



**Otom (Suing as the Administrator of the Estate of Thomas Otom Agullo) v Commissioner of Lands & 2 others; National Land Commission (Defendant) (Environment & Land Case 894 of 2015) [2022] KEELC 14985 (KLR) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14985 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 894 OF 2015  
A OMBWAYO, J  
NOVEMBER 25, 2022  
(FORMERLY KISUMU HCCC NO. 36 OF 2009)**

**BETWEEN**

**MICHAEL ODERA OTOM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THOMAS OTOM AGULLO) ..... PLAINTIFF**

**AND**

**COMMISSIONER OF LANDS ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**KAREN ENTERPRISES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION ..... DEFENDANT**

**RULING**

**Brief Facts**

1. The 3<sup>rd</sup> defendant herein filed a notice of motion application under order 40 rule 2 and order 51 rule 2 of the [Civil Procedure Rules](#), section 1A,3A and 63 (e) of the [Civil Procedure Act](#) seeking for orders that:
  1. For reasons to be recorder, service hereof be dispensed with in the first instant and an order do issue ex-parte that this application be heard on a priority basis, given the urgent need to arrest the irregular and illegal acts of trespass being carried out on the suit property.
  2. The plaintiff, his employees, agents and/or assigns including specifically one Joyce Nyagwala be restrained by an order of injunction from purporting to enter upon, apportion, subdivide, sell, lease, construct upon, develop, or otherwise alienate howsoever all that property known



as land reference number 16345 Kisumu or any portion thereof pending the hearing and determination of his suit.

3. The plaintiff, his employees, agents and/or assigns including specifically one Joyce Nyagwala be compelled by a mandatory injunction to demolish, bring down and/or remove from all that property known as land reference number 16345 Kisumu or any portion thereof all and any structures, buildings, barriers, walls or fences constructed and/or erected thereon in or about July 2021 pending the hearing and determination of this suit.
4. The costs of this application be provided for by the 1<sup>st</sup> plaintiff.
2. The application was based on grounds that the 3<sup>rd</sup> defendant/counter-claimant is and remains the registered proprietor of all that property known as land reference number 16345 Kisumu notwithstanding that the plaintiff have counterclaims against it pending herein challenging the interest and seeking to establish alternative interests therein. That the plaintiff has purported to alienate further a portion of the suit property and to sell the same to one Joyce Nyagwala which are null and void acts in illegality given that he has not established any interest in the suit property or any title capable of selling.
3. It was further averred that the said Ms Nyagwala who is a stranger to the 3<sup>rd</sup> defendant company erected illegal structures on the portion of the suit property without any development permission issued by the County Government of Kisumu wherefore they are erected in contravention of section 57 of the [Physical Land Use and Planning Act](#) (No 13 of 2019) and the said Ms Nyagwala has committed a statutory offence in addition to being in active trespass of the suit property as a person claiming under the 1<sup>st</sup> defendant.
4. That the plaintiff and the said Ms Nyagwala are on the wrong and ought to be restrained by both prohibitory injunctions stopping them from entering and trespassing upon the portion of the suit property or any other part or portion of the suit property and mandatory injunctions compelling them to remove the illegal structures erected thereon.
5. The application was supported by the affidavit of Edwin Ndalo Wadore who stated that on April 13, 2022, during his regular inspection of the properties belonging to the 3<sup>rd</sup> defendant including the suit property, he discovered that structures had been erected on a portion of the suit property which appears to have been fenced off. That upon further inquiries he found out that the structures were erected in July 2021 on the portion of the suit property by Joyce Nyagwala who had acquired the portion of the suit property from the plaintiff.
6. It was averred that no permission or consent was sought or given by the 3<sup>rd</sup> defendant to Ms Nyagwala to enter upon or erect any structures on any part of the suit property and the said Ms Nyagwala is a stranger to the 3<sup>rd</sup> defendant and no planning permission had been sought for the structures erected on the portion of the suit property or for any subdivision of the suit property to create the said portion, demarcated and fenced.
7. That as the 3<sup>rd</sup> defendant remains the registered proprietor of the suit property including the portion of the suit property, there are counterclaims pending before this court by the defendants challenging its ownership and advancing alternative interest, it remains the only legitimate authority under the law for consent to enter upon the suit property or any part thereof and to seek and receive development permission for erecting of any structures thereon. It was further stated that the purported granting by the plaintiff to the said Ms Nyagwala of an interest in the portion of the suit property is an act of illegality and therefore null and void in effect, incapable of vesting in her any title as he has not established any title to the suit property having been sued herein as a trespasser.



8. It was stated that all and any structures erected by the said Ms Nyagwala are not pursuant to any legitimate interest she has acquired and are erected illegally without any development permission issued by the County Government of Kisumu whereof they are erected in contravention of section 57 of the Physical Planning Act. That is in the interest of justice to allow the application in order to preserve the subject and substratum of this suit and also to preclude the plaintiff together with the said Ms Nyagwala who claims under him from violating the provision of the law and then seeking refuge of this court for their illegal acts.
9. This matter came up for hearing on July 26, 2022 where I directed parties to the plaintiff to respond and parties to file written submissions. I have perused the file and do confirm that parties failed to comply with the orders given by this court.

### **Analysis and determination**

10. The 3<sup>rd</sup> defendant herein has sought has sought for an order of injunction that the plaintiff, his employees, agents and/or assigns specifically Ms Nyagwala be restrained from purporting to enter upon, apportion, subdivide, sell, lease, construct upon, develop or otherwise alienate the suit property and has also sought a mandatory injunction to demolish, bring down/and or remove structures erected on the suit property.
11. In the case of *Locabail Agro – Export & Another (1986) 1 ALL ER 901*, it was stated that:
 

' A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being different and higher standard than required for a prohibitory injunction.'
12. In *'Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case'* in which Megarry J as he then was stated follows:-
 

' if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained'
13. The Court of Appeal in the Case of *'Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR* as follows:-
 

' The test for granting a mandatory injunction is different from that enunciated in the 'Giella –Versus - Cassman Brown case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory is higher than the case of prohibitory injunction and the Court of Appeal in the case of 'Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109' had the occasion to discuss and consider the principles that govern the grant of a mandatory injunction was correctly stated in Vol 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948 which states as follows:-



'A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application'.

14. It is the 3<sup>rd</sup> defendant's case that it is the registered owner of the suit property and that the plaintiff has purported to alienate a portion of the suit property and sold the same to one Ms Nyagwala which act is illegal as the plaintiff has not established any interest capable of selling the property. It is also the 3<sup>rd</sup> defendant's case that the said Ms Nyagwala has erected illegal structures on a portion of the suit property without development permission from the county government.
15. This court has established that both the plaintiff and the 3<sup>rd</sup> defendant claim interest in the suit property and there is a clear dispute as to who between the plaintiff and the 3<sup>rd</sup> defendant is the rightful owner of the suit property. Although the 3<sup>rd</sup> defendant has sought for an order of mandatory injunction compelling the plaintiff, his employees, agents and/or assigns including Ms Nyagwala to demolish the structures erected on the suit property, this court is of the view that if it grants a mandatory injunction, litigation in this matter will come to an end.
16. In the upshot, this court therefore orders as follows;
  1. The plaintiff, his employees, agents and/or assigns including specifically one Joyce Nyagwala be restrained by an order of prohibitory injunction from purporting to enter upon, apportion, subdivide, sell, lease, construct upon, develop, or otherwise alienate howsoever all that property known as land reference number 16345 Kisumu or any portion thereof pending the hearing and determination of his suit.
  2. That costs of this application be in the cause.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF NOVEMBER 2022**

**AO OMBWAYO**

**JUDGE**

