



**Cheboi & another v Bore (Environment and Land Appeal
E012 of 2023) [2024] KEELC 14189 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 14189 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E012 OF 2023**

L WAITHAKA, J

MAY 13, 2024

BETWEEN

WILLIAM SAWE CHEBOI 1ST APPELLANT

KIPTUM KIPSANG 2ND APPELLANT

AND

JOSPHAT CHANGWONY BORE RESPONDENT

*(Being an Appeal from the Judgment of Hon. C. Kutwa SPM
delivered on 17th May, 2023 in Iten MCE & L No. E002 of 2021)*

JUDGMENT

1. By a plaint dated 13th January 2021, the plaintiff (now appellant) instituted a suit in the lower court to wit Iten SPMC ELC Case No. E002 of 2021 seeking judgment against the defendant (now respondent) for a declaration that they (the plaintiffs) are the legal owners of Biretwo Trading Centre Plot No.28 (suit property); that the defendant is a trespasser on the suit property; An order of permanent injunction to restrain the defendant, his agents and/or servants from claiming, entering, remaining on the suit property or from further wasting, constructing thereon or in any way dealing with or interfering with the suit property; costs of the suit; any further relief the court may deem fit to grant.
2. The plaintiff pleaded that at all times material to the suit, they were the allottees of the suit property; that the suit property was created from Elgeyo Marakwet/Chepsigot "A"/963 registered under Elgeyo Marakwet County Government as owner.
3. The plaintiffs complained that the defendant had violently forced his way, damaged the fence and constructed illegal structures on the suit property.



4. The defendant filed a statement of defence, dated 17th January 2022, denying the allegations contained in the plaint and contending that the plot centres in Biretwo Trading Centre have not been formally allocated; that no allotment letters had been issued; that his father, the late Changwony Chebore was allocated plots No. 28 and 29 because he donated a huge portion of his land to Biretwo dispensary; that the plaintiffs share of the centre is plot No.64.
5. The defendant contended that the plaintiffs have no proprietary rights to the suit plot at the centre as they are not the registered owners. He urged the court to dismiss the suit with costs to him.
6. Upon considering the case presented before him the learned trial magistrate observed/held:-

“...I have analyzed the evidence on record and parties submissions ...There is elaborate explanation of the procedure governing the alienation of public land. This procedure was captured by Cheron J. in the case of Ali Mohamed Dagane...v Hakar Abshir & 3 others (2021)e KLR where he stated as follows....

In the Instant case, it is clear that the above mentioned procedure was not followed. In particular, P.W.1 pointed out that he had not been issued with an allotment number. There’s no evidence to show that part development plan was ever drawn and approved by the county government nor is there any evidence of gazette notice making the suit property available for disposal to private citizens like the plaintiff via public auction. Further, no evidence presented to show the suit property was acquired through public auction as required. Further more, there is no evidence that an allotment letter was issued to the plaintiff nor is there any evidence that the plaintiff or the defendant made payment of the price that was expected to have been set out in the allotment letter. Additionally, there are no cadastral survey maps that were authenticated and approved by the Director of Survey nor is there evidence that there was a beacon certificate issued to the parties.

The only documents the plaintiffs produced were a letter dated 11th January 2021 from the County Government; search certificate, rate payment receipts and a list of purported beneficiaries of the centre. There’s no evidence by way of minutes to show the matter was tabled before the municipal council of Iten and later ratified by the county assembly of Iten.

From the evidence on record the basic requirements of the law were not followed. The county government of Elgeyo Marakwet, who issued the necessary documents was not sued by the parties. In any event, have perused the search certificate and note that the land still belongs to the County Government of Elgeyo Marakwet. In the premises, I find that the plaintiffs have not proved their case on a balance of probabilities and the same is dismissed with no order as to costs.”

7. Aggrieved by the decision of the trial court, the plaintiffs appealed to this court on grounds that the learned trial magistrate erred by:-
 1. Determining issues that were not presented for his determination and failing to determine the issues before him from the pleadings, evidence and the submissions;
 2. Disregarding the plaintiffs’ weighty evidence, submissions and authorities cited;
 3. Disregarding the undisputed fact that the plaintiffs pay rates to the County Government of Elgeyo Marakwet despite that fact having been confirmed by the Town Administrator;
 4. Failing to appreciate that the plaintiffs have been in possession of the suit property for over ten years;



5. Failing to appreciate that the allottees have legitimate expectation that the County Government of Elgeyo Marakwet would complete the allocation process;
 6. Failing to appreciate that the parcels were allocated by the defunct County Government of Keiyo;
 7. Disregarding the list of allottees/beneficiaries confirmed by the Town Administrators;
 8. Failing to consider the plan produced in court;
 9. Failing to appreciate that the process of completion of leases is administrative and National Land Commission cannot capriciously take away legitimate expectation of allottees;
 10. Putting more weight to the defendant's evidence while totally disregarding their evidence and submissions thereby arriving at a wrong decision;
 11. Making a decision that is against the weight of evidence adduced, erroneous and untenable in law.
8. The plaintiffs pray that the entire decision be set aside, proper finding be made and the appeal be allowed with costs.
 9. Pursuant to directions given on 7th December 2023, the appeal was disposed off by way of written submissions.

SUBMISSIONS

Appellants Submissions

10. In their submissions filed on 5th February 2024, the appellants have given an overview of the cases urged by the parties in the lower court and submitted that they adduced compelling evidence namely; letter from the County Government of Elgeyo Marakwet showing that they are allottees of the suit plot (plot No. 28); a search certificate showing land parcel Elgeyo Marakwet/Chepsigot A/963; rates receipt dated 30th August 2020; receipt for a trade application form for a shop at Chepsigot Biretwo Centre dated 7th February, 1978; list of allottees of Chepsigot Biretwo Trading Centre dated 2nd July 2020; letter to the Town Administrator complaining about the respondent's behaviour.
11. Based on the decisions in the cases of Festo Ogeda Agutu v. Richard Odumbe & another (2022) e KLR and Caroline Awinja Ochieng & another v. Jane Anne Mbithe Gitau & 2 others (2015) Eklr, the appellants have reiterated that the evidence they adduced proved, on a balance of probabilities, their beneficial interest in the suit property.
12. Concerning the evidence adduced by the defendant/respondent, the appellants have submitted that he failed to prove, on a balance of probabilities, that the defendant/respondents had any claim in the suit plot, plot No.28.
13. Based on the fact that the suit property is public land, the appellants term the defendant/respondent's claim that he was given the suit plot by his father an absurdity.
14. The appellants have reiterated their contention that the learned trial magistrate erred by delving and dwelling on issues that were never raised during the trial; for example the issue of procedure to be followed in allotment instead of addressing whether the appellants established and sustained their claim of beneficial interest in the suit plot.



Respondent's Submissions

15. In his submissions filed on 15th February 2024, the respondent has similarly given an overview of the case urged by the parties before the lower court and based on the decision in the case of Ali Mohamed Dagane supra submitted that the appellants' claim was void ab initio for failure to follow due process in obtaining the suit plot.
16. Maintaining that the appellants have not made up a case for interference with the trial court's decision, the defendant/respondent urges this court to dismiss the appeal with costs to him.

Analysis and determination

17. In exercise of the duty vested in this court as a first appellate court I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123, *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
18. According to the evidence adduced before the lower court, both the plaintiffs and the defendant contended that they were allocated the suit plot; plot number 28. The parties also admitted and acknowledge that the suit property belonged to the County Government of Baringo.
19. The totality of the evidence adduced before the trial court shows that the predecessor of the County Government of Baringo, the County Council of Koibatek had began the process of allocation of plot number 963 from which the suit plot was hived from to members of the public. The process was, however, not completed.
20. According to Joseph Kerich, the Town Administrator Keiyo South who testified as P.W.5, plot No.963 from which the suit plot among other plots were hived, belongs to the County Government of Baringo. The plot was meant for a market.
21. informed the court that planning in respect of plot No.963 was partly done by the local authority; that the local authority came up with a list of allottees/beneficiaries of the plots curved from plot number 963. He produced the list of the beneficiaries of the plots hived off plot number 963 as Pexbt 10.
22. further informed the court that the County Government is collecting annual rent from the allottees.
23. With regard to the suit plot, plot No. 28, P.W.5 informed the court that according to the list of allottees (Pexbt 10), it was allocated to the plaintiffs. He also informed the court that the plaintiffs are the ones who have been paying rent for the suit plot. He produced copy of rates receipts as Pexbt 11 and a draft plan from the defunct local authority as Pexbt 12.
24. further informed the court that the defendant was allocated plot No. 26.
25. D.W.1, Joseph Bore, informed the court that he was given plot No. 28 and 29 but does not have any document to show that he was given the plots. It is the testimony of D.W.1 that he was given the plots by his father.
26. D.W.1 further informed the court that he is aware that adjudication was done and that the suit plot, plot No.28, was given to the plaintiffs. He did not raise any objection during land adjudication against the County Council's decision to allocate the suit plot to the plaintiffs.



27. D.W.1 acknowledged that according to the list of allottees produced in evidence by P.W.5 (Pexbt 10), his plot is plot No.26.
28. In re-examination, D.W.1 informed the court that plot No. 28 belonged to his father and that he inherited it from him.
29. From the pleadings, evidence and the submissions before the lower court, the issue presented before the court for determination was who between the plaintiffs and the defendant was entitled to beneficial use of the suit plot; plot number 28. Both the plaintiffs and the defendant claim to be the beneficial owners of the suit property. The plaintiffs' claim was based on the licence granted to them by the defunct County Council of Koibatek while the defendant claimed that he was given the property by his father.
30. Whilst the plaintiff by himself and his witnesses proved that he was the one granted beneficial use/licence by the defunct County Council of Koibatek, the defendant did not adduce any evidence capable of proving his pleaded case that the suit plot belonged to his father.
31. According to the evidence adduced before the lower court, it is common ground that plot No. 963 from which the suit plot was hived alongside other plots listed in the list of allottees produced in evidence by the plaintiffs (Pexbt 10), belongs to the County Government of Baringo. That being the case, the defendant cannot be heard to claim that he obtained the suit plot from his father as it did not belong to him. It is only the County Government of Baringo or its predecessor in entitlement to plot number 963, the County Council of Koibatek that could allocate or grant licence to the parties to use the suit plot.
32. The totality of the evidence adduced before the lower court shows that it was the plaintiffs who were granted licence by the defunct County Council of Koibatek to occupy and use the suit property.
33. It is the considered view of this court that the plaintiffs as the beneficial owners of the suit plot can bring and maintain action against any person interfering with their licence.
34. It is the considered view of this court that the learned trial magistrate erred by determining the dispute on an issue that was not raised by the parties either in their pleadings or submissions, that is to say, the issue of want of procedure in allocation of the suit plot. In this regard, see the case of Raila Amollo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 others (2017) e KLR where the Supreme Court stated:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

35. In the case of Elizabeth O. Odhiambo v. South Nyanza Sugar Co. Ltd (2019) e KLR the court *inter alia* held:-

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation



and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing parties and leads to denial of justice.”

36. The dispute before the trial court was about beneficial ownership or entitlement to use and occupation of the suit plot as between the plaintiffs/appellants and the defendant /respondent.
37. The evidence adduced sufficed for purpose of making a determination as to who, between the plaintiffs and the defendant was entitled to beneficial use of the suit plot. The decision would be a decision in persona as opposed to in rem hence would not affect the rights of the County Government of Elgeyo Marakwet in case it turns out that the applicable procedure was not used in allocation of the suit plot to the plaintiffs/appellants.
38. There was no evidence capable of proving that the occupation of the suit plot by the plaintiffs/appellants was unlawful to warrant dismissing their claim based on the grounds cited by the trial court.
39. The upshot of the foregoing is that the plaintiffs/appellants have made up a case for interference with the decision of the lower court. Consequently, I set aside the judgment of the lower court and substitute it with an order allowing the plaintiffs’ claim against the defendant as prayed in the plaint dated 13th January, 2021.
40. I award the plaintiffs/appellants the costs of the suit in the lower court and of the appeal.
41. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 13TH DAY OF MAY 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered electronically: -

N/A for the Appellants

N/A for the respondent

Court Asst.: Christine Towett

