



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC APPEAL NO. 13 OF 2019**

**FESTO OGEDA AGUTU ..... APPELLANT**

**-VERSUS-**

**RICHARD ODUMBE.....1<sup>ST</sup> RESPONDENT**

**TOWN COUNCIL OF AWENDO.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**A. INTRODUCTION**

1. This Appeal emanates from the Judgment and decree of Hon. Z. J. Nyakundi dated 16<sup>th</sup> January, 2013 in Rongo Principal Magistrates' Court Civil Case No. 17 of 2011, in which the Appellant's claim instituted by way of Plaint dated 21.04.2011 was dismissed with costs. The grounds in the Memorandum of Appeal are that: -

**i. THAT the Learned Trial Magistrate erred in law and in fact in finding that the Plaintiff did not have any claim against the Defendants despite the weight of the evidence on record.**

**ii. THAT the Learned Trial Magistrate erred in law and in fact in relying on the exhibits produced by the 1<sup>st</sup> Defendants in proof of possession in spite of the fact that the same were sufficiently impugned by the Plaintiff.**

**iii. THAT the Learned Trial Magistrate erred in law and in fact in failing to appreciate adequately or at all that the evidence on record sufficiently proved the Plaintiff's claim even without documentary evidence of ownership.**

**iv. THAT the Learned Trial Magistrate erred in law and in fact by finding for the 1<sup>st</sup> Defendant against the weight of the evidence and submissions on record.**

2. The backdrop to this appeal is that the sometimes in 2004, the 2<sup>nd</sup> Defendant Respondent allocated to the Plaintiff; who was a squatter at Awendo Township, Plot No. EAST SAKWA/ WAWARE/ 1159 measuring 50 by 100 for a consideration of Kshs. 5,600/= as payment for the survey and the allotment fees. This was after a directive was issued by the Town-Clerk of the 2<sup>nd</sup> Defendant, that squatters within the area be resettled and given plots within the area upon payment of Kshs. 5,600/=. The Plaintiff thereafter constructed a semi-permanent house where he has been residing since 2004 to date. It was the Plaintiff's contention that in blatant breach of the allotment agreement, the 2<sup>nd</sup> Defendant refused, ignored and neglected to issue him with an allotment letter, plot card or any documentation to indicate ownership of the said plot by the Plaintiff or to issue the official receipt/ documentation acknowledging the payments made with regard to the Plot by the Plaintiff.

3. That the 2<sup>nd</sup> Defendant in further breach of the allotment agreement, allocated the suit property to the 1<sup>st</sup> Defendant in disregard

of the Plaintiff's prior overriding interest on the suit property, who is now threatened with eviction. The Plaintiff therefore sought for permanent injunction to restrain the Defendants from demolishing, interfering, dealing with suit property and the plaintiff's quiet and peaceful possession.

4. The 1<sup>st</sup> Defendant's contention on the other hand denied there being an allotment of the suit property to the Plaintiff by the 2<sup>nd</sup> Defendant and the Plaintiff's claim in totality. He produced exhibits to prove that the plot in dispute had been allotted to him and that he was the rightful owner of the same. It was his assertion that no documentary evidence was produced to support the ownership claims by the Plaintiff. The matter was heard and the court delivered its Judgment on 16.01.2013 whose effect was to dismiss the Plaintiff's case with costs to the 1<sup>st</sup> Defendant which culminated to the Appeal herein.

5. On 19.10.2021, this court issued directions on the mode of hearing of the Appeal and directed that the same be canvassed by way of written submissions to be filed and exchanged within 14 days for each party. The Appellant was also directed to serve the Respondent with the Record of Appeal.

6. The Appellant filed his written submissions dated 15.11.2021 which I have taken into consideration in arriving at my decision while on a perusal of the court record, I have noted that the Respondents did not file any written submissions. Be that as it may, I will proceed to determine the Appeal as hereunder.

7. It was the Appellant's submission that he tendered evidence which was never controverted at all to the effect that he had been allocated the suit property Plot No. East Sakwa/ Waware/1159 measuring 50ft. by 100ft in the year 2004. He also stated that he paid the consideration of Kshs. 5,000/= to Hellen Okumu and Jared Onyando both working for the 2<sup>nd</sup> Respondent but was never issued with receipts.

8. Further, he also submitted that the issue of possession and the absence of the relevant documents was confirmed by the other squatters who were also issued land at the same time with him and took possession and who testified as witness in support of his case. He thus urged the court to find that the plot card used by the 1<sup>st</sup> Respondent was not a document of title and thus the 1<sup>st</sup> Respondent cannot rely on the same to prove that he is the lawful owner of the suit property.

9. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This mandate certainly does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. See the Court of Appeal decision in ***Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR***.

10. Further, the Court of Appeal in ***Selle v Associated Motor Boat Co. [1968] EA 123*** held as follows: -

***“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”***

11. I will now proceed to re-evaluate and re-assess each of the party's claim and their witnesses from the lower court record. The Appellant testified as PW1; it was his testimony that in the year 2000, upon electing James Ochieng as the councillor, he promised them permanent plots, he thereafter applied and got permanent plot No. 1159 measuring 50ft by 100ft. He took possession of the said plot upon payment of Kshs. 5,000/= as consideration which was paid to one Hellen Okumu and Jared Onyando who were employees of the 2<sup>nd</sup> Defendant. They were not issued with any receipt nor given any plot card numbers, their names were only entered in the register of the 2<sup>nd</sup> Defendant. It was his assertion that the 1<sup>st</sup> Defendant trespassed into his suit property in 2007 even though he had the necessary documentations and maintained that the plot belonged to him.

12. PW2 – James Obuya Ogada he testified that he knew the Plaintiff and they both lived in Awendo. He was one of the squatters who were allocated land by the 2<sup>nd</sup> Defendant upon payment of Kshs. 6600/= and was given a receipt. He claimed that the 2<sup>nd</sup> Defendant took back the receipt and the same has never been returned to them. He also confirmed that they have never been given any plot cards over the allocated properties.

13. Juliana Auma Mugo testified as PW3, it was her testimony that she was also given the property by the are councillor James Ochieng, who promised them permanent plots. Also claimed to have been given a receipt upon payment of Kshs. 6600/= which was later taken back and never returned. No plot card has ever been given to her. PW4- Divina Adoyo also testified to have been given a plot but she neither has the receipt nor the plot card.

14. The 1<sup>st</sup> Defendant/ Respondent also testified as DW1. He confirmed to have been allocated the suit property Plot No. 1159 upon application and subsequent payment of the required fee and was given a receipt to that effect. He produced the following documents as exhibits in support of his claim of ownership of the suit property No. 1159, to wit,

i. Application for the allocation of Plot dated 29.06.2007 – DEXHIBIT 1

ii. Payment receipt of Kshs. 1500/= - DEXHIBIT 2

iii. Plot Card of plot no. 1159 dated 02.10.2007- DEXHIBIT 3

iv. Payment receipts of Plot rent and rates - DEXHIBIT 4 (a-e)

v. Notice issue to the Plaintiff dated 28.02.2010 - DEXHIBIT 5

vi. Notice to the Defendants - DEXHIBIT 6

15. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the Appellant's submissions in totality; I find that the main Issue for determination is whether in the circumstances, this Court should interfere with the exercise of discretion by the trial court and set aside its judgement.

16. At the centre of the dispute between the parties herein is the ownership of suit property Plot No. 1159 East Sakwa/Waware. The Appellant maintains that he is legal owner of the said suit property and has been in occupation of the same since 2004, when the same was allocated to him and thus the trial magistrate erred in relying in the evidence produced by the 1<sup>st</sup> Defendant and disregarding his claim, evidence and proof of possession.

17. It is trite law that he who alleges must prove. Section 107(i) of the Evidence Act provides that: -

*“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*

18. From a re-evaluation of the evidence adduced and the testimonies of each of the parties and their witnesses in the trial court and the submissions made herein, I find that the Appellant did not adduce any evidence whatsoever to prove his ownership or payment of the suit property at all, he did not produce any receipt to confirm that he made any payment to Awendo Town Council neither did he produce any register where his name was registered as alleged nor a plot card to prove ownership. The Appellant cannot claim that since the other witnesses who testified in support of his case also owned plot in the same area and have been occupying the same without neither the plot cards or receipts of payments for the same, then the same should be used as a prima facie evidence of his legal ownership of the suit property, I find the said position as misguided.

19. J.L. Onguto, J in the case of **Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others** [2015] eKLR, in determining the issue of ownership of the plot stated as follows: -

*“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....*

*It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’:* per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

*The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”*

20. The 1<sup>st</sup> Defendant on the other hand produced several documentation including receipts for payment of the rates and rent to the council, the plot card, receipts of payments and the application for the plot; which in my view prove the issue of ownership of the suit plot to the required threshold. In adopting the above mentioned decision, I find that the 1<sup>st</sup> Defendant has satisfactorily proved his ownership of the suit plot.

21. Further, no relationship/nexus was established by the Plaintiff between the 2<sup>nd</sup> Defendant and Hellen Okumu and Jared Onyando, who are allegedly the employees of the 2<sup>nd</sup> Defendant to confirm whether they were indeed employees of the 2<sup>nd</sup> Respondent, if the payment of the amounts was done as alleged and further whether they had the authority to collect and receive money on behalf of the council. I also agree with the trial magistrate that the area councillor at the time one James Ochieng, did not have the sole capacity/mandate to issue the plots in dispute in the manner in which he did.

22. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in dismissing the plaintiff’s claim. The analysis and subsequent decision was purely made upon examination of facts presented before him and the evidence adduced in support of each party’s claim. I find no need to interfere with the said decision.

## **CONCLUSION**

23. In conclusion, I accordingly find that the Appeal is **not merited** and is therefore dismissed with no costs. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 28TH DAY OF JANUARY, 2022.**

**MOHAMMED N. KULLOW**


**JUDGE**

**In presence of: -**

Nonappearance Appellant

Nonappearance Respondent

Tom Maurice – Court Assistant

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