



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**CIVIL SUIT NO. 519 OF 2017**

**TIMOTHY MUTOKAA KARIUKI.....PLAINTIFF**

**VERSUS**

**ADAN MAALIM IBRAHIM..... DEFENDANT**

**RULING**

The application before this court is a Notice of Motion dated 9th March, 2017 by the Plaintiff brought pursuant to Section 3 & 3A, of the Civil Procedure Act and Order 40 Rule , 2, 3 and 4 of the Civil Procedure Rules. The application is based on the following grounds which in summary are that the Plaintiff is the lawful and bona fide allottee of Plot No. 9923/A3/Saina Estate (suit land) having been issued with an allotment letter on 23rd November, 1999. The Respondent has trespassed, taken possession and threatened to put up permanent structure on the suit property.

The application is supported by the affidavit of TIMOTHY MUTOKAA KARIUKI the Plaintiff herein where he deposes that after allotment of the suit land he had complied with the requirements and have been paying land rates for the suit property. He states that on 22nd December, 2016 the Respondent trespassed and took possession of the suit land, unlawfully demolished the structures he had put in place. He reported the matter to the National Land Commission who wrote to the Defendant/Respondent to stop his unlawful activities in respect of the suit land until the matter is determined by the said office. The Defendant/ Respondent ignored the letter from the National Land Commission and commenced fencing and collecting building materials at the site with the intention of starting a building. Further that the matter was referred to the Criminal Investigation Department Kajiado Office whereby investigation was done and parties advised to pursue the matter with the office of the National Land Commission. He states that he is the bona fide owner having been issued with allotment letter by the relevant authority.

The Defendant ADAN MAALIM IBRAHIM opposed the application and swore a replying affidavit where he deposed that sometime in the year 2013, he applied to the Town Council of Kajiado for allotment of three plots known as A3/Saina Estate, A4/Saina Estate and A5/Saina Estate all measuring 0.4047 hectares each. He was asked to pay annual rents, survey fees, rates and conservancy fees which he did, and there was no development on the plots when he was allotted and was asked to build residential houses thereon. He avers that in the year 2016 he entered into a sale agreement with LIKIZO HOMES COOPERATIVE SOCIETY LTD where he was paid consideration with the company expressing interest in the plots and seeking to put up many housing units thereon which he could not do as a person. He further avers that he took the purchasing company to the Kajiado County Government whereof the allotment was validated on 15th February, 2017 and the Plaintiff was physically present when the said validation was conducted and it was confirmed by the county officials that there was no site for the Plaintiff's plot. He states that the purchasing company has embarked on massive development of the plots with the same being approved by the County Government of Kajiado. He further states that he was given allotment of the said plots by the County Government of Kajiado for 99 years and it is not possible that he

would be allotted plots already given to a third party, and the Plaintiff's plot No. 9923/A3/Saina Estate is materially different from the plots allotted to him. He further states that the Plaintiff has failed to annex any approved survey plan, technically left out the County Government of Kajiado in this suit and should ask the said County to show him his plot. He insists the Purchaser will incur massive losses and the Plaintiff can be remedied in damages if he proves he is the owner of the suit property.

Both parties filed written submissions reiterating their respective cases and on 29th May, 2017 Counsel for the Plaintiff was present and highlighted his submissions.

### **Issues and determination**

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 9th March, 2017 and analyzed that the following are the issues for determination:

- whether the Plaintiff is entitled to the interlocutory injunction sought.
- Whether the Defendant has encroached on the Plaintiff's plot.

From the Plaintiff's arguments, it is not in dispute that he was allocated plot no. 9923/A3/Saina Estate on 23rd November 1999. The receipts exhibited by the Plaintiff show that he paid Land Rent fees to the County Government of Kajiado in February 2016 and rates in February 2017 respectively. He also produced photographs of a structure he had put on the suit land which he claims the Defendant destroyed. The Defendant on the other hand has also produced a Letter of Allotment issued by the Town Council of Kajiado dated 14th March, 2013 for plot number A3/Saina Estate; receipts for payment of Rent dated 6th June, 2016 and 15th February, 2017; Sale Agreement between him and a third Party **LIKIZO HOMES HOUSING COOPERATIVE SOCIETY LIMITED** dated 4th October, 2016; Pictures of development on the suit land; A Notification of Approval of Development Permission dated 27th February, 2017 by the County Government of Kajiado. Both parties have furnished court with documents to prove their claim.

The threshold of granting interlocutory injunction were settled in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience.

Bearing this principle in mind, it is upon the court to interrogate whether the applicant has demonstrated a prima facie case with a probability of success at the trial. Although the Plaintiff was issued with a Letter of Allotment sometime 23rd November 1999, he has only provided two receipts of February 2016 and February 2017 respectively of the land rent he had paid. The Defendant was also issued with a letter of allotment dated 14th March 2013 for plot no. A3/Saina Estate and provided receipts of 2016 and 2017 for payment of land rent. The Court notes the Defendant has sold the allotted plot to a third party who is already developing it, as evidence by the Notification of Development Permission dated 27th February, 2017 and Photographs annexed to the replying affidavit. The Plaintiff stated that the Defendant demolished structures he had put on the plot. The Court notes that the numbers to the two plots are different. The Court hence finds that Plaintiff has failed to demonstrate whether he has a prima facie case as against the Defendant.

It is also evident from the receipts annexed by both the Plaintiff and the Defendant that they are paying land rent/rates for different plots respectively. The Plot that was allotted to the Defendant which he sold to **LIKIZO HOMES HOUSING COOPERATIVE SOCIETY LIMITED** is currently being developed as evidenced by the photographs annexed to the replying affidavit. From the foregoing, it is clear that the Plaintiff will not suffer any irreparable injury if the order sought is denied.

From the documents presented, the plot numbers for both the Plaintiff and Defendant are different, the

issue of determining the real owner of the suit parcels cannot be handled by way of affidavit evidence and must proceed to full trial. I am further persuaded by Kimondo J. in the case of **Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR** when he had this to say on whether a Letter of Allotment amounts to title to land;

***“... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property”***

What is curious is that the Plaintiff has not enjoined County Government of Kajiado in this suit, as it was the authority giving the allocation. He does not tell the court the outcome of the investigation by the National Land Commission and whether he lodged a complaint with the County Government of Kajiado to intervene regarding the suit land.

The upshot is that the Plaintiff has failed to establish a prima facie case that would warrant granting of the orders of injunction. If there was a wrong, the Plaintiff can be compensated by way of damages. The notice of motion dated 9th March, 2017 is not merited and is consequently dismissed entirely with costs.

**Dated signed and delivered in open court at Kajiado this 31<sup>st</sup> day of July, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**