



**Watimah v Wabwile & another (Environment and Land Appeal
8 of 2019) [2023] KEELC 405 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 405 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 8 OF 2019
BN OLAO, J
JANUARY 20, 2023**

BETWEEN

MARY NAMULIZA WATIMAH APPELLANT

AND

ISAAC WASWA WABWILE 1ST RESPONDENT

PHILIP WEKESA WAMBIANGA 2ND RESPONDENT

*(Being an appeal from the judgement of Hon. N. N. Barasa Srm
delivered on 22nd February 2019 in Webuye Spmcc No 27 of 2012)*

JUDGMENT

1. Mary Namuliza Wabwile (the Appellant) Filed At Webuye Senior Principal Magistrate's Court Civil Case No. 27 of 2012 seeking against Isaac Waswa Wabwireand Philip Nekesa Wambilianga(the 1st and 2nd Respondents respectively) judgment in the following terms:
 1. Eviction of the Respondents form the Plot No 2xx at Webuye site and service and an order of permanent injunction restraining the Respondents or anybody claiming through them from interfering with the said plot belonging to the Appellant.
 2. Special damages of Kshs.16,500.
 3. Costs of this suit.

It was the Appellant's case that the plot No 2xx at Webuye Site And Service(the suit plot) had been allocated to her by the National Housing Corporationafter she had paid all the required fees but in January 2012, the 2nd Respondent entered it and destroyed the Appellant's fence and also threw away her building materials valued at Kshs.16,500 alleging that he had purchased the same from the 1st Respondent.



2. The Respondents resisted the Appellant's claim and filed separate defences.
3. The 1st Respondent denied having entered the suit plot or destroying the Appellant's property. He added that he has no interest in the suit plot and is a stranger to the averments in the plaint.
4. The 2nd Respondent pleaded that he, and not the Appellant, is the rightful owner of the suit plot which had been allocated by the Municipal Council of Webuye to the 1st Respondent who then sold it to him. He added that if the Appellant ever owned the suit plot, then the same was duly repossessed from her after she failed to pay the land rates and rent due to the Municipal Council of Webuye and the Government of Kenya. He denied having destroyed the Appellant's property on the suit plot and pleaded that the Appellant's suit was an abuse of the process of the Court and Preliminary Objection would be raised during the hearing.
5. The matter fell for hearing before Hon N. N. Barasa (SRM) who after considering the testimonies of the Appellant and the 2nd Respondent who were the only witnesses who testified, delivered the Court's judgment on 22nd February 2022 dismissing the Appellant's case and directing that each party meets their own costs.
6. Aggrieved by that judgment, the Appellant preferred this appeal seeking to have the trial court's judgment and decree set aside and the appeal allowed.
7. The following six (6) grounds of appeal were raised:
 1. That the learned trial Magistrate erred law and in fact in failing to address herself to the real issues in controversy and arrived at a decision that was not backed with evidence.
 2. That the learned Magistrate erred in law and in fact in holding that the Appellant had failed to prove ownership of the suit land known as plot No 2xx Webuye Site and Service yet there was sufficient evidence to back the Appellant's claim.
 3. That the learned Magistrate was misdirected in failing to award the Appellant special damages pleaded and proved for a sum of Kshs.16,500 the value of the building material damaged by the Respondents on the site on plot No 2xx Webuye Site and Service.
 4. That the learned Magistrate erred in law and in fact in holding that the Appellant had failed to enjoin a non-party i.e. Municipal Council of Webuye And National Housing Corporation to the suit yet the claim before Court was purely against the Respondents seeking eviction and for unlawful acts of trespass seeking to restrain them permanently from interfering with the Appellant's quiet, peaceful occupation and utilization of the suit land being plot No 2xx Webuye Site and Service.
 5. That the learned trial Magistrate failed to consider and take into account that the Respondents jointly and/or severally forcibly entered and interfered with the Appellant's peaceful and quiet occupation of plot No 2xx Webuye Site and Service during the pendency of the suit herein aimed at defeating the ends of justice thus occasioning the Appellant to suffer serious loss and damage.
 6. That the learned Magistrate erred in law and in fact in failing to analyse the issues before her critically, wholly or properly and the judgment was evidently pre-determined, biased, flawed, indefeasible and was arrived at in cursory and perfunctory (*sic*) is devoid of service, reasoning and justification and occasioned a serious miscarriage of justice.



8. The appeal has been canvassed by way of written submissions. These have been filed both by Mr Osango instructed by the firm of Osango & Company Advocates for the Appellant and by Mr Makokha instructed by the firm of Makokha, Wattanga & Luyali Associates Advocates for the 2nd Respondent. The 1st Respondent did not participate in both the hearing in the trial Court nor in this appeal.
9. I have considered the record of appeal the submissions by counsel and the law applicable.
10. This being a first appeal, it is my duty to re-consider and analyse the evidence adduced before the trial court and arrive at my own decision taking into account the fact that I did not have the benefit of hearing, seeing and assessing the witnesses and their demeanour *Selle & Another v Associated Motor Boat Co. Ltd & Others* 1968 E.A 123. I must also bear in mind that it is a strong thing for this Court to differ with the finding of fact by the trial court unless there was no evidence upon which such a finding could be supported – *Peters v Sunday Post Ltd* 1958 E.A 124.
11. I shall consider grounds 1, 2 and 6 together as the trial magistrate is assailed for failing to address the real issues in controversy between the parties, failing to find that the Appellant had proved ownership of the suit plot and arriving at a pre-determined, biased and flawed decision.
12. Having pleaded that she was the owner of the suit plot, the burden was on the Appellant to adduce cogent evidence to prove that fact. Sections 107, 108 and 109 of the [Evidence Act](#) make that very clear they read:
 - 107 .
 - (1) “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The Appellant’s case as per paragraph 5 of her plaint was that the National Housing Corporation had allocated her the suit plot. As part of her documentary evidence, she produced two letters one dated 12th November 2002 and addressed to her from the National Housing Corporation and the other dated 1st February 2012 also from the National Housing Corporation and addressed to the Town Clerk Webuye Municipal Council. The first letter was warning her that she was in arrears of Kshs.21,458.00 towards the repayment of her loan and that she would be physically evicted on 19th November 2002 unless the loan was cleared. No evidence was provided during the trial to prove that she settled the loan.

13. The letter dated 1st February 2012 from the National Housing Corporation addressed to the Town Clerk Webuye Municipal Council is very telling and due to its relevance, I shall cite it in extenso:

“Dear Sir

Ref: Plot No. 2xx Site & Service Scheme.



This is to request you to confirm the ownership of plot No 2xx Site and Service Scheme for records show Mary Watima Id No xxxx of P. O. Box 712 Webuye and a letter Ref MCW/L&A/205/111 dated 14/4/2009 shows plot was repossessed and re-allocated to Mr Isaac Waswa Wabwire of P.O. Box 447 Webuye. The plot has a loan balance the last payment was paid on 23rd January 2004. Receipt No 431197 for Kshs.554/=

Yours faithfully

David K. Terer

O/C – NHC Kakamega.”

On the other hand, the 1st defendant filed among his documents a letter dated 14th April 2009 from the Municipal Council of Webuye and addressed to the Managing Director National Housing Corporation. The letter was copied to the 1st defendant and again I shall cite it in extenso due to its relevance in these proceedings:

“Re-allocation of Plot No 7996/55/2xx Webuye Site & Service Scheme.

Please refer to Council Meeting held on 27th September 2005 under MIN TPWC/201/205 and meeting held on 9th March 2006 under MIN TPWC/217/2006 respectively that resolved that the undeveloped plots be repossessed and be re-allocated.

The above plot has been re-allocated to Mr Isaac Waswa Wabwire as per the condition governed (*sic*) below:

- i. That he develops the plot within two years.
- ii. That he clears council rates in time.

Yours faithfully

J. K. O. Musongo

Town Clerk.”

Among the persons to who this letter was copied are the District Lands Officer Bungoma and the 1st defendant. The 1st defendant, as I have already stated above, did not testify during the hearing but the above letter was among the documents produced by the 2nd defendant without objection including another letter dated 14th April 2009 addressed to him by the Municipal Council of Webuye allocating the suit plot to the 1st defendant as well as a sale agreement dated 8th November 2011 by which the 1st defendant sold the suit plot to the 2nd defendant at a consideration of Kshs.175,000. Clearly, the National Housing Corporation could not have been writing to the Municipal Council of Webuye to “Confirm the ownership of plaintiff No 2xx Site and Service” If it was the one who had allocated it to the Appellant. And if there was any doubt about the ownership of the suit plot, the said Municipal Council of Webuye did write to both the 1st defendant and the National Housing Corporation confirming that the 1st defendant had been re-allocated the said plot. The contents of those letters were never re-called. In light of that very cogent and un-rebutted evidence, the Appellant cannot now be heard to allege that the trial magistrate failed to address the real issues in controversy or that the trial magistrate erred in law and in fact in holding that the Appellant had failed to prove ownership of the suit plot. The ownership of the suit plot was a key issue in this dispute and it was fully addressed by the trial magistrate. Further, the evidence on record confirmed without doubt that the 2nd respondent, who had purchased the suit plot from the 1st Respondent, and not the Appellant, was the owner of the suit plot.



14. On the allegation that the trial magistrate was biased and therefore arrived at a judgment which was pre-determined and flawed, counsel for the Appellant has not in his submissions placed before this court any evidence to suggest bias on the part of the trial magistrate. The term “bias” is defined in *Black’s Law Dictionary* 10th Edition as:

“A mental inclination or tendency; prejudice; predilection.”

The term “actual bias” on the other hand is defined in the same Dictionary as:

Genuine prejudice that a judge, juror, witness or other person has against some person or relevant subject.”

Any judicial officer who has a personal interest in the subject of a trial must of necessity recuse himself from hearing the dispute. There can be no fair trial without impartiality of those whose duty it is to administer the law. It was held in *Locabail (uk) Ltd v Bayfield Properties Ltd* & another 2000 QB 451 that:

“The basic rule is not in doubt. Nor is the rationale of the rule that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would without more undermine public confidence in the integrity of the administration of justice.”

A complaint of bias on the part of a judicial officer is also a breach of the judicial Code of Conduct and Ethics. There is nothing in the record herein to even suggest that the trial magistrate Hon N. N. Barasahad any interest in the suit plot and therefore the outcome of the dispute or that he was personally known to the parties herein or indeed had any reason to pre-determine the outcome of the case before him for his own selfish interests. And if there was any such fear on the part of the Appellant, nothing would have been easier than to seek for the recusal of Hon N. N. Barasa from presiding over the dispute that was before him. The allegation that the trial magistrate delivered a flawed judgment because of having a pre-determined mind or being biased is a mere detraction and not made in good faith. I must reject it.

15. Grounds No 1, 2 and 6 of the memorandum of appeal has no basis and are hereby dismissed.
16. In ground No 3, the Appellant states that the trial magistrate was misdirected in failing to award her pleaded and proved special damages of Kshs.16,500 being the value of the building materials damaged by the Respondents. The Appellant pleaded in paragraph 7 of her plaint that the Respondents not only destroyed her fence but also threw away her building materials valued at Kshs.16,500. That being a special damages claim, it had to be specifically pleaded and proved. In *Hahn v Singh* 1985 KLR 716. The Court of Appeal stated that:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved ... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularly of proof required depends on the circumstances and nature of the acts themselves.”

In *Douglas Kalafa Ombeva v David Ngama* 2013 eKLR, the Court of Appeal held that:

“Where there is no evidence regarding special damages, the Court will not act in a vacuum whimsically.”



Other than pleading that the Respondents threw away her building materials valued at Kshs.16,500, the Appellant did not produce any receipt, invoices or any other documents to satisfy the trial magistrate that the building materials were worth Kshs.16,500. The Appellant filed his case in February 2012 just a month after the incident in January 2012 when she alleges that the Respondents threw away her building materials. Surely she must have purchased the materials from somewhere and it was not too late to obtain relevant documents to prove to the trial court that indeed they were worth Kshs.16,500. And even if the receipts and other documents were not available, the court would certainly have required other cogent evidence to prove that claim. A sum of Kshs.16,500 is not of course a substantial amount but nonetheless, the law is that such a claim must be strictly proved. From the record herein, that sum appears to have been plucked from the air and the trial magistrate was justified in declining to grant it.

17. That ground similarly fails.
18. In ground No 4, the Appellant takes issue with the trial magistrate for holding that the Appellant failed to enjoin non-parties being the Municipal Council of Webuye and the National Housing Corporation yet the claim was purely against the Respondents for trespass. That complaint appears to me to be justified. This is how the trial magistrate addressed that issue:-

“In my view, the plaintiff failed to enjoin crucial parties such as the alleged recipient of the plaintiff’s money, the National Housing Corporation to shed light on how the plaintiff issue was handled as well as the Municipal Council of Webuye. I find that the defendant however are not at fault as the 1st defendant was re-allocated the land which at his will sold to 2nd defendant at a willing buyer willing seller cost.” (*sic*)

The trial magistrate erred both in law and fact in arriving at the above conclusion for two reasons. Firstly, the remedies of eviction, permanent injunction and special damages which the Appellant sought could only be pleaded as against the Respondents. Neither the Municipal Council of Webuye nor the National Housing Corporation had trespassed onto the suit plot and carted away the Appellant’s building materials. Therefore, the Appellant had no dispute with those entities and had no business impleading them in these proceedings. Secondly, the respondents could have taken out third party proceedings to enjoin the Municipal Council of Webuye or the National Housing Corporation seeking contribution, indemnity or any other relief relating to the allocation of the suit plot to the Appellant whereas, as the 1st Respondent claimed, the same had been allocated to him. The only way the Appellant could have involved the Municipal Council of Webuye and the National Housing Corporation in these proceedings would have been to call its officers as her witnesses to support her case that in fact she was the rightful allottee of the suit plot. However, she had no basis to enjoin them as parties in these proceedings because she was not seeking any remedy from them. Only the Respondents could have enjoined them as third parties under Order 1 Rule 15 of the *Civil Procedure Rules*. That ground of appeal succeeds but is readily of no significance because as it must now be clear, the dispute before the trial court pitted the Appellant against the Respondents over the ownership of the suit plot and nothing more.

19. Finally in ground 5, it is pleaded that the trial magistrate failed to consider and take into account that the Respondents jointly and/or severally forcibly entered and interfered with the Appellant’s peaceful and quiet occupation of the suit plot during the pendency of this suit thus causing her serious loss and damages. The record shows that by a Notice of Motion dated 26th August 2016, the Appellant had sought orders to injunct the Respondents from interfering with the suit plot. However for a whole year, that application remained un-prosecuted and on 23rd May 2017, the trial magistrate dismissed it with no orders as to costs. The application itself came too late in the day because by 26th August 2016,



the Respondents had been in occupation and possession of the suit plot for over 5 years because the same was sold to the 2nd Respondent *vide* an agreement dated 8th November 2011. So, by 2016, there was nothing which a temporary order of injunction could remedy.

20. In my view therefore, other than the misdirection about enjoining the Webuye Municipal Council and the National Housing Corporation in these proceedings and which did not affect the final orders by the trial magistrate, I am not persuaded to allow this appeal. The trial magistrate properly addressed the main issues as to who between the Appellant and the Respondents was the rightful owner of the suit plot and arrived at the only inevitable conclusion that it was the Appellant. Therefore, there would have been no justification to evict the Appellant from the suit plot. To begin with, the 1st Respondent was no longer in occupation thereof and as for the 2nd Respondent, the same had properly been transferred to him by the 1st Respondent who was the only recognized allottee by the Municipal Council of Webuye. The 2nd Respondent was therefore not a trespasser liable for eviction. If anything, he was entitled to use reasonable force to remove the Appellant or her properties therefrom.
21. With regard to costs, the trial court directed that each party meets their own costs. I see no reason to interfere with that order.
22. Ultimately therefore, this appeal is devoid of merit. It is dismissed. Each party to meet their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 20TH DAY OF JANUARY 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES. RIGHT OF APPEAL.

BOAZ N. OLAO

JUDGE

20TH JANUARY 2023

Explanation Notes:

This judgment was due 13th October 2022 a date which had been fixed prior to my transfer to Busia Elc. The delay which is regretted was therefore inevitable.

BOAZ N. OLAO

JUDGE

20TH JANUARY 2023

