Case Number:	Environment and Land Appeal 4 of 2019
Date Delivered:	15 Dec 2021
Case Class:	Civil
Court:	Environment and Land Court at Nakuru
Case Action:	Judgment
Judge:	Mwangi Njoroge
Citation:	Martha Wambui v Joseph Kangogo & another [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	Hon. J.B. Kalo, (CM)
County:	Nakuru
Docket Number:	-
History Docket Number:	CMC Civil Suit 1776 of 2004
Case Outcome:	-
History County:	Nakuru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

APPEAL NO. 4 OF 2019

MARTHA WAMBUI.....APPELLANT

VERSUS

JOSEPH KANGOGO.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU.....2ND RESPONDENT

(Being an Appeal against the Judgment of Hon. J.B. Kalo, Chief Magistrate in Nakuru CMC Civil

Suit No. 1776 of 2004 delivered on 4/12/2018)

JUDGMENT

1. The background to this appeal as far as the record before this court is concerned is that the appellant filed suit, **Nakuru Civil Suit No. 1776 of 2004,** against the respondents on **17/8/2004** by way of a plaint which was amended on **27th October 2006,** claiming that she was allocated the suit land by the 2nd respondent on **19th March 2001**. She stated that she has at all material times been the registered owner of the suit premises and entitled to possession thereof; however on an unknown date and without any knowledge and/or consent of the appellant the 2nd respondent allocated the same premises to the 1st respondent who evicted the appellant and took possession and commenced some developments thereon hence the suit. The 1st respondent never filed any defence to the claim but the 2nd respondent filed a defence which it later amended and on **15th November 2006.** In the amended defence the respondent stated that if there was any allocation that was made in favour of either the appellant or the 1st respondent then that allocation was irregular and fraudulent and that the premises in question remain the property of the 2nd respondent and the appellant and the 1st respondent remained mere tenants of the 2nd respondent.

2. The trial court delivered judgment on the **4/12/2018.** It dismissed the suit with costs to the 2nd respondent. it found that the appellant was allocated the suit land and that when she failed to comply with the conditions in the said letter she was issued with a demand notice dated **2nd June 2001** requiring her to pay **Ksh 60,000/=** within **60** days from the date of the notice. The court also found that she paid **Ksh 40,000/-** to the 2nd respondent between **August 2001** and **February 2002.** In its determination the court found that the appellant did not comply with the terms contained in the allotment letter and the demand notice and that therefore the appellant was deemed not to have accepted the allocation and she can not therefore be held to be the lawful owner thereof.

3. On the alternative prayer for a refund of the money paid, the court stated that the letter of allotment did not contain any clause on refund of monies paid and that to order a refund would amount to rewriting the contract between the appellant and the 2nd respondent a power beyond the court's reach.

4. Being dissatisfied with the with the trial court's judgement the appellant who was the appellant in the court below has appealed to this Honourable Court against the said judgment and sets forth the following grounds of appeal as follows:

1. That the learned trial Magistrate erred in law and in fact in finding that the appellant failed to comply with the terms and conditions attached to the allocation letter of the parcel of land known as Gilgil Housing

Estate Unit No. 34.

2. That the learned Trial Magistrate erred in law and in fact in finding that the appellant was not the lawful owner of the parcel of land known as Gilgil Housing Estate Unit No. 34.

3. The learned Trial Magistrate erred in law and in fact in finding that the appellant had not paid Kshs. 9,300 as required by the allocation letter.

4. The learned Trial Magistrate erred in law and in fact in finding that the appellant had not paid Kshs. 60,000 within sixty days as per the demand notice.

5. The learned Trial Magistrate erred in law and fact in failing to refund the appellant the money paid as an alternative prayer.

6. The learned Trial Magistrate erred in law and in fact in failing to find that the appellant had proved her case against the respondents on a balance of probabilities.

5. The appellant prays that the appeal be allowed, the judgment in the subordinate court be set aside with costs and the claim be allowed here and below.

6.On **21/10/2021** the appeal was admitted for hearing and this court gave directions that the same be canvassed by way of written submissions. The 2nd respondent filed its submissions on **11/11/2021.**

Determination.

7. The circumstances in which this court can interfere with the trial magistrate's exercise of discretion are well circumscribed in the Court of Appeal case of **Mbogo and Another v Shah [1968] EA 93** where the court held that it can interfere with the discretion if it's satisfied that the trial court misdirected itself arriving at a wrong decision resulting to an injustice. In such circumstances it is the duty of this court to revisit the evidence on record, evaluate it and reach its own conclusion on the dispute.

8. The gist of the dispute between the parties in the trial court which has given rise to the present appeal is a plot described as **Gilgil Housing Estate Unit No. 34**.

9. According to the evidence adduced by the appellant, the suit land was allocated to her by the County Council of Nakuru vide an allotment letter. The appellant produced payment receipts dated **31/8/2001** and **14/2/2002** for the sums of **Kshs. 10,000** and **Kshs. 30,000** respectively being payment for the suit property. She also produced a receipt dated **6/4/2004** for **Kshs. 50,** a demand letter dated **3/6/2003** and a notice dated **2/6/2001**.

10. The trial magistrate in his evaluation of documents produced before him noted that the appellant produced a letter of allotment from the defunct County Council of Nakuru which prescribed conditions precedent, that the appellant was to fulfil, for the allocation to be deemed accepted. The trial magistrate further stated that the condition was that the appellant pays **Kshs. 9,300** within thirty (**30**) days from the date of offer to signify acceptance.

11. On cross-examination, the appellant testified that indeed she was to pay **Kshs. 9,300** within thirty (**30**) days but failed to do so claiming that the plot had already been allocated to someone else.

12. It is the case that from the letter of allotment the same did not confer any proprietary right but only a right to receive property or to be allocated upon complying with the terms and conditions stated therein.

13. The appellant submitted she was the proprietor and she had paid the required **Ksh 60,000/=** and taken possession to signify her acceptance of the land. Consequently the land became unavailable to any other person and the allocation to the 1st respondent was therefore illegal and in breach of the appellant's constitutional rights. Citing **Kanyungu Njogu vs Daniel Kimani Maingi 2000 eKLR** it was further urged that in civil cases the burden of proof is on a balance of probabilities and relying on **Section 107 (1)** of the evidence act it was averred that the court has discretion to render a judgment based on the evidence adduced. The appellant submitted that it provided the court with more than sufficient proof that she had complied with the terms and conditions of the allotment letter while no evidence whatsoever was adduced on behalf of the respondents at the trial. It is also stated that there was no evidence that the said letter of allotment was ever cancelled, and the 2nd respondent therefore had no power to allocate the suit property to the 1st respondent without following the laid down procedure.

14. The appellant cited the cases of **Faruj Maharus Vs Jb Martin Glass Industries & 3 Others Civil Appeal No 130 Of 2003 (Unreported)**, **Harrison Mwangi Nyota Vs Naivasha Municipal Council & 20 Others 2019 eKLR** and **M'Ikiara M'Rinkanya & another vs Gilbert Kabeere M' Mbijiwe (1982- 1988) 1 KAR 196** in support of the proposition that the decision by the trial court to the effect that the letter of offer had lapsed was erroneous as the allottee who is the appellant had signified acceptance by paying the sum required. She pointed out that no refund was ever made to her of the sums paid. In respect of the orders declining a refund of the sums paid to the 2nd respondent, the appellant submitted that the trial court had no evidence to support that conclusion yet the appellant had proved on a balance of probabilities that she had paid the money. It was further urged that it was erroneous to hold both that the appellant had not met the conditions for the allotment and also that she could not be refunded her money; that it would be unfair and untenable for the 2nd respondent to breach the agreement and to keep the money and thus be unjustly enriched; that where the 2nd respondent deems the letter of allotment as rescinded or repudiated it would be unjust and inequitable to keep the money, and it should refund that deposit by the appellant at court rates from the date of payment till repaid in full. Citing the case of **Makube Vs Nyamuro 1983 eKLR** it was urged that a trial court should not normally interfere with the finding of fact unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. In conclusion the appellant submits that she proved her case on a balance of probabilities and prays that the appeal be allowed.

15. Citing **Bubaki Investment Co Ltd Vs National Land Commission & 2 Others 2015 eKLR**, the 2nd respondent on its part in its submissions stated that the trial court never erred in finding that the appellant never complied and that she was not the lawful owner of the suit premises since the appellant had admitted that she had failed to comply with the terms on the letter of allotment. Further it was submitted that the appellant never demonstrated she paid the **Ksh 9,300/=** stated on the allotment letter and that she had further failed to comply with the demand notice dated **2/6/2001** seeking payment of **Ksh 60,000/=** within **60** days of its date. On the issue of the trial court declining a refund, the 2nd respondent claimed that parties are bound by their pleadings and since the prayer for a refund is a category of special damages which must not only be specifically pleaded but also proved and the appellant had failed to plead or prove any special damages, the trial magistrate did not err in declining a refund. It was submitted that the trial court was right in finding that the appellant had not proved her claim on a balance of probabilities.

16. In the determination of the instant appeal, consideration must be made of two crucial documents that were tendered in evidence by the appellant. They are an undated letter of allotment addressed to the appellant and a notice dated **2/6/2001** addressed to one Martha Kiboi. The letter of allotment of course notified the appellant that she had been offered allocation of the premises pursuant to a Council meeting of **19/3/2001** subject to payment of Ksh **9,300/=.** The notice dated **2/6/2001** notified one *Martha Kiboi* to pay **Ksh 60,000/=** within **60** days from the date of the notice in default of which the Council would have no alternative than to give the same opportunity to other interested members of the public who are ready to buy. There is no indication in the record that *Martha Wambui* and *Martha Kiboi* both refer to the appellant. There is also no indication as to when, if at all, the two documents were served upon the appellant.

17. It appears from the evidence adduced before the trial court that the appellant failed to pay the amount required by the letter of allotment that is **Ksh 9,300** within **30** days of the date of the offer. I have examined the letter in detail and found that it is not dated. However it has a date of the meeting of the District Plot Allocation Committee. That date is **19/3/2001**. Is that the date to be taken as the date of offer" In this court's view it would be confusing to rely on the date of a meeting as the date of offer. The letter itself is the letter of offer. There is no other evidence of offer of the plot to the appellant. The normal thing to do is to indicate the date of the letter as the date of offer, or the date of receipt of the letter of offer.

18. It is noteworthy that the 2nd respondent does not dispute procedural issues. It does not dispute that the appellant paid it monies towards the plot. The matters pleaded by the 2nd respondent in the defence did not allow the respondent to raise any other defence other than that which was pleaded for indeed it is the law that parties are bound by their pleadings. Therefore as far as pleadings were concerned the 2nd respondent did not claim that the appellant failed to pay the monies required. It only termed the allocation irregular and fraudulent. Noteworthy is the fact that none of the respondents called any evidence at the hearing of the suit. A defence whose statements are not backed up by any evidence is not of any use to any respondent. The statements made in the 2nd respondent's amended defence therefore remain unproved.

19. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. In the case of ***Commissioner of Lands and another Vs Kithinji Murugu M'agere (2014) eKLR,*** the court held as follows:

"In this case, the applicant's case is that having been allotted the suit parcels of land, the Respondents ought to be compelled to issue him with the title documents. In Dr. Joseph N K Arap N'gok vs. Justice Moijo Ole Keiwua & Others Civil Application No. Nai. 60 of 1997 it was held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held. In this case save for the Miritini property no evidence has been exhibited that the applicant paid the requisite fees for the Ngong Township properties. Accordingly, it is not possible to find that the applicant had met the conditions specified in the letter of allotment with respect to the said property. In the premises there is no basis upon which I can find that the applicant has shown that he has a legal right, or substantial interest the performance of which must be done by the Respondents.

With respect to the Miritini property, it is contended by the Respondents that in the absence of an acceptance by the applicant, it cannot be said that the applicant fulfilled the conditions specified in the letter of allotment."

20. The acceptance of a letter of allotment can either be in writing or by conduct through payment as one of the terms.

21. It is a fact that the appellant did not fully comply with the terms of the allotment letter within the stipulated **30** days by making the payments stipulated therein. However, the County Council of Nakuru did not demonstrate that the appellant never paid the sums that she claims were paid to it or that she is not the rightful allottee of the suit property.

22. The defence of the 2nd respondent on the other hand contained numerous mere denials and a statement that any allocation regarding the suit parcel either to the appellant or to the 1st respondent was irregular, fraudulent and illegal and that the 1st respondent and appellant were simply its tenants.

23. At the trial, the appellant testified to the effect that the demand for **Kshs. 60,000** was in the name of Martha Kiboi. However, the appellant nevertheless paid part of the price for the suit property as evidenced by the receipts she produced in evidence. The appellant showed that despite the fact that the notice dated **2/6/2001** was apparently

addressed to another person, she had the knowledge that she was required to pay **Kshs. 60,000** in respect of the premises she had been allocated.

24. The 2nd respondent submitted that the appellant neither pleaded not proved any special damages. However, it is my view that the appellant in fact proved special damages to the tune of **Kshs. 40,000** as evidenced from the receipts produced dated **31/8/2001** and **14/2/2002** respectively**.** The trial court noted in its findings that the allocation letter does not contain a clause on refund of any monies paid and that ordering a refund would amount to re-writing the contract prayers which power the court was not vested with.

25. In respect of the issue of refund and to borrow from the decision in **Amina Abdul Kadir Hawa v Rabinder Nath Anand & another [2012] eKLR** the court there relied on the case of **Collins Versus Stimson (1883) VOL.XI.142** where a deposit was forfeited on account default of performance and the case of **Howe Versus Smith (1884) VOL.XXVII.A.C.89** wherein it was held *inter alia* that:-

"The deposit although to be taken as part payment if the contract was completed was also a guarantee for the performance of the contract and that the plaintiff having failed to perform his contract within a reasonable time, had no right to a return of the deposit."

26. In the present case, the appellant failed to perform her part of the agreement as stipulated in the allotment letter by failing to pay the **Ksh. 9,300** within thirty (**30**) days as required by the latter of allotment. Notwithstanding the default on the part of the appellant, the 2nd respondent did not immediately cancel or rescind the offer but allowed the appellant more time, to be precise, 60 days from the date of the letter which was **2/6/2001**, to pay an enhanced amount of **ksh 60,000/=.** Two thirds of this new amount imposed in the letter of **2/6/2001** was paid by the appellant, **ksh 10,000/=** on **31/8/2001** (within the **60** day period) and **Ksh 30,000/=** on **14/2/2002** (outside the **60** day period.) In this court's view, payment of the first sum within the stipulated period brought both parties to a point of recognition that the appellant was still interested in acquiring the premises offered. Notwithstanding the fact that the second instalment was paid outside the period prescribed in the letter dated **2/6/2001**, the 2nd respondent accepted the same and issued her with a receipt clearly indicated ***"VALUATION COST PLOT NO 34 –GILGIL."***

27. Though in many instances the court will decline to construe the contractual document in a manner that amounts to literal re-writing the terms of an agreement, the court at times upholds the varying of contractual terms of a contract where the conduct of the parties shows that they have agreed to such an implied variation.

28. In the case of **Arnold Wabwile Lutalala v Peter Sane Lepatai [2018] eKLR** held as follows:

"However, the Respondent did not tender any evidence as to whether he had given the Appellant notice to resend the sale agreement, but he continued to receive funds after the completion date. According to the Law Society of Kenya conditions of Sale, at clause 4 (4) it requires that the vendor should serve the purchaser twenty one (21) day notice to complete a contract before the same can be rescinded. Further, a defaulting party has to be given ample notice for rescission of contract. Since the Respondent never gave the Appellant notice for rescission of contract and continued to receive the purchase price, it is my considered view that he is hence estopped from claiming that the Sale Agreement had lapsed."

29. From this court's re-evaluation of the evidence and materials placed before the trial court, it is my view that the trial court misdirected itself in rejecting the appellant's claim of permanent injunction and the alternative of a refund of the purchase price paid in arriving at the impugned judgment. Had it considered the lack of evidence on the part of the respondents it would have arrived at the decision that the claim was unopposed. In addition, the trial court should have found that the evidence of payment of the **Ksh 40,000/=** by the appellant and acceptance thereof by the 2nd respondent without any indication that the offer had been cancelled and the premises allocated to another

person or that the allocation had been otherwise cancelled for illegality, was sufficient to support its conclusion that the terms of the agreement between the two parties had been varied by conduct. The positive effect of such a conclusion would have been the further finding that the appellant was entitled to one of the alternative prayers contained in **prayer no (a)** of the plaint which prayed for an injunction against the respondents or an order of refund.

30. This court must, in view of the foregoing address the prayers to be granted in this appeal, for it must be very crystal clear at this juncture that the instant appeal is bound to succeed.

31. Contrary to what the submissions of the 2nd respondent emphasize, the appellant had prayed for an injunction *or in the alternative a refund* as well as costs of the suit and interest and any other relief that this court may deem fit and just.

32. On the prayer for injunction it behoved the appellant while testifying at the trial court to demonstrate that the same situation at the filing of the suit obtained, that is that the 2nd respondent had allocated the 1st respondent the suit premises and that the 1st respondent was still in occupation thereof. Noteworthy is the fact that the amended plaint filed after the defence of the 2nd respondent was filed included a claim for a refund which was not there before. Soon after the amended plaint was filed the 2nd respondent amended its defence to state *inter alia* that any allocation of the premises to the appellant or to the 1st respondent was illegal and that the premises remained its property and the 1st respondent and the appellant its tenants which allegations the appellant denied in her reply to the 2nd respondent's amended statement of defence.

33. Section 107 of the **Evidence Act** provides as follows:

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

34. Consequent to those provisions of the law the legal burden of proof lay upon the appellant to prove her claim at the trial but the denial of the contents of paragraphs **(7A)** and **(7B)** of the 2nd respondent's amended defence meant that since it had the monopoly of knowledge of the alleged illegality it claimed, the 2nd respondent was required to bring evidence to demonstrate to the court that what it stated in those statements was true; this meant that the evidential burden of proof in regard to the statements in the cited paragraphs of the amended defence remained on the shoulders of the 2nd respondent, which burden it did not address or satisfy by way of any evidence.

35. However as I have stated hereinbefore it was incumbent upon the appellant to create a graphic picture of the situation on the ground with regard to the suit premises as at the time of the hearing before the trial court so that the court may, if the allegations made in the defence were correct, not give orders in vain. Since the appellant did not address the issue and she amended her plaint to include the refund prayer, this court presumes that she studied the situation on the ground and found that securing the premises was impossible hence the refund prayer. This court is therefore of the considered opinion that so many years after the letter of allocation was issued it is not certain what the ground situation is even now. This court must have in mind that fact even as it deals with the prayers in this appeal, which seek merely that the appeal be allowed and the judgment of the trial court be set aside and the claim in **Nakuru CMCC No 1776 of 2004** be allowed. The grant of an injunction may meet an entirely different set of persons on the premises. Furthermore, having the consideration in mind that the nullity of the allocation may still be a possibility, this court may not be desirous of sanitizing the allocation. If the 1st respondent obtained the land and his allocation was confirmed by the 2nd respondent after the declaration was made by the 2nd respondent that the allocation was illegal, the remedies for that, either at the instance of the appellant herein or the relevant public authorities, may lie in another case on another day and not in this suit. Consequently this court finds that in the light of the adduced evidence, the only competent prayer in the amended plaint is that of the refund.

36. In this court's view though the appellant only paid part of the **Ksh 60,000/=** demanded in the letter of **2/6/2001,** she was entitled to better treatment and with sufficient evidence, other different orders may have been obtained in the suit or appeal. Be that as it may, it is the conclusion of this court that the 2nd respondent acted as a public body charged with governance for the welfare of the residents within its jurisdiction in regard to implementation of the social right to good housing and the transaction between it and the appellant should not be viewed strictly through a commercial lens. The situation in the instant suit is thus different from that in the cases of **Collins Versus Stimson (1883) VOL.XI.142** and **Howe Versus Smith (1884) VOL.XXVII.A.C.89.**

37. In the opinion of this court leaving the 2nd respondent to benefit from the deposits made by the appellant without any quid pro quo is unjust enrichment of the 2nd respondent at the expense of the persons it governs. Consequently it is this court's view that the only equitable conclusion in this appeal is that the appellant is entitled to a refund of **Kshs. 40,050/-** which she proved to have been paid to the 2nd respondent.

38. In the end I find that the instant appeal has merit and I hereby enter judgment in favour of the appellant against the 2nd respondent and I issue the following final orders:

a. The appellant's appeal is hereby allowed.

b. The 2nd respondent shall refund to the appellant the sum of Ksh 40,050/= expended in respect of the allocation of Gilgil Housing Estate Unit No 34;

c. The 2nd respondent shall pay to the appellant both the costs of this appeal and the costs of the suit in Nakuru CMCC No 1776 of 2004.

d. The amount in order No (b) herein above shall attract interest from the date of filing suit till the date of payment in full.

e. The taxed costs in Order No (c) above shall attract interest from the date of the certificate of taxation until paid in full.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15TH DAY OF DECEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.

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