



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 7 of 2009

DR. PETER NYAGONCHONGA OMBOGA....PLAINTIFF/APPLICANT

VERSUS

PAUL OGEKA NYATWANGA

KISII MUNICIPAL COUNCIL.....DEFENDANTS/RESPONDENTS

RULING:

The plaintiff filed an application dated 14th January, 2009, seeking to restrain the defendants and/or their agents from interfering with a parcel of land known as **KISII TOWN/BLOCK I/754**, hereinafter referred to as the “**suit land**”. In his affidavit in support of the application, the plaintiff deposed that on 10th May, 1991 he was allotted unsurveyed plot No. 2 within Kisii town by the 2nd defendant. He annexed to his affidavit the letter of allotment. On the strength of the said allotment, he continued to pay ground rent and rates to the 2nd defendant. The 2nd defendant had been sending to the plaintiff demands for rents and rates in respect of the suit land upto December, 2008. To date the plaintiff has cleared all the land rents and rates. The suit land was surveyed as Kisii **Town/Block I/754** and Beacon certificate was issued on 16th June, 2008. In December 2008, the plaintiff discovered that a person unknown to him had fenced the suit land and assembled building materials thereon ready to start developing the same. On 29th December, 2008 the plaintiff wrote to the 2nd defendant inquiring about the suit land but he did not get any response. When the plaintiff carried out a search at the Lands Registry, Kisii, he discovered that the suit land was registered in the name of the 1st defendant. The plaintiff stated that he stood to suffer substantial loss if the order sought is not granted.

In reply, the 1st defendant stated that he was issued with a letter of allotment in respect of Kisii Municipality Block I/1754, on 5th January 1998. He processed the said allotment and on 15th September, 2005 he was issued with a certificate of lease in respect of the same. The lessor of the suit land is Gusii County Council and the same was leased to him for a term of 99 years from 1st January 1998. The first defendant is the first lessee of the suit land. He added that he had been in possession of the suit land from the date of allotment to him and he had never seen nor known the plaintiff. He added that he had paid all the outstanding rents and rates in respect of the suit land. He urged the court to dismiss the plaintiff’s application.

The 2nd defendant filed grounds of opposition and stated, *inter alia*, that the plaintiff’s application is frivolous, vexatious and misconceived. They further stated that the application does not satisfy the basic principles for grant of an injunction.

Mr. Masese for the plaintiff, Mr. Ombachi for the 1st defendant as well as Mr. Bosire for the 2nd defendant made brief submissions which I have taken into consideration.

The plaintiff was allotted an unsurveyed residential plot by the Commissioner of Lands on 10th May, 1991. There were special conditions that were attached to that allotment. It was not disclosed whether those special conditions were satisfied by the plaintiff within the required period of time.

Those conditions included formal written acceptance and payment of stand premium and rent to the Municipal council of Kisii and Conveyance fees, Registration fees, Provisional rates, stamp duty, and survey fees to the Commissioner of Lands. Where formal acceptance and payments are not made within thirty (30) days from the date of allotment, the offer is considered as having lapsed.

From the plaintiff's exhibits **PNO II (c) (d) and (p)**, it is apparent that stand premium, provisional rates and plot rent were paid to the second defendant on 7th February, 1996. It is not clear whether the sums payable to the Commissioner of Lands were ever paid and if so, the date of such payment.

However, the second defendant has been sending to the plaintiff demand notices for land rates and ground rents. The plaintiff has so far paid the same.

On the other hand, the first defendant was issued with a letter of allotment in respect of the suit land on 5th January, 1998. On 15th September, 2005 he was issued with a certificate of lease. The letter of allotment is from the Commissioner of Lands and the Lessor is the Gusii County Council. None of the two is a party to these proceedings. In **SUN PALM LIMITED & OTHERS –VS- PIERRE LAPORTE LIMITED**, Civil Application Nairobi 242 of 1997, the Court of Appeal observed that in a dispute revolving around an allegation of wrongful transfer, it is difficult to see how the title of a proprietor can be questioned without joining the Commissioner of Lands. This is because the Commissioner was the one who did the allotment.

The plaintiff did not promptly comply with all the terms and conditions of the allotment. He was required to pay certain sums of money to the Commissioner of Lands and the second defendant within 30 days from 10th May, 1991 but he did not effect the payments until 7th February, 1996. He was supposed to have made the payments, processed the allotment and secure a document of title in his favour and proceed to submit to the Local Authority and Commissioner of Lands building plans for approval. That was not done.

In **DR. JOSEPH ARAP N'GOK –VS- JUSTICE MOIJO OLE KEIWUA & 7 OTHERS**, Civil Application Number Nairobi 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 all the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held.

In this case, the property is held under the provisions of the **Registered Land Act** Cap 300 Laws of Kenya. Under **Section 27** of the said Act, a registered proprietor of land has absolute ownership of the land while **Section 28** gives the registered proprietor indefeasible rights over the land.

It is trite law that title to land takes precedence and is supreme over a letter of allotment, see **WRECK MOTORS ENTERPRISES –VS- THE COMMISSIONER OF LANDS & OTHERS**, Civil Appeal No. 71 of 1997. The plaintiff's letter of allotment cannot prevail over the first defendant's certificate of lease.

The plaintiff has not established a *prima facie* case against the defendants. The plaintiff has also not demonstrated that he will suffer irreparable loss if the orders sought are not granted. If at the end of these proceedings the matter is decided in his favour, he can be adequately compensated by way of damages.

For reasons aforesaid, I dismiss the plaintiff's application with costs to the defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF MAY, 2009.

D. MUSINGA

JUDGE.