



REPUBLIC OF KENYA



**Gathumbi & 2 others v Kioko & 3 others (Environment & Land Case E027 of 2023) [2023] KEELC 21486 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21486 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E027 OF 2023  
CA OCHIENG, J  
NOVEMBER 14, 2023**

**BETWEEN**

**SYLVIA WAIRIMU GATHUMBI ..... 1<sup>ST</sup> PLAINTIFF  
PATRICK NARORET ..... 2<sup>ND</sup> PLAINTIFF  
TOM NDETO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**VERONICA KIOKO ..... 1<sup>ST</sup> DEFENDANT  
OFFICER COMMANDING POLICE DIVISION (OCPD) ATHI  
RIVER ..... 2<sup>ND</sup> DEFENDANT  
OFFICER COMMANDING POLICE STATION (OCS) MLOLONGO .... 3<sup>RD</sup>  
DEFENDANT  
THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the 27<sup>th</sup> March, 2023 brought pursuant to Order 40 Rules 1(a) and 4(1) and Order 51 of the [Civil Procedure Rules](#) including Section 3A of the [Civil Procedure Act](#). The Plaintiffs seek the following Orders:
  1. Spent
  2. Spent
  3. Pending the hearing and determination of the suit herein, this Honourable Court be pleased to restrain the 1<sup>st</sup> Defendant, whether by herself, servants, agents, hired goons, clients or anybody else claiming through the 1<sup>st</sup> Defendant, from entering into, trespassing on, encroaching on,



remaining upon, developing, continuing to develop or in any manner whatsoever, interfering with the Plaintiffs land known as LR No 337/1931 (IR 247768).

4. The Officer Commanding Police Division (OCPD) Athi River Station, to enforce compliance with Court Order(s) herein.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 1<sup>st</sup> Plaintiff Sylvia Wairimu Gathumbu, where she deposes that the Plaintiffs are joint proprietors of all that parcel of land known as LR No 337/1931 (IR 247768) hereinafter referred to as the 'suit land'. She explains that on or about the 14<sup>th</sup> January, 1997, the Government of Kenya, pursuant to Government Authority No 102749/1/V, issued the Plaintiffs with a Letter of Allotment over the suit land. Further, that the Plaintiffs' accepted the Letter of Allotment and the terms thereof and on 22<sup>nd</sup> February, 2018, duly satisfied the terms of the said Letter of Allotment by particularly paying up the Kshs 171,720 for Standard Premium, Rent, Conveyancing fees, Registration fees, Stamp Duty and Approval fees as demanded. She states that on 21<sup>st</sup> January, 2019, the Plaintiffs paid to the Director of Surveys, Survey approval fees for the suit land under file No CT221/Vol 106/135 entered on 23<sup>rd</sup> January, 2019. Further, the Plaintiff was subsequently issued with a Lease over the suit land. She contends that, as endorsed by the Registrar of Titles on the copy of the Certificate of Title, a search done on 25<sup>th</sup> November, 2022 confirms they own the suit land. She avers that the 1<sup>st</sup> Defendant with the supervision of the 3<sup>rd</sup> Defendant, encroached on the suit land and is in the process of erecting a perimeter boundary wall on the land, with the intention of eventually settling thereon. She states that they do not know the 1<sup>st</sup> Defendant and have never dealt with her. Further, that the 1<sup>st</sup> Defendant's acts of encroachment deprive them of the suit land. She reiterates that attempts by the Plaintiff to report the acts of trespass and encroachment, to the 2<sup>nd</sup> Defendant has fallen on deaf ears.
3. In opposition to the instant Application, the 1<sup>st</sup> Defendant filed a Replying Affidavit sworn by Veronica Jemima Kioko where she deposes that together with her son Erick Kioko Kitheka, they are the legal representatives of the Estate of Daniel Kitheka Kioko. She contends that the instant Application is not merited because it is grounded on fraudulent documents of title. She explains that the suit land was allocated to her deceased husband vide a Letter of Allotment dated the 3<sup>rd</sup> December, 1993. Further, at the time of the allotment, it was described as UNS.Residential Plot No 35 - Athi River. She avers that in compliance with the conditions in the aforementioned Letter of Allotment, they paid Stand Premium, Rent, Stamp Duty, Registration fees and other charges. She confirms that a Deed Plan No 184150 was issued on 24<sup>th</sup> May, 1994 and on 14<sup>th</sup> July, 1994 instructions were issued for preparation of a Lease in favour of the deceased. Further, that a Lease was prepared and on 26<sup>th</sup> August, 1994, a Grant was issued in favour of the deceased. She insists that todate the suit land is registered in the name of the deceased and this is confirmed by a search conducted in February, 2023. She states that the Government has never repossessed the suit land and she even cleared outstanding rates of Kshs 13,397 on 7<sup>th</sup> December, 2022. She contends that the Title documents presented by the Plaintiffs are fraudulent because their Letter of Allotment is dated 14<sup>th</sup> January, 1997 while the Letter of Acceptance is dated 22<sup>nd</sup> February, 2018. Further, the payment receipt in respect of approval of Deed Plan No 184150 is dated 21<sup>st</sup> January, 2018 while the said Deed Plan as drawn is dated 24<sup>th</sup> May, 1994, the Lease document is not executed and the Certificate of Title is issued on 4<sup>th</sup> June, 2021. She avers that the Certificate of Title is based on a Certified Copy of a Deed Plan and IR Number given in respect of the said title is 247768 as opposed to the authentic IR No 63387. She reiterates that the Plaintiff has not attached a current search of the suit land. Further, that when she embarked on fencing the suit land, she was surprised to learn that a third party was laying a claim over it and the Plaintiffs had hired goons to prevent her from fencing it. She confirms reporting the matter to the Police who established she is the owner of the suit land.



She reaffirms that the Plaintiffs have never been in possession or occupation of the suit land as she has been in possession thereof.

4. The Plaintiffs filed a further Affidavit sworn by Sylvia Wairimu Gathumbi where she reiterates her previous averments and insists that they hold a current search. She contends that the 1<sup>st</sup> Defendant has not adduced a valid search issued by the Registrar of Titles confirming her proprietorship of the suit land. She states that the 1<sup>st</sup> Defendant's purported Letter of Allotment concerns a residential plot in Athi River which is almost 10 kilometers from the suit land. She explains why they were issued with a Certificate of Title twenty four (24) years later, after issuance of a Letter of Allotment and insists that they hold a genuine title to the suit land. She further insists that the 1<sup>st</sup> Defendant is not in possession of the suit land.
5. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

6. Upon consideration of the Plaintiff's Notice of Motion Application dated the 27<sup>th</sup> March, 2023 including the respective parties' affidavits and rivaling submissions, the only issue in determination is whether the Plaintiffs' are entitled to orders of temporary injunction restraining the Defendants from dealing with the suit land, pending the outcome of this suit.
7. The Plaintiffs in their submissions provided a background of the dispute herein and relied on the documents annexed to their Affidavits. They contended that as registered proprietors of the suit land who hold a Certificate of Title to that effect, they indeed have established a prima facie case to warrant the orders sought. They argued that the dispute herein involves enforcement of their proprietary rights to the suit land which is threatened by the 1<sup>st</sup> Defendants acts of trespass. They insisted that they will suffer irreparable loss and the balance of convenience tilts in favour of granting them the orders of injunction. To support their averments, they relied on the following decisions: *Giella v Cassman Brown* (1973) EA 358; *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125; *Waitbaka v Industrial and Commercial Development Corporation* (2001) eKLR and *Kiplangat Shelisheli Mutarakwa v Joseph Rotich Kones* (2018) eKLR.
8. The 1<sup>st</sup> Defendant in her submissions contended that the Plaintiffs have not established a prima facie case with a probability of success and insisted that the deceased Letter of Allotment and Grant were issued first as compared to the Plaintiffs' Letter of Allotment including Certificate of Title. She argued that insofar as the Court at this stage is not meant to make a definite determination in respect to the dispute herein, but there are glaring evidence of illegality of the Plaintiffs' title documents. She averred that the Plaintiffs shall not suffer irreparable loss if an order of injunction is not issued since they have not been on the suit land for the past thirty years. To support her averments, she relied on the following decisions: *Wreck Motor Enterprises v Commissioner of Lands & 3 Others* (1997) eKLR; *Gitwany Investment Limited V Tajmal Limited & 3 Others* (2006) eKLR; *African Inland Church – Kenya (Registered Trustees) V Catherine Nduku & 12 others* (2017) eKLR; *Robins Nyangau Mosongo & Another v Ngoitoi Leiyan & Another* (2021) eKLR; *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125; *Elizabeth Muthoni Hussein v Vikesh Jinit Shah* (2018) eKLR and *Hesbon Pyatich Lokwager v Kenneth Lotodo Loyatum & 2 Others* (2020) eKLR.
9. As to whether the Plaintiffs have established a prima facie case with a probability of success at the trial, I wish to rely on the principles as enunciated in the case of *Giella v Cassman Brown & Company* (1973) EA 358 as well as the description of a prima facie case as explained in the case of *Mrao Ltd v First American Bank of Kenya & 2 Others* (2003) KLR 125.



10. The Plaintiffs' claim to be the registered proprietors of the suit land and annexed a copy of Certificate of Title to that effect. The Plaintiffs have explained how they acquired their title to the suit land. The 1<sup>st</sup> Defendant insists her deceased husband was allocated the suit land, wherein he paid the requisite fees and was issued with a Certificate of Title which she annexed to her Replying Affidavit. Both the Plaintiffs and 1<sup>st</sup> Defendant produced searches issued in 2023 indicating they are owners of the suit land. The 1<sup>st</sup> Defendant argues that her title was issued first and that the Plaintiffs used a certified copy of a Deed Plan to obtain their title which she insists is fake. The Plaintiffs contend that the 1<sup>st</sup> Defendant has interfered with their ownership of the suit land and is being supported by the rest of the Defendants to fence it.
11. I have perused the documents presented by the Plaintiffs' as well as the 1<sup>st</sup> Defendant and note the 1<sup>st</sup> Defendant's title was actually issued first on 21<sup>st</sup> September, 1994 while the Plaintiffs who were issued with a Letter of Allotment dated the 14<sup>th</sup> January, 1994 only obtained their title on 4<sup>th</sup> June, 2021. As per the searches produced by each party, it indicated that both Plaintiffs and 1<sup>st</sup> Defendant owned the suit land. However, I note the IR Number for the Plaintiffs' title is 247768/1 while the 1<sup>st</sup> Defendant's is 63387. At this juncture, I note there are two competing titles issued by the Ministry of Lands and I cannot decipher which is the genuine one. Further, since this is an interlocutory application, I opine that the determination of the genuine owner of the suit land can only be done, once the parcel files for the two titles are produced and the Land Registrar made to explain the process of their acquisition. The Plaintiffs claim to have been on the suit land but the 1<sup>st</sup> Defendant has commenced to fence it. From the averments of the respective parties including photographs produced, I note the suit land is not yet developed.
12. Based on the facts as presented and in the interest of justice, noting that there are two competing titles to the suit land, I am of the view that there is an urgent need to preserve the substratum of the suit.
13. In the circumstance, I will proceed to make the following Orders:

No party should be in possession nor interfere with LR No 337/1931 (IR 247768) or (63387) as well as dispose of it to third parties, pending the hearing and determination of this suit."
14. I hence find the Notice of Motion Application dated 27<sup>th</sup> March, 2023 compromised.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2023**

**CHRISTINE OCHIENG**  
**JUDGE**

