



Omar & another v Wambua & 2 others; Mwendwa & 3 others (Interested Parties) (Environment & Land Case E004 of 2021) [2023] KEELC 437 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E004 OF 2021
A NYUKURI, J
FEBRUARY 1, 2023**

BETWEEN

MOHAMED MAALIM OMAR 1ST PLAINTIFF

AMELIA JEPTOO CHESIYNA 2ND PLAINTIFF

AND

RICHARD WAMBUA 1ST DEFENDANT

STANLEY MANGUYER 2ND DEFENDANT

NZEKIM ENTERPRISES LTD 3RD DEFENDANT

AND

ALEX KADEGE MWENDWA INTERESTED PARTY

ABDIWAHAB ADAM MAALIM INTERESTED PARTY

JOHN MUTUKU KIOKO INTERESTED PARTY

BENSON MUSEMBI WAMBUA INTERESTED PARTY

RULING

1. Before court is a notice of motion dated January 20, 2021 filed by the plaintiffs/ applicants seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. This honourable court be pleased to restrain by a temporary injunction the defendants, their servants and/or agents or any person acting by them or through them from digging,



constructing or erecting any structures in Land Parcel No 28360 Athi River and from entering into, remaining into or selling, charging or interfering or dealing with the said parcel of land in any manner whatsoever till this suit is heard and determined.

- d. This honourable court be pleased to order the OCS Mlolongo Police Station and the OCPD Athi River to enforce the order.
 - e. Costs of this application be provided for.
2. The application was supported by the affidavit sworn by Mohamed Maalim Omar, the 1st plaintiff in this matter. The applicants' case is that the 1st plaintiff is the registered proprietor of Land Parcel No 28360 in Athi River Sub County, having a letter of allotment No 31840/XV of April 20, 1995 (suit property). Further, that the plaintiffs are in possession of the suit property, but on January 10, 2021, the defendants trespassed on the suit property and began constructing thereon and upon being asked to stop, they turned violent against the plaintiff.
 3. The application was opposed. Stanley Manguyer the 2nd defendant swore a replying affidavit dated February 25, 2021. He stated that he was the Managing Director of Nzekim Enterprises Ltd, (the 3rd defendant herein) who are the owner of LR No 28360 IR No 124395. It was his case that together with Alex Kadenge Mwenda, they purchased the aforesaid company together with the suit property from Juliet Khamisi and Wilfred Nyamu vide an agreement dated June 17, 2011 and subsequently incorporated one Nicholas Mbugua and have been in physical possession of the same since then to date. That the land was owned by the company stated above.
 4. The 2nd defendant further stated that due to incessant soil dumping on the property, they decided to subdivide it into plots and offer the same for sale, only for the 1st plaintiff to encroach and claim that the suit property was his. That this led to the matter being reported at the CID offices in Mlolongo which summoned all the parties and subsequently informed the plaintiffs to keep off the suit property for lack of title documents.
 5. The 2nd respondent also stated that the plaintiffs' documents were forged as there was no proof of payment of rent through the county bank accounts and the rent clearance certificate allegedly issued by the Commissioner of Lands was under a repealed act (the Government Lands Act). He stated that the Ministry of Lands has been issuing rent clearance certificates through ecitizen. Further, that the rent due and owing now stands at Kshs 5,367,320/-.
 6. The application was canvassed by written submissions. On record are the plaintiffs' submissions filed on May 25, 2022 and the defendants' submissions filed on June 8, 2021. The court has duly considered the submissions.

Analysis and Determination

7. Principles governing grant of temporary injunctions are well settled. In the case of *Giella v Cassman Brown & Co Ltd [1973] EA 358*, the court held that for an applicant to succeed in applying for an interlocutory injunction, they must demonstrate that they have a *prima facie* case with a probability of success; that unless the injunction is granted, they stand to suffer irreparable injury that may not be adequately compensated in damages; and where the court is in doubt, it ought to decide the application on a balance of convenience.
8. The plaintiff produced an allotment letter, deed plan and a rent clearance certificate and argued that an allottee of land is the absolute and indefeasible owner thereof. While the plaintiffs have an allotment letter, the 3rd defendant is the registered proprietor thereof having been issued with title on November



- 1, 2007. The plaintiffs have submitted that since the allotment was done in 1995 which was earlier than the registration of the 3rd defendant's title, then their rights rank higher than the defendants' rights.
9. In my view, an allotment letter is merely an offer which ought to be accepted by the allottee and terms thereof complied with, for an allottee to purport to exercise any rights in respect thereto. It is the registration that confirms the offer made in an allotment letter. The 1st plaintiff is not the registered proprietor of the suit property. He argues that between equal equities, the first in order of time shall prevail. My view however, is that there can be no equal rights conferred between a letter of allotment and registration as registration confirms the proprietary rights while an allotment is merely an offer not sufficient to confer any rights, priority in time notwithstanding. Section 23 of the *Registration of Titles Act* (cap 281 (repealed) the Act pursuant to which the title was issued, provided that a certificate of title was proof of indefeasibility of the title, except where fraud is shown. That provision is restated in section 26 of the [Land Registration Act](#) No 3 of 2012.
 10. Having considered the plaint, I note that no challenge had been made against the 3rd defendant's title.
 11. In the circumstances, I am not persuaded that the plaintiffs have made out a *prima facie* case as against the defendants with any chance of success. The upshot is that the application dated January 20, 2021 lacks merit and the same is dismissed with costs to the defendants.
 12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1st DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the presence of;

Ms Mukami for interested parties

Ms Mwanzia holding brief for Mr Mutua for the defendant

Josephine – Court Assistant

