REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 10 OF 2016

BRAMWEL PEPELA KIMUKOTI.....APPELLANT

VERSUS

EDWARD TISA)

COUNTY GOVERNMENT OF

KAKAMEGA FORMERLY

MALAVA TOWN COUNCIL).....RESPONDENTS

JUDGEMENT

The appellant being aggrieved by the decision of the learned trial magistrate entered on the 27th September, 2012, preferred an appeal to this honourable court. He raised eight grounds of appeal enumerated in the Memorandum of Appeal as follows;

1. That the learned trial magistrate erred in evaluation of the evidence before her.

2. The learned trial magistrate completely failed to appreciate the nature of the documentary evidence produced by the appellant.

3. The learned trial magistrate grossly erred in failing to resolve the contradictions and inconsistencies of the defendant's case in favour of the appellant.

4. The learned trial magistrate failed to completely give due attention to the evidence adduced by PW2 a former clerk to the 2nd respondent.

5. The learned trial magistrate did not give any or any due attention to the submissions made by the appellant.

6. The learned trial magistrate standard of proof was higher than a balance of probabilities.

7. The learned trial magistrate exhibited bias against the appellant.

8. The learned trial magistrate's final decision has occasioned a miscarriage of justice.

It is proposed that the judgment be set aside and be substituted thereof with an order allowing the appellant's suit with costs. The appellant who was the plaintiff in the lower court had sought mainly an

order of a permanent injunction restraining the defendants, jointly and severally, restraining them, their agents and or servants from allocating, alienating, wasting and or in any manner interfering with the plaintiff's use and enjoyment of plot number 25 Malava Market. The suit herein was dismissed with costs hence the present appeal.

Firstly, the appellant submitted that the learned magistrate failed to properly evaluate the evidence presented to her by the plaintiff. The learned trial magistrate particularly failed to evaluate the nature of the documentary evidence produced by the appellant. The appellant during trial provided the original town Council of Malava minutes WMTP/10/2000 and 17/11/2000 together with an allotment letter that granted him occupation of plot number 25 Malava, together with payment receipts. Had the learned magistrate analyzed the aforementioned documentary evidence then she could have arrived at different decision.

PW2 testified on behalf of Malava Town Council and adduced evidence in favour of the plaintiff. As a former town clerk, he stated that, the plaintiff duly made an application to extend his plot and he was duly granted through an allotment letter signed by PW2 himself as the Town Clerk. Once again, the trial magistrate failed to appreciate the evidence thus arriving at an unjustifiable decision. The learned trial magistrate also failed to resolve the contradictions raised in the defendant's case during trial in the lower court. For instance, in his evidence in chief, he told the court that he was given the plot by the Malava Town Council but he never produced an application for allotment of a plot nor the allotment letter itself. In short, he never produced any documentary evidence to support his case.

DW1 testified on behalf of the Town Council. He informed the court that the 2nd defendant was an applicant for council trust land. He further said that he knew the plaintiff very well and that the plaintiff occupied plot number 25 within Malava Market. His evidence contradicted with that of the 2nd defendant one Edward Tisa. His evidence supported the plaintiff's case. When cross examined by the plaintiff's counsel, he confirmed that the application for allotment letter to the 2nd defendant was fictitious. It was not authenticated by the office of Malava town council. In his final evidence there was no authority granted to the 2nd defendant to extend his plot to number 25 in Malava Town Council. As aforementioned the learned trial magistrate failed to direct her mind on the contradictions of the defendant and make a decision in favour of the appellant.

The learned trial magistrate by disregarding the submissions made by the appellants, she never gave any due attention to the said submissions. She exhibited bias against the appellants and as a result arrived at an unfair decision. Finally, the standard of proof applied by the magistrate was beyond a balance of probabilities which is not the test applicable in civil cases. It is now settled law that the trial court has a duty to evaluate and analyze the evidence a fresh. This was held in the case of **Pil Kenya Limited Vs. Opong KLR 2009 at page 442.**

The court of appeal observed that it is the duty of the court of appeal as a first appellate court to analyze and evaluate the evidence on record a fresh and to reach its own independent decision but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor giving allowance to that. The court re-evaluated the trial court's evidence and came to a different decision to the one arrived at by the trial court. The appellant urged the court to re-evaluate the evidence afresh and arrive at a justifiable decision to avoid a miscarriage of justice.

The respondents submitted that the trial magistrate did deliver her judgment on 27th September 2012 as per the decree dated 7th November 2013. The appeal is opposed in toto. That a brief look at the record of appeal shows that the learned magistrate was balanced in her consideration of the case before her and in the analysis of the evidence which was adduced by both sides of the case. To say that the learned magistrate blacked out all references to the plaintiff's case and in particular PW1 is to miss the point.

A brief look at the judgment reveals as follows; at Page 63 the account of the PW1's evidence is candidly given**.** *"PW1 Bramwel Pepela Kimokoti testified that a letter dated 13/8/2004, the 2nd defendant allocated him a plot at Malava Town in response to an application made in 2000 ....."* This is in

itself reference to the plaintiff PW1's case. In determining the issues at hand, at Page 3 of judgment and Page 65 of the record the learned magistrate says;

> *"Firstly the plaintiff stated that he was the owner of plot No. 25 after the same was granted to him by Malava Town Council and that he further made application for extension of the plot in the year 2000 vide minute No. WMTP 10/2000 – 17/11/2000 produced as exh. 5 and letter of 13/9/2004 ....."*

The bone of contention by the appellant is not just that the learned trial magistrate "did not" consider PW1's case but that she allegedly "did not consider PW1's documents." The citation foregoing would negate such assertions. Indeed the learned magistrate according to the respondent, did consider the alleged documents only that she found them to have lesser projective value hence she rightly proceeded to discard them.

Finally with regard to alleged blacking out of PW1's evidence, there is paragraph 3 of Page 67 of the record this is to the effect that;

> *"Additionally going back to exh4 the plaintiff was asked to liaise with the works officer so that identification of the plot boundary could be done. There is no evidence that the plaintiff heeded that advice"*.

Therefore clearly and logically there was full regard to the plaintiff's case and consideration duly made to the alleged documents exhibited by PW1. The learned magistrate as per the foregoing found the prayers for both issues in favour of the respondents, the appellant's prayers are as vivid as a fore indicated. No error or illustrated and no law has been cited to have been misapprehended.

The respondent submits that the former clerk to the council labeled as PW2 did testify on 3rd November 2011 and his name is Evans Matuga Lavasa and his evidence was also considered in the judgement. Therefore all the foregoing is adequate cover for the evidence of PW2. Due consideration was made on this testimony as has been adequately covered above as to why the court rejected the 'extension letters' as the same was not written on a letter head and contained no stamp of the council nor its minutes. In fact at Page 64 of the record (Page 2 of the judgment) the second line, the court observes "in cross exam PW2 confirmed that the name of the defendant was on the list of Pexh. 5 but not that of the plaintiff."

The respondent hence submitted that the judgment is balanced and well founded on the evidence which was submitted. There is no evidence of misapprehension of the law. The court relied on in evidence on record as per the ruling shows the burden of proof is always on the plaintiff and he failed to dispense with this onus **(Jibril-vs-East Africa Television Network & 6 others KLR 2006 309)**. We submit the case for the appellant is weak and appeal should be dismissed with costs.

This court has carefully considered the appeal and submissions herein. The appellant states that, the learned trial magistrate erred in evaluation of the evidence before her. The learned trial magistrate completely failed to appreciate the nature of the documentary evidence produced by the appellant. The learned trial magistrate grossly erred in failing to resolve the contradictions and inconsistencies of the defendant's case in favour of the appellant. The learned trial magistrate failed to completely give due attention to the evidence adduced by PW2 a former Clerk to the 2nd respondent. The learned trial magistrate did not give any or any due attention to the submissions made by the appellant. The learned trial magistrate standard of proof was higher than a balance of probabilities. The learned trial magistrate exhibited bias against the appellant and that her final decision has occasioned a miscarriage.

I have perused that court file and the trial magistrate's judgement in great detail.

A look at Page 66 of the record and Page 4 of the judgment, there is full analysis why the documents by PW1 were rejected and I quote;

> *"Further a close look at P. Exh. 4 being letter dated 13/9/2004 addressed to the plaintiff and*

same to be a copy, no original was availed (emphasis ours) the letter does not contain a letter head and it is common knowledge that all institution official letters including that of the county council must have a letter head- the original is usually dispatched to the recipient whereas the copy is retained by the sender Exh. 4 does not contain letterhead and would be wrong a conclude that same was authorized and bureau but not the Malava Town Council, no stamp of the council is contained thereon ....."

The former clerk to the council labeled as PW2 Evans Matuga Lavasa did testify on 3rd November 2011. On the allegation that his evidence was disregarded the judgment on Page 1 stated as follows;

"PW2 Edward Mataga Lavasa a deputy town clerk at Nakuru Municipality testified that he used to work at Malava Town Council from 1998-2004 as a town clerk when Bramwel (PW1) made an application to extend his plot in 2000. The council held a meeting on 17/11/2000 and passed a resolution and vide letter of 13/9/2004, the plaintiff was informed that the extension had been granted to him. PW2 signed the letter but the original which contained the letter head got misplaced."

This court has also perused the exhibits and finds that the 'extension letter' was not written on a letter head and contained no stamp of the council nor the minutes. The name of the defendant was on the list of people considered in PEx. 5 (Minutes) but not that of the plaintiff and this has not been disputed. Indeed one of the defence witnesses Dominic Makori (DW1) who was the town clerk of Malava town council (at the time of the trial) confirms that the documents produced by the plaintiff in the lower court purporting to be an approval of extension were fictitious and he disowned the same. The letter was not certified as the true copy of the original and he does not have a copy of the same because it does not exist. I see no contradiction in the defendant's case during the trial.

From the evidence and testimony on record I find that the learned trial magistrate did not err in evaluation of the evidence before her. She did not fail to appreciate the nature of the documentary evidence produced by the appellant as she considered the authenticity of the same. There were no contradictions and inconsistencies of the defendant's case in favour of the appellant and due attention was given to the evidence adduced by PW2 a former Clerk to the 2nd respondent. The learned trial magistrate gave due attention to the submissions made by the appellant as evidenced in her judgement and the standard of proof applied was on a balance of probabilities. No bias was exhibited against the appellant.

In **Mwanasokoni v Kenya bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial Court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. I find that the decision was judiciously arrived at and I will not interfere with the same. I find no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21ST DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE