



**Amboye (Suing as the Legal Representative of the Estate of the Late Silas Inonda Amboye) v Soita & another (Environment and Land Appeal E040 of 2022) [2024] KEELC 3396 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3396 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E040 OF 2022**

**DO OHUNGO, J**

**APRIL 25, 2024**

**BETWEEN**

**JOEL WANJILLA AMBOYE ..... APPELLANT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
SILAS INONDA AMBOYE**

**AND**

**ANDRIANNO WEKULO SOITA ..... 1<sup>ST</sup> RESPONDENT**

**RICHARD WAFULA KISAKA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hon. Eric Malesi, Principal Magistrate) delivered on 30th August 2022 in Kakamega MCELC No. E047 of 2021)*

**JUDGMENT**

1. The background of this appeal is that on 19<sup>th</sup> March 2021, the appellant filed a plaint dated 18<sup>th</sup> March 2021, against the first and second respondents herein as first and second defendants, respectively. He averred in the plaint that Silas Inonda Amboye (deceased) was the legal owner of a land parcel known as Kakamega/Mautuma Central L.R. 108/1014 (Panpaper Centre Mautuma Settlement Scheme Plot No. Block 1014 measuring 2 acres (the suit property) having been allocated to him by virtue of being a member of Mulembe Investment Society Sacco. That the deceased purchased the suit property from the second respondent at a purchase price of Kshs 270,000 through a sale agreement entered into on 27<sup>th</sup> and 29<sup>th</sup> July 2009. That the deceased fully paid the purchase price but when he went to the suit property to take possession, he found the first respondent in occupation who refused to vacate. That the deceased filed Nairobi Co-operative Tribunal Case No. 08 of 2009 and that the tribunal



ordered eviction of the first respondent, but the order was ignored, and its execution frustrated by the respondents. The appellant therefore prayed for judgment against the respondents for:

- a. A declaration 1<sup>st</sup> defendant Andrianno Wekulo Soita is a trace passer (sic) on parcel of land referred to as Kakamega/Mautuma Central 108/1014 measuring approximately 2 acres.
  - b. Order of eviction directing the 1<sup>st</sup> defendant Andrianno Wekulo Soita to give vacant possession of the parcel of land to parcel of land referred to as Kakamega/Mautuma Central 108/1014 measuring approximately 2 acres to the plaintiff. The OCS Milimani police station to supervise, assist and ensure compliance.
  - c. An order of permanent injunction restraining the Defendants by themselves, agents, servants, family members and any other person acting under the defendants instructions from claiming, entering upon, further encroaching on the parcel of land, or in any other way from interfering with the said parcel of land referred to as Kakamega/Mautuma Central 108/1014.
  - d. Costs of this suit.
2. The first respondent filed a statement of defence in which he averred that Thomas Soita Ondenyi who was his father exchanged his land measuring 2 acres with the government in 1996 for the development of a school and was allocated four acres of land in Mautuma Settlement Scheme in exchange. That his father took possession of the land in 1996 and settled there with his family until he passed away on 4<sup>th</sup> January 2010 and was buried peacefully on the land.
  3. The second respondent filed a statement of defence in which he admitted that the tribunal case was filed and added that it was the responsibility of the appellant to execute the orders. He averred that he was wrongly joined and denied the appellant's other averments.
  4. Upon hearing the matter, the Subordinate Court (Hon. Eric Malesi, Principal Magistrate) delivered judgment on 30<sup>th</sup> August 2022 and dismissed the appellant's case with costs to the respondents.
  5. Dissatisfied with that outcome, the appellant filed this appeal on 12<sup>th</sup> September 2022 through Memorandum of Appeal dated 5<sup>th</sup> September 2022. He prayed that the judgment be set aside and that his claim in the Subordinate Court be allowed.
  6. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
    1. The learned trial Magistrate erred both in law and fact by finding that there was no instrument evidencing the 2<sup>nd</sup> defendant as a trustee, yet the 2<sup>nd</sup> defendant in his statement filed in court he identifies himself as holding the land in trust for the society.
    2. The learned trial Magistrate erred both in law and fact by ignoring the evidence of the settlement officer who clearly stated that from the documents in the parcel file, the deceased is the current registered owner of the parcel.
    3. The learned trial magistrate erred both in law and fact when on one hand he confirms that it is evident that the suit parcel of land was first allotted to the 2<sup>nd</sup> defendant who sold it to the deceased, on the other he contradicts himself when he states that there exist transactional gaps.
    4. The learned trial Magistrate erred both in law and fact by disregarding the payment receipts produced in evidence by the appellant, and terming them as creating confusion as to what the deceased was paying for, yet the those were payment for the suit parcel of land.



5. The learned trial Magistrate erred both in law and fact by making a finding that there could have been a double allocation of the parcel of land, being a parcel of land under a scheme without any evidence to support the finding.
  6. The learned trial Magistrate erred both in law and fact by finding that the plaintiff applied the law of the jungle yet the court itself did not state which law it was relying in arriving at its decision.
  7. That the learned trial Magistrate erred in law and fact by finding that deceased pursued the transaction backwards, and failed to appreciate the fact that the deceased had pursued the society in the cooperative tribunal case and there was an eviction order that was issued.
  8. That the learned trial Magistrate erred in law and fact by disregarding the evidence and the documents contained in the parcel file as produced by the settlement officer, and by dismissing the plaintiffs case, did not declare the rightful owner of the parcel of land.
  9. That the learned trial Magistrate erred in law and fact by burdening the plaintiff to proof that 1<sup>st</sup> respondent's father was allotted the suit parcel of land in exchange of their own parcel of land, which burden was on the 1<sup>st</sup> respondent's shoulder.
  10. That the learned trial Magistrate erred in law and fact by failing to consider that no single witness was called from Lukume School, to support the 1<sup>st</sup> respondents' position that his father indeed surrendered his land to the school.
  11. That the learned trial Magistrate erred in law and fact by failing to consider that there was no single document produced by the 1<sup>st</sup> respondent as confirm the land exchange transaction concerning his father, who allotted his father the land and who authorized the land exchange transaction.
  12. That the learned trial Magistrate erred in law and fact by relying on the 1<sup>st</sup> respondents' documents not produced in evidence and ignored documents produced by the plaintiff and the settlement officer.
  13. The learned trial magistrate erred both in law and fact and disregarding the information contained in the letters dated 2/1/2001 & 9/1/2002 by the 1<sup>st</sup> respondents' father, which letter confirmed that the suit parcel of land had been allotted to someone else.
  14. The learned trial magistrate erred both in law and fact by disregarding the 2<sup>nd</sup> defendants' evidence (the original allottee) in court and making a decision that the said party was wrongly enjoined in the case yet, the 2<sup>nd</sup> respondent testified and gave evidence and clarified the ownership of the parcel of land.
7. The appeal was canvassed through written submissions. The appellant argued that it was clear from the evidence of the settlement officer that the second respondent sold the suit property to the deceased and that the second respondent stated that he executed transfer in favour of the deceased. That in view of that evidence, the Subordinate Court should have found in his favour. He relied on the case of *David Peterson Kiengo & 2 Others v Kariuki Thuo* [2012] eKLR in support of that contention.
  8. The appellant further argued that the deceased fully paid the purchase price of Kshs 120,000 as evidenced by the sale agreement made on 27<sup>th</sup> July 2009 and as confirmed by the second respondent who stated that he executed transfer in favour of the deceased. That the Subordinate Court contradicted itself when it stated that there was confusion as to what the deceased was paying for. He further argued that the Subordinate Court did not cite any law or evidence to support its conclusion



that there may have been a double allocation of the suit property. That the first respondent did not produce any document to show that the suit property was allocated to his father. The appellant also argued that the learned Magistrate disregarded the evidence of the second respondent who stated categorically that the suit property belonged to the deceased. He added that the trial court had a duty to determine the rightful owner of the suit property on a balance of probabilities and that none of the respondents produced documentary evidence to contradict his case. Finally, the appellant cited Order 1 Rule 9 of the Civil Procedure Rules as well as the cases of *Deported Asians Custodian Board vs Jaffer Brothers Ltd* [1990] 1 E.A. 55 (SCU) and *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR and argued that the trial court erred when it held that the second respondent had been wrongly joined.

9. The first respondent argued that the appellant did not prove his case in the Subordinate Court and that the judgment was sound. He further contended that no instrument of transfer was produced and that the receipts that the appellant produced could not be equated with instrument of transfer. He therefore urged this court to dismiss the appeal.
10. The second respondent argued that he was wrongly joined in the suit and that he was not a necessary party. He relied on Order 1 Rule 3 and Order 4 Rule 5 of the Civil Procedure Rules together with the cases of *Sumaria & another v Allied Industrial Limited* (2007) KLR 1 and *Kenya Commercial Bank v Titus Kilonzo Mutua t/a Mbwala Agencies & 24 others* [2006] eKLR and argued that the appeal does not raise any cause of action against him. He urged this court to dismiss the appeal.
11. This is a first appeal. Consequently, the mandate of this court is to re-consider and re-evaluate the pleadings, the evidence, and the material on record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
12. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the deceased was the owner of the suit property, whether the second respondent was a necessary party and whether the reliefs sought ought to have issued.
13. The appellant's case as pleaded was that the deceased was "the legal owner" of the suit property and that the first respondent trespassed thereon and refused to vacate. According to the appellant, the deceased purchased the suit property from the second respondent at a consideration of Kshs 270,000 through sale agreements entered into on 27<sup>th</sup> and 29<sup>th</sup> July 2009. I have perused the sale agreement dated 27<sup>th</sup> July 2009 which was between the deceased as purchaser and the second respondent as vendor. The property sold in the agreement was "Panpaper Centre, Mautuma Settlement Scheme Plot No. Block 1014" and the purchase price was Kshs 120,000. Pursuant to clause 4 of the agreement, it is clear that the property was subject of an allotment letter.
14. I have also perused the other document dated 29<sup>th</sup> July 2009 which is headed "Mulembe Investment Co-op Society Limited" and reads in part:

Ref: Transfer of Block 1014 By Mr. Richard Kisaka Wafula .... (trustee) To Mr. Silas Inonda Amboye ... Located At Panpaer, Lugari

The above refers.

Following deliberations of the executive committee meeting held on 29/7/2009 at Nakuru it was agreed among other things as follows:



That I, Richard Kisaka Wafula transfer the above said land on block 1014 to Mr. Silas Inonda Amboye, M/no: 1228, who has fully paid for the purchase of one (1) acre on the same block.

That Mr Amboye be given priority to purchase the remaining one (1) acre of land on the same block of land at an agreed purchase prize of Ksh. 150,000.

That this development cancels any other earlier allocation that had been made to the said Mr. Amboye by the society management.

15. The document dated 29<sup>th</sup> July 2009 was signed by the Secretary, and Treasurer of Mulembe Investment Co-op Society Limited as well as by the deceased and a witness by the name Jackson Wandera. The sale agreement dated 27<sup>th</sup> July 2009 did not state the size of the land that was sold. Nevertheless, a reading of the subsequent document dated 29<sup>th</sup> July 2009 leaves no doubt that the deceased purchased one acre of block 1014 through the agreement dated 27<sup>th</sup> July 2009 at Kshs 120,000 and that pursuant to the document dated 29<sup>th</sup> July 2009, he was to be given priority to purchase “the remaining one (1) acre of land on the same block of land at an agreed purchase prize of Ksh. 150,000” thereby making the total of Kshs 270,000 that the appellant referred to in his plaint. It should be noted that the suit property as defined by the appellant in his plaint is land parcel known as Kakamega/Mautuma Central L.R 108/1014 (Panpaper Centre Mautuma Settlement Scheme Plot No. Block 1014 measuring two acres.
16. I have not seen any evidence of actual purchase of the extra one acre referred to in the document dated 29<sup>th</sup> July 2009. Logically, the purchase was to take place sometime after 29<sup>th</sup> July 2009. It is not clear who between the second respondent and Mulembe Investment Co-op Society Limited was to sell the extra one acre to the deceased.
17. I am aware that the Sub-County Land Adjudication and Settlement Officer who testified as PW2 stated that a letter of offer dated 9<sup>th</sup> May 2002 was issued in favour of the second respondent in respect of plot number 1014 Mautuma Central Settlement Scheme measuring 0.8 hectares or 2 acres and that the second respondent later sold the parcel to the deceased. According to PW2, the deceased was the owner of the 2 acre parcel. It was however not shown how the parcel grew from the 1 acre in agreement dated 27<sup>th</sup> July 2009 to the 2 acres in the letter of offer. That explanation is crucial since the first respondent is said to be in occupation and is claiming the same land.
18. According to PW2, neither the second respondent nor the deceased had processed transfer in respect of the parcel. It follows therefore that the reigning document remains the letter of offer. Courts have repeatedly stated that allotment letters and letters of offers are incapable of conferring interest in land since they are nothing more than an offer awaiting the fulfilment of conditions stipulated. The Supreme Court stated in *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) that an allottee has to perfect the allotment by fulfilling the conditions of the allotment including making the requisite payments and that even after the perfection of the allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. The court emphasised that it is the act of registration that confers a transferable title and not the possession of an allotment letter.
19. To the extent that the deceased did not have any title, he did not demonstrate any ownership of the suit property. I also note that the appellant did not seek any orders to declare the deceased the owner of the suit property. He simply assumed that the deceased was the owner and, on that score, sought declaration of the first respondent a trespasser, eviction of the first respondent and a permanent injunction against the first respondent.



20. Now turning to the issue of whether the second respondent was a necessary party. The second respondent stated that he sold the suit property to the deceased. Pursuant to Order 1 Rule 10 (2) of the Civil Procedure Rules, his presence before the court was necessary to enable the court to adjudicate fully upon and settle all the questions involved in the matter. I have no difficulty in finding, as I now do, that the second respondent was a necessary party.
21. The last issue for determination is whether the reliefs sought by the appellant ought to have issued. The appellant sought a declaration that the first respondent was a trespasser, eviction of the first respondent and a permanent injunction against the first respondent.
22. Trespass is defined in the 10<sup>th</sup> Edition of Black's Law Dictionary as an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. The appellant failed to demonstrate that the suit property belonged to the deceased. In those circumstances, he can neither term the first respondent a trespasser nor validly obtain his eviction. If appellant genuinely believes that the deceased was entitled to the suit property, he should pursue issuance of title with both Mulembe Investment Co-op Society Limited and the Land Adjudication and Settlement office.
23. As regards the appellant's prayer for a permanent injunction against the first respondent, he needed to demonstrate that his case was meritorious and that he would suffer damage if the order was not granted. See Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR and Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR. He failed to surmount that test and was therefore not entitled to a permanent injunction.
24. In view of the foregoing discourse, I find no merit in this appeal, and I dismiss it with costs to the respondents.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF APRIL 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the Appellant

No appearance for the First Respondent

No appearance for the Second Respondent

Court Assistant: M Nguyayi

