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Kiok v Mpoe (Environment and Land Appeal E003 of 2023) [2024] KEELC 4171 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4171 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E003 OF 2023

CG MBOGO, J

MAY 23, 2024

BETWEEN

BENARD SEMEIYAN KIOK .... APPELLANT

AND

CHARITY TITO MPOE .... RESPONDENT

(Being an appeal against the judgment of Hon. Mungai, Chief Magistrate, delivered on 18th April, 2023 in Narok ELC Case No. 121 of 2019)

JUDGMENT

1. The appellant herein being aggrieved by the judgment of Hon Mungai, Chief Magistrate, delivered on 18th April, 2023 filed a memorandum of appeal dated 26th April, 2023 challenging the judgment on the following grounds: -

    1. That the learned magistrate erred in law and fact in failing to appreciate and take judicial notice that there was in existence a dispute between the plaintiff and defendant over the said parcel of land and the same was resolved by the County Dispute Resolution Committee vide minutes dated 28/6/2019 where they resolved that the specific plot was properly allocated to the plaintiff/appellant.

    2. The learned magistrate erred in law and fact in failing to address the fact that the documents provided by the defendant/respondent was replete with errors, erasures and contradiction with even some documents issue indicating that they were prepared by public office on a Sunday.

    3. That the learned magistrate erred in law and fact in finding that the appellant was wrong in using minutes prepared in the year 1991 to back his claim when in real sense the said minutes are being utilized as a matter of practice by the county to issue plot in the area to this date.

4. That the learned magistrate erred in law and fact in finding that the appellant had not proved his case whereas the documents to wit: - allotment letter, receipts and proof of payment of receipts to the county were availed and uncontroverted thus conferring ownership.

5. That the learned magistrate erred in law and fact by wrongfully awarding the plot in dispute to the defendants yet the defendant/respondent widely failed to provide allotment letter for that specific plot save for documents pointing to an allocation of a petrol station on an anonymous parcel of land.

6. That the learned magistrate erred in law and fact by disregarding the appellant's evidence on record and dismissing the appellant's case.

7. That the judgment of the learned magistrate on the appellant's case in quo delivered on the 18th April, 2023 is against the law, judicial and legal principles and the weight of the evidence on record.

2. The appellant therefore prays: -

   a. That the judgment of the learned magistrate dated 18th April, 2023 be reviewed and/or set aside.

   b. That the honourable court be pleased to revisit the appellant's case through the plaint dated 18th September, 2019 and allow the same as prayed.

   c. That the respondents do bear the costs of this appeal.

3. The memorandum of appeal was canvassed by way of written submissions.

4. On 4th April, 2024, the appellant filed his written submissions dated 3rd April, 2024. The appellant submitted that it is important to look at the extent of involvement of an applicant, in the process of allocation of land through allotment. Reliance was placed in the cases of William Rerimoi Lagat versus Dickson Kiprop Kebut ELC Appeal E021 of 2022 and Harrison Mwangi Nyota versus Naivasha Municipal Council & 20 Others [2019] eKLR. The appellant submitted that the trial court erred in finding that he couldn't tell if any meeting took place as he is not part of that stage in the process of allotment.

5. The appellant further submitted that although errors are normal and ought to be corrected, the error in the respondent's allotment letter is questionable as to the time and manner these purported errors were done. The appellant questioned why the error ran through the survey receipt listed in the documents dated 4th April, 2009. He submitted that it is impossible that for two separate documents, issued by separate offices in a separate period of 5 years would bear the same error. The appellant further questioned whether the receipt dated 4th April, 2009 was genuine as it was issued on a Saturday.

6. The appellant further submitted that it was substantially wrong, for the trial court to hold the view that the appellant whereas he had an allotment letter, had failed to develop the suit plot within 24 months. That in fact, as at the time of filing the suit, no party had developed the plot courtesy of the conflict that arose between the parties. While relying on the case of Mbau Saw Mills Limited versus Attorney General for and on behalf of the Commissioner of Lands & 2 Others [2014] eKLR, the appellant submitted that the offer for allotment lapsed before the respondent paid for acceptance of the same.

7. The appellant further submitted that the court was wrong in questioning the size of the suit plot which was not an issue in dispute. While relying on the case of William Rerimoi Lagat versus Dickson Kiprop Kebut (Environment and Land Appeal E021 of 2022, the appellant submitted that it is the

Commissioner of Lands who prepares the part development plan before allocation, and that the appellant not knowing the size, does not in any way deny him ownership.

8. The respondent filed her written submissions dated 13th May, 2024 and she submitted that a record of appeal is supposed to be complete with all the necessary documents. That the crucial documents missing or left out by the appellant in his record of appeal are, the decree, plaintiffs' list of witnesses and witness statement, plaintiff's list of documents and exhibits produced, the defence, defendant's list of witnesses and witness statements, defendant's list of documents and the defendant's submissions.

9. The respondent further submitted that Order 42 Rule 13 (4) of the Civil Procedure Rules lists the requirements of a record of appeal and in the absence of the listed documents, this court is not able to scrutinize and come up with its own conclusion as envisaged in an appeal. The respondent relied on the case of Trans Mara Sugar Company Limited versus James Omondi Obudho [2020] eKLR. She submitted that the appellant wants this court to go on a wild goose chase trying to figure out what they meant in their submissions as proof. The respondent relied on the case of Bwana Mohamed Bwana versus Silvano Buko Bonaya & 2 Others [2014] eKLR and submitted that without the complete record of appeal, there is no appeal for consideration and the same ought to be struck out with costs.

10. I have considered the grounds of appeal and the written submissions filed by both parties. I am of the considered opinion that the issue for determination is whether the memorandum of appeal has merit. This being a first appeal, I am mindful that the duty of this court as set out in the decision of Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) EA 123 is to reconsider the evidence, evaluate it and draw its own conclusion of facts and law, and this court will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in Jabane versus Olenja (1968) KLR 661, or where its discretion was exercised injudiciously as held in Mbogo & Another versus Shah (1968) EA 93.

11. The respondent herein submitted that the record of appeal is incomplete and as demonstrated, there is no appeal for consideration.

12. Order 42 Rule 13 (4) of the Civil Procedure Rules provides that;

> " Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party,The memorandum of appeal;The pleadingsThe notes of the trial magistrate made during the hearing;The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;All affidavits, maps and other documents whatsoever put in evidence before the magistrate;The judgment, the order or decree appealed from and, where appropriate, the order (if any) giving leave to appeal"

13. A perusal of the court file confirms that the memorandum of appeal was filed on 26th April, 2023. The appellant filed a record of appeal dated 12th October, 2023, containing pleadings. The appellant filed a supplementary record of appeal dated 18th December, 2023.

14. Order 42 (1) of the Civil Procedure Rules provides;

> " Every appeal to the high court shall be in form of a memorandum of appeal signed in the same manner as a pleading".

15. From the record in the instant case; there is valid and legal appeal based on memorandum of appeal filed on 26th April, 2023. Order 42 (2) of the Civil Procedure Rules further provides;

> " Where no certified copy of decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed".

16. In the instant case, there is no certified copy of the decree and /or order that was filed with the memorandum of appeal. However, the record of appeal contains a certified copy of the judgment. Order 42 Rule 13(4) of the Civil Procedure Rules, further provides;

> " Provided that;
>
> i) ......
>
> ii) the judge may dispense with production of any document of part of document which is not relevant, other than those specified in (a) (b) & (f) [above]"

17. From the above outlined provisions and applying the same to the pleadings in the instant case; this court finds that the fact that a decree has not been included in the record of appeal, and any other pleading as submitted by the respondent, that does not in law render the appeal incompetent as the above proviso does not make it mandatory that all outlined documents shall be filed with the appeal except for memorandum of appeal, pleadings and certified copy of decree and/or order in this case the judgment that is the subject of appeal. The documents said to missing are also not alien to the respondent herein since he participated in the trial before the lower court. It is also my belief that the lower court file forwarded to this court is essential in ensuring that it is not caught unawares in such instances. With the lower court file, however tedious it may be for the court to peruse the pleadings left out, it still has an advantage of counter checking to its satisfaction before rendering its' decision. In my view, the documents or pleadings left out are not fatal to the appeal herein and the prayer to strike out the memorandum of appeal thus fails. See the case of County Government of Narok versus British Pharmaceutiocals Limited [2021] eKLR.

18. The appellant filed a plaint dated 18th September, 2019 seeking the following orders: -

    a. A declaration that plot no. 37 Ololulunga Centre/Market within Narok County belongs to the plaintiff by virtue of having been allocated the said plot by the County Council of Narok now the County Government of Narok.

    b. A declaration that any purported allotment & documents giving rise to allocation of plot number 37 Ololulunga Market/ Centre Narok County to the defendant is invalid.

    c. Costs of this suit.

    d. Any other or further relief(s) that the honourable court may deem fit and just to grant.

19. In the plaint, the appellant averred that he was allocated parcel no. 37 by the County Government in the year 2001 and upon being allocated the parcel of land, he paid all the relevant rates and rent until January, 2017 when the dispute arose over the suit plot. Further, that he took possession of the same after the boundaries were shown to him and that on 14th September, 2019, the respondent, without any justification trespassed onto the said parcel of land alleging ownership.

20. The appellant further averred that the respondent had at one time claimed ownership but the County Government in minutes of the meeting held on 28th June, 2019 resolved that the suit plot belong to him.

21. The respondent filed an amended defence dated 15th February, 2021 pursuant to grant of letters of administration ad litem issued on 19th November 2020. The respondent denied the contents of the plaint and averred that he took possession of the same after allocation. The respondent averred that the suit is bad in law and incompetent as it does not disclose any cause of action and should be struck out with costs.

22. The matter proceeded for hearing and the trial court delivered a judgment on 18th April, 2023, that is the subject of the instant appeal.

23. As I have understood the matter as it was before the trial court, the dispute between the parties revolved around a parcel of land said to have been issued to the parties through allotment by the former County Council of Narok, which is now the County Government of Narok. The appellant's case proceeded for hearing on 7th June, 2021. The appellant testified that he was allocated the suit plot by the County Government of Narok in the year 2001 but he did not develop the same. He testified that he had been paying rates, and was issued with receipts. He testified the respondent also claimed ownership of the suit plot and they were summoned by the Plots Administration and Dispute Resolution Committee, which resolved that the property belonged to him. The appellant produced a copy of the letter of allotment, copies of receipts of payment of rates and a copy of the minutes of the meeting held on 28th June, 2019.

24. On cross-examination, the appellant testified that he applied for the plot in the year 2001.On being shown the allotment letter and the minutes for the meeting held on 18th December, 2011, the appellant testified that the same indicates a meeting that was held in the year 1991 but he maintained that he does not know the minutes which were used by the County Government to allocate land. The appellant further testified that the plot was standard in size but bigger than an ordinary plot and that further he never took measurements and he did not have the area map.

25. According to him, there was no other meeting prior to the meeting held on 28th June, 2019. He testified that the respondent's letter of allotment is for plot no. 377 and it is dated 25th November, 2004, and it was amended to read 37.

26. On re-examination, the appellant testified that the life form has been erased to 37 instead of 377 and that the defence documents were tampered with. According to him, the County Government is responsible for allocating land which he applied through filling a form. The appellant testified that there is no signature on the letter of allotment for parcel no. 377 and that this particular letter of allotment was erased. He also testified that the letter was issued in the year 2004 and that the signature was appended in the year 2019.

27. The defence, called two witnesses. They were Vincent Osewe (DW1) a Senior Assistant Director of Physical Planning and Charity Mpoi Lemein (DW2). On cross-examination Vincent Osewe (DW1) testified that based on the court summons, it was indicated as plot no. 377 and that in making his report, he was relying on an approved plan from their office. He agreed, that the report does not mention anything about the plot and that the said plan does not have a number as it is only an extract. On re-examination, DW1 testified that the plan he produced is with respect to plot no. 37 which is a proposed petrol service station.

28. The respondent, Charity Mpoi Lemein (DW2) testified that her late husband, applied to the Narok County Council committee for issuance of an allotment letter and that the said committee resolved to give him the plot for the petrol station. She produced the minutes dated 22nd March, 2004 and extracts of the meeting of 1st April, 2004 as evidence. She testified that the committee approved her late husband's allocation and issued him with an allotment letter dated 25th November, 2004. She admitted that there was a dispute and the committee deliberated and concluded that the petrol station belonged to her late husband.

29. The respondent sought to rely on the letter dated 6th September, 2019 written by the CEC of lands which confirms that the plot was allocated to her late husband. She admitted that the property is not developed and that the appellant has never constructed on the said plot.

30. On cross-examination, the respondent informed the trial court that they got the plot in the year 2004 which was for a petrol station. She testified that whereas she does not know the process of acquisition of land through allotment, the letter of allotment issued to her late husband refers to plot number 37 and the number 7 is counter signed and dated 25th November, 2004. She further testified that the receipt dated 4th April, 2009 bears plot number 37 and the number 7 is counter signed. She testified that she was not surprised that the survey receipt was issued on a Saturday for a land matter and further, that the extracts of the committee do not mention plot no. 37 but only refer to a petrol station. The respondent admitted that there was a dispute between the parties concerning the same issue which was resolved by the dispute resolution committee on 28th June, 2019. The respondent further admitted not to have produced receipts of rates paid to the County Government save for the payment of the survey works. According to her, a petrol station does not need to have a number like a plot and that she does not know whether there was any advertisement. She also told the court that in Ololulunga, there is no petrol station.

31. On re-examination, the respondent testified that no application requesting for allocation of the plot has been identified by the appellant and that the minutes dated 28th June, 2019 came later after the letter from the CEC lands which confirmed that the plot belonged to her deceased husband. She testified that the receipt for survey dated 4th April, 2009 refers to the petrol station and has indicated position 1 and 2. It was also her evidence that her receipt and allotment do refer to plot no. 37.

32. As earlier stated, this court exercising appellate jurisdiction, reconsiders the evidence, evaluates it and draws it own conclusion, taking into consideration the fact that it did not have a chance to hear the witnesses first hand.

33. I have re-evaluated the totality of the evidence (oral and documentary) adduced before the trial court. In so doing, I have taken note of the fact that parties were cross examined on the contents of the documents that were produced. I have perused the impugned judgment that is the subject of this appeal. In addressing itself to the issues before it, the trial court questioned how the plaintiff was allocated the suit plot ten years before he applied for the same and the admission by the appellant that he did not know which minutes were used to allocate him the plot. The trial court also delved into the issue of the size of the suit plot, a matter which was not an issue for determination before it. According to the trial court, the appellant did not comply with the conditions spelt out in the allotment letter even if he was to assume that he had been allocated the suit plot properly.

34. On the other hand, the court considered the evidence of the respondent and was satisfied that based on the documents produced by the respondent i.e. the minutes, the development plan, and the letter of allotment disclosing that the same was for a petrol station, the suit plot belonged to the respondent's

late husband. The trial court was also convinced that the suit plot number which read 377 was corrected to read 37 and it was backed up by the rest of the documents and the corrections are counter signed.

35. The trial court concluded by stating in paragraph *21* as follows :-

> "The evidence presented by the plaintiffs poses more question than it answers which the evidence presented by the defendant is cogent and very consistent and tallies in all material particulars. It was amply corroborated by DW1 and the exhibits. The plaintiff has therefore failed to establish his case against the defendant on the balance of probabilities and his claim must fail."

36. Having analysed the evidence tendered by the parties, I note that the trial court misdirected itself on a number of issues based on the evidence presented before it.

37. First, the size of the suit plot was not an issue disputed by the parties that required consideration by the court. On this I find that the court erred in delving into this issue.

38. Secondly, both parties, held letters of allotment said to have been issued by the County Government allocating them the suit plot. What the court would have done is interrogate these documents, apply the law and cited authorities in arriving at its conclusion.

39. It was the appellant's evidence that he was issued with an allotment letter having applied for the same in the year 2001. On the other hand, the respondent laid claim over the same on the strength of a letter of allotment issued to him in the year 2004. A look at the letter of allotment issued to the appellant showed that following a plot allocation meeting held on 18th December, 1991, his application for plot no. 37 was approved vide minute 12/91. The said letter of offer contained terms and conditions which the appellant was supposed to meet. Whereas, the letter of allotment contradicted the time which the appellant is said to have applied for the same, the receipts for payment of rates confirmed that he complied with the terms and conditions contained by paying the costs from the year 2001. This can be seen from the receipts. Among the receipts produced is one dated 9th October, 2001, indicating payment of Kshs. 4260/-. From the receipts produced, it shows that the appellant duly paid the rates from the year 2001 to 2017 and the said receipts all indicated plot no. 37.

40. On the other hand, the respondent produced a copy of a letter of allotment dated 25th November, 2004. This particular letter of allotment indicates that the respondent was allocated plot number 3777 petrol S 1-2 vide minute number 9/04. There was no evidence of compliance of the terms and conditions set out therein.

41. In the case of Mbau Saw Mills Ltd versus Attorney General for and on behalf of the Commissioner of Lands & 2 others [2014] eKLR it was stated as follows:

> "I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the

offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law."

42. In the absence of proof showing that the respondent had accepted the letter of offer, it is impossible to tell whether indeed he is the owner of the suit plot. That notwithstanding, there were errors on the plot number which indicated that the plot is number 377 with a correction made through a signature. I also do note that the earliest payment that can be traced to this property is one dated 4th April, 2009 which was for survey and showing fee. The same refers to plot number 377 which appears to have been corrected through signature. I wonder why such an error would run through a receipt 5 years later if at all the intention was lawful.

43. In a bid to confirm ownership, the respondent relied on minutes of the meeting held on 24th March, 2004. I have perused the said minutes and there is no indication of plot no. 37 being allocated to the respondent. The minute no. 9/04 refers to an application by the respondent for a petrol station which was approved. It does provide particulars of any plot number. The evidence of DW1 through the approved plan did not also provide the details of the suit plot and only sought to inform the court of the approved plan of Ololulunga Town by the County Government.

44. To shed light and to clear doubt, it appears that the dispute between the parties over the suit property was considered by the Plots Administration and Dispute Resolution Committee Meeting held on 28th June, 2019. These minutes in my view answer the question as to who the owner of the suit plot is. The allocation of the suit plot to the appellant is then made clear because these minutes recognized the existence of a letter of allotment issued to the appellant.

45. The minutes no. PADSC/04/06/2019: Semeyian Ole Kiok And Supeiyo Ole Lemein Plot Number 37 At Ololulunga Trading Centre stated as follows: -

> " The committee noted that this case has dragged for long hence the need to resolve and give direction is paramount. Previous submission were revisited by the committee to help come up with a verdict on who the rightful owner of plot number 37 is
>
> Based on oral presentation made by both parties on a meeting held on 3rd July, 2018 vide minute/ PADRC/02/01/2018, the committee once again analysed and fully interrogated the evidence and resolved as follows:-
> The plot register was looked on and it shows Semeyian Kiok own plot number 37 and due process was followed in allocating him the plot according to records presented.Allotment letters for both parties were screened and Semeyian Kiok's letter of allotment was not tampered with.Supeyo Lemein allotment letter was erased. The number 371 had the last digit erased to read 37.Supeyo Lemein minutes could not be verified as genuine proceedings of the said minutes. He could not satisfactorily convince the committee that indeed the minutes are authentic and genuine.Though Lemein was allocated space for petrol sation, he could not convince the committees that the ground allocated to him for petrol station the location where plot number 37 is located.The filed visit conducted by officers found that the ground in dispute is the location for plot number. 37 and not for petrol station as alleged by Mr. Supeyo Lemein.

Based on the above analysis, the committee was convinced beyond any reasonable doubt that Semeyian Ole Kiok is the rightful owner of plot number 37 at Ololulunga trading centre. Consequently, the

committee hereby confirm him as the rightful owner of plot number 37. He should hereby be allowed to develop the said plot without any interference from anybody. This case hereby resolved and closed as indicated above. A letter communicating this verdict should be given to both parties."

46. The report above by the committee responsible to determine disputes arising from plot allocation answers the question as to ownership. The letter by the Chief Executive Committee Member dated 6th September, 2019 does not confer the ownership rights of the plot to the respondent. The contents in the letter refer to the minutes of the meeting held on 24th March, 2004 which does give particulars of the plot in dispute.

47. Having said the above, I am satisfied that on a balance of probabilities, the suit plot belongs to the appellant herein. The upshot of the foregoing is that this court finds merit in the appeal and it is hereby allowed in the following terms: -

    i. The judgment of the Hon Mungai delivered on 18th April, 2023 is hereby set aside.

    ii. The plaint dated 18th September, 2019 is allowed in terms of prayers (a), (b), and (c).

    iii. The respondent to bear the cost of this appeal.

    Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 23RD DAY OF MAY, 2024.

HON. MBOGO C.G.

JUDGE

23/05/2024.

In the presence of: -

Mr. Meyoki Pere – C. A