by the appellant in evidence as rightly pointed out by the 1<sup>st</sup> respondent in his submissions show that the suit property was also referred to as Plot No. D047904 which is the same reference the property was given in the agreement for sale between the appellant and Mugo. From the foregoing, the lower court in my view fell into error when it based its judgment on an issue which was not raised before it and as such denied the appellant an opportunity to respond to it. The lower court's decision on the issue had no basis on the pleadings and the evidence that was before the court.

I am also in agreement with the submission by the appellant that once the suit property was allocated to Mugo and the allotment was accepted by him, the property was not available for allotment to any other person unless Mugo breached the terms of allotment leading to the forfeiture of the property. On this issue, I am in agreement with the decision of Odunga J. in the case of Republic vs. City Council of Nairobi & 3 Others[2014]eKLR that was cited by the appellant in his submissions. The appellant led evidence which was not controverted in the lower court that from 1987 when he purchased the suit property from Mugo, he faithfully paid to the 2<sup>nd</sup> respondent ground rent and rates for the property in the name of Mugo as and when the same fell due. The appellant produced receipts issued by the 2<sup>nd</sup> respondent for these payments. The 2<sup>nd</sup> respondent neither filed a defence nor adduced evidence in the lower court. The payments referred to above were therefore not contested. I am in agreement with the

observation by the lower court that the payments were made in the name of Mugo. In my view, Mugo was not a third party as the lower court treated him. The appellant led evidence that he purchased the suit property from Mugo and that the property had not been transferred to him. He was therefore making payments in the name of Mugo whose name was still reflected in the 2<sup>nd</sup> respondent's records as the owner of the suit property. There was no suggestion in the lower court that these payments were made by someone else other than the appellant.

With the evidence that was placed before the lower court by the appellant that the suit property had been sold by Mugo to the appellant in the year 1987 and that the ground rent and rates for the same had been paid up to the year 2011 by the appellant who had acquired a beneficial interest in the property, the burden shifted to the respondents to prove the legality of the 1<sup>st</sup> respondent's title over the property. It was not enough in my view for the 1<sup>st</sup> respondent to dangle a letter of allotment which was allegedly issued to him by the 2<sup>nd</sup> respondent after alleged repossession of the property from Mugo. In the case of George Mbiti Kiebia & Another vs. Isaya Theuri M'lintari & Another (2014) eKLR the Court of Appeal stated that:

*“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M’Kiebia Baithumbu.”*

In the same case the court stated further as follows:

*“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title which is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted in the register.”*

I am in agreement with the submission by the 1<sup>st</sup> respondent that the onus was upon the appellant to prove his case in the lower. However, that obligation did not extend to matters which were within the knowledge of the respondents. The respondents placed no evidence before the court showing that Mugo had either breached the terms of allotment of the suit property or had defaulted in the payment of ground rent or rates to the 2<sup>nd</sup> respondent. There was also no evidence placed before the court showing that the 2<sup>nd</sup> respondent had taken steps provided for in law in the alleged repossession of the suit property. In the circumstances there was no evidential basis for the lower court's findings that the suit property had been repossessed and that the same had been lawfully allotted to the 1<sup>st</sup> respondent. In the absence of any evidence that the allotment of the suit property to Mugo had been lawfully terminated, the suit property was not available for allotment to the 1<sup>st</sup> respondent. The lower court fell into error in its finding that the 1<sup>st</sup> respondent acquired legitimate title over the suit property. The 1<sup>st</sup> respondent could not acquire a valid title over a property which had already been allotted to another person whose allotment had not been revoked. The interest of the appellant who derived his title to the suit property from the first allottee had to prevail over that of the 1<sup>st</sup> respondent.

In the final analysis and for the foregoing reasons, I find merit in the appeal before me. The appellant had proved his case against the respondents in the lower court on a balance of probabilities and his suit should not have been dismissed. The appeal is therefore allowed on the following terms;

1. The heading of the decision that was made by the lower court on 4<sup>th</sup> August 2015 is amended by striking out the word “Ruling” and replacing it with the word “Judgment”.
2. The judgment and decree of the lower court made on 4<sup>th</sup> August 2015 is set aside. In place

thereof, judgment is entered for the appellant against the respondents for:

- i. A permanent injunction restraining the respondents by themselves, their servants, agents or otherwise howsoever from entering, using or interfering with the appellant's possession and occupation of Plot No. D7904 Dandora Phase 2 Area 4 save as provided by law or any other contractual arrangements under which the property is held by the appellant.
- ii. A declaration that the appellant is the lawful beneficial owner of Plot No. D7904 Dandora Phase 2 Area 4.

3. The appellant shall have the costs of the appeal and the costs in the lower court.

**Delivered and Signed at Nairobi this 29<sup>th</sup> day of September 2017**

**S. OKONG'O**

**JUDGE**

**Judgement read in open court in presence of:**

Mr. Okoth for the Appellant

N/A for the 1<sup>st</sup> Respondent

Mr. Muriungi for the 2<sup>nd</sup> Respondent

Kajuju Court Assistant