



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWERA & MURGOR, J.J.A)

CIVIL APPEAL NO.167 OF 2006

BETWEEN

ENOCK IRUNGU.....APPELLANT

AND

BENSON IRUNGU MBARIA.....1ST RESPONDENT

MUCHANGI NDUATI NGINGO.....2ND RESPONDENT

***(Being an appeal from the Judgment and Decree of the High Court of Kenya
at Nairobi (Mugo, J.) dated 16th June, 2006***

in H.C.C.C. No.2213 of 1997)

JUDGMENT OF THE COURT

The appeal we are about to determine arose from the judgment of the High Court (*Mugo, J.*) delivered on 16th June, 2006.

The appellant filed the plaint dated 8th September, 1997 against the 2 respondents, office bearers of a body called Embakasi Welfare Society. The appellant averred that by a letter dated 22nd November, 1993 the then Nairobi City Council (now County) allotted to him Plot No.CF 14 UMOJA INNERCORE SECTOR 1, hereinafter the Plot, to build a nursery school. He took possession and paid due premiums and rates without fail. However on or about 15th July, 1997, he espied the respondents trespassing and digging trenches on the same plot and erecting structures without consent. Despite the appellants' requests that they cease to do so, the respondents did not take heed whereupon their acts caused loss and damage to the appellant. He therefore sought a mandatory injunction to issue against the respondents in respect of the acts complained of and also leave to evict them from the suit plot. There were, besides, prayers for general damages and costs.

The respondents filed the defence dated 17th September, 1997 pleading, *inter alia*, that being only the officials of Embakasi Welfare Society, they were wrongly joined in the suit. There was no cause of action against them and that the City Council ought to have been sued. The respondents denied all claims set out in the plaint and, in the alternative, averred that Embakasi Welfare Society was the owner of Plot

NAIROBI/UMOJA/83/14-UMOJA INNERCORE as per an allotment letter dated 20th November, 1993 – a public utility plot. They added that if the appellant was allotted this plot for private development, such allotment was irregular. They continued that the society had expended much energy and resources in developing the plot. There were interlocutory proceedings before the main trial got under way where, however, there featured a variation especially in reference to the respondents' plot. On 20th July, 1998, **Oguk, J.** (as he then was) directed that the parties and officials of the council proceed to the site to mark:

“...the correct location on the grounds (sic) of Plot CF 14 INNERCORE SECTOR 1... allocated to the plaintiff ... and plot No.CF UMOJA 1 SECTOR 1-3 (Nairobi/Umoja/83/14 (300 units Innercore) that was allocated to the defendant...”

That order had to be complied with in 30 days with a report being returned to court. As it shall appear later, the respondents do not appear to have visited the site as directed. Later **Waki, J.** as he then was, so remarked accordingly on 30th May, 2002, before the main trial began. Eventually, the visit issue appears to have been abandoned whereupon **Mbiti, J.** directed on 4/7/03 that parties file their respective documents for the trial. The trial began on 12th July, 2004 before **Mugo, J.**

The appellant (PW1) adverted to the letter (Exh.P.1) from the City Council dated 22nd November, 1993 by which he was allotted Plot No. C. F. 14 UMOJA INNERCORE SECTOR 1, measuring 1.4 hacteres. He was required to pay Sh.175,000/=. The appellant paid Sh.140,000/= on 14th July, 1994 (Exh.P2) and a further Sh.35,000/= on 14th July, 1994

(Exh.P3). He also paid survey fees on 14th July, 1994 (Exh.P4). Thereafter, a lease drawn up between the appellant and the council, was executed on 27th January, 1998 (Exh.P7). PW1 continued that by the court order (Exh.P8) **Oguk, J.** following a consent of both parties, the City Council was directed to point out the correct location of the plot allotted to the appellant as against that allotted to the respondents. The appellant produced the letter from the Director of City Planning Section dated 24th July, 2000 (Exh.Pa) addressed to the lawyers of both parties requiring that they visit the site. While the appellant with his lawyer and the city surveyor attended, he told the trial judge, the respondents did not. The surveyor indicated plot No.CF14 at Umoja Innercore. The appellant added that:

“There was no such plot as Umoja 1 Sector 1-3”

And so he desired that the court grant him his prayers.

In cross-examination, the appellant repeated that he was allotted that suit plot and he made due payments for it and then got a beacon certificate (Exh.P6).The appellant was certain that the letter from the council directing the parties to visit the site was copied to both lawyers.

His lawyer was **Mr. Ombete** but he could not say whether the copy to the respondents' lawyers (**M/S Kahuthu & Company Advocates**) was received there. The appellant said that the exhibits produced originated from the council; they were not forgeries at all.

In re-examination, the appellant more or less repeated the foregoing except to repeat that all the documents/receipts he produced originated from the council whether they bore the council letterheads or stamps. And that his brother one **Mr. Malenya** worked at the council offices, but he had nothing to do with the allocation.

Nathan Kathungu Mulinge (PW2), the Director of the Housing Development Department at Nairobi City Council, next took the witness stand. His duties included development of housing estates complete with community services and selling the same to the beneficiaries. He identified (Exh.P6) the letter of allotment in favour of **Enock Irungu**, the appellant, dated 22nd November, 1993 to build a nursery school at Umoja Innercore on a Plot measuring 1.4 ha., with a stand premium of Sh.140,000/=.

PW2 also identified the letter dated 20th November, 1993 addressed to Embakasi Welfare Society and allotting Plot No. CF 14 UMOJA 1 SECTOR 1-3 to it. PW2 told the court:

“The two letters do not relate to the same plot. Umoja Innercore Sector 1. The latter was developed in 70’s and does not have sectors. Umoja 1 has units known as core areas C,D, E, F ... The letter of 20th November, 1993 was an allotment letter in respect of a nursery school wherein the acreage is given as 1.2729 ha and the stand premium and rent totaling Sh.22,400/=. The letter of 22nd November, 1993 shows an annual rent of Sh.28,000/=. The two letters do not relate to the same plot.”

We quote from the evidence of **Mr. Mulinge** (PW2) *in extenso* because the determination of whether the two letters of allotment refer to two separate plots or not, was crucial in deciding the case before court.

The letter dated 24th January, 2000 by which PW2 summoned both parties, through their respective lawyers, to meet at his office on 2nd February, 2000 (Exh.P7) for the visit as ordered by **Oguk, J.** was tabled. He told the court only the appellant with his lawyer availed themselves and they proceeded to the plot which he identified. **Mr. Mulinge’s** evidence was that the 2 allotment letters referred to two different plots.

In cross-examination, the court heard that as an architect not a surveyor, the visit to the site was only for pointing out the plot, using maps. He concluded that:

“Nursery schools are allocated to private developers since the council itself cannot develop them.”

The appellant closed his case and the 1st respondent (DW1) took the witness stand. As the chairman of Embakasi Welfare Society, whose objectives included assisting the less fortunate, he was tasked with raising funds and procuring properties to develop amenities.

His society was allotted a Plot in 1993 by a letter dated 20th November, 1993 (Exh.D1) for plot No.CF 14 UMOJA 1 SECTOR 1-3. He, too, produced a beacon certificate (Exh.D2). The society paid a total of Sh.22,400/=. DW1 also produced a lease agreement with the City Council (Exh.D3). The respondents intended to erect a social hall, develop a children’s playground and establish a school. The social hall was built in 1994 (Exh.D4 (a), (b) photographs). The respondents were enjoying the property until 1997 when the appellant filed the subject suit.

Mr. Mbaria answered in cross-examination that from the beginning of the proceedings, the respondents were not informed that both parties had to visit the suit plot. He was not aware of **Oguk, J.’s** orders of 20th July, 1998 to that effect. Or that the Town Clerk summoned the parties to visit the site. That the respondents did not receive the summons for the visit from **Mr. Mulinge** (PW2); their lawyers then were M/S Kahuthu & Company Advocates. Being shown the letter of allotment of a plot to the appellant, DW1 said:

“I agree that there is a dispute as to whether there are two plots allocated or one plot allocated to 2 people (persons) by council.”

The two allotment letters differed in details and DW1 conceded that their own ref. HDD/1023 /64.PA/CAM/LS and the appellant’s HHD/1993/64.DA/CAM/CS actually did differ. He also acknowledged that two plots allotted also differed in detail as observed in the pleadings. Similarly, the premiums payable differed in the sum of. Sh.20,000/=for their plot, but Sh.140,000/= for that of the appellant. Then he told the learned trial judge:

“The differences would suggest that the council issued two different plots and there is no case of double allocation.”

With that, the trial closed. Both sides filed written submissions. The learned trial judge penned the judgment under review in this appeal, making findings, including:

- i. that the appellant did not make the requisite payments in 30 days as per the letter of allotment;
- ii. the lease document was not sealed in the presence of the Mayor together with the Town Clerk;
- iii. the appellant was allegedly allotted the plot for a nursery school, not a community facility;
- iv. some letters were not on council letterheads;
- v. and the receipts for payment did not bear stamps to evidence that duty was paid;
- vi. the plot intended for public utility was properly allocated to the respondents and not the appellant who wished to build a nursery school there (for private use);
- vii. the respondents' documents were properly executed and witnessed;
- viii. **Mr. Mulinge** (PW2) only pointed out the plot allocated to the appellant but he did not rule out the existence of the plot also having been allocated to the respondents;
- ix. the respondents did not receive the invitation to visit the site;
- x. there was no proof that the appellant took possession.

In the end the learned judge found that the appellant had not proved that he had a better title to the suit plot than the respondents and his claim was dismissed. The respondents' occupation could not be disturbed. Each party had to bear its own costs and any restraining orders against the respondents were lifted.

The High Court decision, as we noted earlier provoked the present appeal premised on seven (7) grounds which **Mr. L. M. Ombete**, learned counsel for the appellant argued together. On the other hand, **Mr. G.R. Matwere**, learned counsel holding brief for **Mr. R. Kinuthia** opposed the appeal.

Mr. Ombete, having briefly given the history of the case, argued that while the two parties presented two different letters of allotment referring to what appeared as two different plots, the learned judge proceeded as if the only issue she was being called upon to decide was: To whom did the appellant's plot belong?

Mr. Ombete urged us to note and therefore find that there were two plots involved with different reference numbers, different of allotment letters and even different premium sums payable to the council. The two plots were therefore not one and the same, a thing the learned judge did not decide. Counsel continued that the learned judge found that the appellant had not made the payments as per the letter of allotment in 30 days yet, she did not allude to the same conditions in respect of the respondents' letter; and even as the appellant exhibited payment receipts, the respondents had none, that the issue of payments was not in dispute between the litigants, and neither did **Mr. Mulinge** (PW2), an official from the recipient council, disclaim those receipts; and more importantly, that the letter of allotment issued to the appellant was never terminated; the council was not a party to the suit and so it was irrelevant and in error for the learned judge to purport to find that the receipts did not bear stamps to evidence payment of duty. The appellant exhibited his lease agreement with the council together with a beacon certificate. In the event the recitals in the lease were inaccurate, that was an issue with the council because the respondents' lease contained similar recitals yet the two documents were treated differently. And more **Mr. Ombete** argued, that even if the appellant's lease agreement did not bear the Mayor's signature, PW2 appeared before court, but he was not asked about the authenticity of that document at all. The document had been properly signed and witnessed by one **Mary Mugo**, an advocate. In the end **Mr. Ombete** repeated that the learned judge had not framed issues for determination properly and she ended up making

findings on issues that were not in dispute.

On his part, **Mr. Matwere** supported the High Court decision as having been based on both oral and documentary evidence, even as he conceded the plot references (recitals) were different as well as the letters of allotment. He maintained, though, that the absence of the Mayor's signature on the appellant's letter of allotment made it invalid. It did not have stamps to show that duty was paid. Counsel, while claiming that the respondents made due payment for the Plot, agreed that they did not exhibit any receipts thereof but in any event they took possession. And that the council could not have granted approvals for development if due payments were not made. We heard that the respondents did not receive the council's letter inviting parties to visit the site, which letter dated 24th January, 2000 we noted was addressed to the parties' lawyers, and not the parties themselves. Counsel concluded that **Mr. Mulinge** (PW2) did not take part in the allotment of the subject plot, neither did he rule out the possibility that the Plot was allotted to the respondents.

This being a first appeal, we are not bound by the findings of the trial judge. We have a duty to conduct a retrial as per the recorded evidence (see ***Selle vs the Associated Motor Boart Co. Ltd [1968] EA 123***) and make our own findings. We have set out the evidence in this matter and so this is our decision.

To begin with, it needs no repeating that decisions in civil matters are based on a balance of probabilities. The pleadings filed, evidence adduced and issues framed by the parties and or the court, lead to a decision.

In this case, we begin with the way the learned judge framed the issues or issues to which the evidence was applied to decide the dispute. She stated at the onset of the judgment:

“This suit involves a dispute over a plot in the Umoja area of the City of Nairobi referred to as PLOT NO.C.F. 14 UMOJA INNERCORE SECTOR 1 in the plaint...”

Then she referred to the rest of the plaint and moved to the evidence of the appellant, covering considerable space, before she alluded to the defence, in that the respondents had claimed ownership of the same Plot referred to as Nairobi/Umoja/83/14- Umoja Innercore.

In our view, there was a misdirection by the learned judge as to what was in dispute. The proper dispute would have been stated from the start that it was one plot under dispute with either side having different letters of allotment and different reference numbers to it. Then she could proceed to analyze the evidence to decide who held the proper documents to the Plot. In beginning with the matter in a one-sided manner, the judge proceeded thus all the way to the end, concluding that the Plot was the property of the respondents. Naturally, framing a wrong issue definitely led to a wrong decision leaving the dispute between the parties unresolved.

We have set out the pleadings and evidence from both sides, both oral and documentary. We have heard both sides in submissions. In our view and on a balance of probabilities, the appellant's side presented better evidence to the High Court. Agreed, both sides had allotment letters, lease agreements and even beacon certificates. But, the appellant went a step further and exhibited receipts to evidence payments made to the council. The respondents did not exhibit any. **Mr. Mulinge** (PW2) was in court and did not disown or disclaim any of the documents the appellant presented. They were thus taken and ought to have been considered as authentic in the circumstances, whether they bore the mayor's signature or did not carry duty stamps. In any case, issues as these were not in contention at all. It was thus in error for the learned judge to doubt the authenticity of the payment receipts and on her own invalidate them. In any case, the respondents did not exhibit any.

Had the learned judge noted that the allotment letters, the recitals therein, the sizes of the plots, the premium payment required for each allotment were different in material particulars, which we find they were, she should have concluded that two plots were involved. Furthermore, the council officer, **Mr. Mulinge** (PW2) invited the parties to go and be shown their respective plots, and only the appellant went and was shown his Plot. The conclusion was to be that as and when the respondents chose to go to be

shown their plot, the same could have been shown to them. In any event, **Oguk, J** (as he then was) had recorded the consent order for the parties to arrange with the City authorities to be shown the correct location of their plots on the ground. Indeed, **Benson Irungu Mbaria** (DW1) did seem to agree that there were two plots involved when in cross examination he compared the acreage and the premiums payable and answered that:

“The differences would suggest that the council issued two different plots and there is no case of double allocation.”

From those detailed differences, our view is that they suggested allotment of two separate plots, but that indeed two different plots were allocated to each of the litigants, and all they needed was to go on the ground and be shown their respective plot. The appellant did so; he was shown the plot by PW2 fitting the details in the letter of allotment. He made payments and was issued with receipts. The respondents who agreed to the order by **Oguk, J.** that they visit the site, appeared to argue that they did not get the council’s letter inviting them to the site. That letter was addressed to **Mr. Kahuthu** of Kahuthu & Kahuthu Advocates who were the respondents’ lawyers at the time. That firm has not denied that it received that letter. And in any case with the consent order to visit the site, one would expect that the respondents would follow up with what became of that visit, before proceeding to occupy and develop the Plot. They did not do that, and we hope they do not claim that also they did not know of that order. We do not wish to appear to impute anything adverse on the part of the respondents at this stage, but suffice it to note that even as this appeal was before this Court, it made orders on 17th April, 2013 and repeated the same on 12th February, 2014 that parties visit the site in company of county official with the probability of ironing out the dispute. City County invited the parties by their letter of 27th

March, 2014 but seemingly the respondents’ side appeared least enthusiastic about that visit.

We will not conclude this matter without referring to the finding by the learned judge that producing receipts without stamps showing that duty was paid made the documents and therefore the lease invalid. First, that was not an issue in the case. Second,

Mr. Mulinge was in court and it was not put to him whether the lease was valid or not. And third, under the **Stamp Duty Act (Cap 480) Section 19**, the learned judge, if she felt that duty ought to have been paid, but it was not, she could have directed that the same be paid.

“19. (1) Subject to the provisions of subsection (3) of this section and the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except –

(a)... (b) ...

2. ...

3. ***Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions –***

a. ***if the period of time within or before which the instrument should have been stamped has expired and the instrument one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;***

b. ***in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given reasonable opportunity of applying to a collector for leave under section 20 or obtaining a certificate under section 21;***

C. ...

(4) (5)

So confining ourselves to the parts of section 19 (quoted) for the sake of this case, the receipts produced in the High Court which did not bear duty stamps were not invalid. If found necessary, the appellant could still go and pay such duty if the court was minded to insist on such payment.

In sum, the learned trial judge was not justified in rejecting those receipts on account of missing stamps. And this is in the light of the fact that the respondents did not avail any evidence that they made the payments required of them to the council.

As for the use to which the suit plot was allotted, the learned judge appeared to say that instead of being used for a community facility, the appellant was going to put it to private use, namely building a nursery school. First, the user of the subject plot was not an issue before the court. Second, **Mr. Mulinge** (PW2) had told the court in his cross-examination that:

“Nursery Schools are allocated to private developers since the council itself cannot develop them.”

Accordingly, the appellant should not have been faulted on the use of the Plot. Lastly, we advert to the learned judges remark that:

“The plaintiff has not questioned any of the defendant’s documents or proved that the same did not refer to the same plot.”

Again, with due respect to the learned judge, it was not the appellant’s duty to question or disprove the respondents’ documents. His was to prove with his documents that the related to the Plot as pleaded, and upon which the respondents had trespassed. Thus had the judge examined the two sets of documents in respect of details thereof, she could have come to the conclusion that two plots were involved, and that the appellant had shown that the suit plot was allocated to him.

We think we have said enough. In the result we allow the appeal by setting aside the findings of the High Court. The prayers in the plaint were proved on the balance of probabilities, which we now grant with costs to the appellant both here and in the High Court.

Dated and delivered at Nairobi this 25th day of March, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR