



**Kioko v Mutunga (Environment & Land Case E068 of 2021)
[2024] KEELC 5702 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5702 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E068 OF 2021**

**A NYUKURI, J
JULY 24, 2024**

BETWEEN

ROBINSON KIOKO PLAINTIFF

AND

ZACHARIA MUSILA MUTUNGA DEFENDANT

JUDGMENT

Introduction

1. Vide a plaint dated 2nd July 2021, the plaintiff brought this suit against the defendant seeking the following prayers;
 - a. A permanent injunction to restrain the defendant by himself, his agents or servants from trespassing onto or in any manner from encroaching, entering regressing into the land or engaging in any activity giving the impression that he owns or is in a position to offer the land for sale or in any manner whatsoever alienating or interfering with the plaintiff's right to ownership, possession, access, use and enjoyment of the said parcel of land.
 - b. A declaration that the plaintiff's letter of allotment issued on 18th July 2007 is legitimate and sufficient deed of ownership of the said parcel of land.
 - c. Cost of the suit
2. The plaintiff averred that pursuant to a letter of allotment and a Part Development Plan (PDP) issued to him on 17th July 1998, he is the registered owner of a residential plot or parcel of land known as Land Reference number 27772 situated in Syokimau/Mlolongo area of Athi River. He averred to have since been in occupation of the land until about May 2021 when he noticed some persons claiming to be agents of the defendant visiting and inspecting the suit property and presenting the property to prospective buyers. It was also alleged that the said persons declined to identify themselves and that



they have continued to bring unsuspecting members of the public to the property despite the plaintiff repeatedly making it known to them that the plaintiff is the bona fide owner of the suit property. The plaintiff claimed that the trespass may lead to a fraudulent transfer of the suit property which may lead to the plaintiff losing his investment unless the orders sought are granted.

3. The defendant filed notice of intention to act in person dated 19th July 2021, but did not file defence although he filed a replying affidavit to the plaintiff's application for injunction wherein he stated that he was not aware that the suit property belonged to the plaintiff and that he put up a temporary structure to protect himself from the hot weather.
4. The matter then proceeded for hearing on 13th July 2023, with only the plaintiff testifying in support of his case. Although served, the defendant did not participate in the trial.

Plaintiff's evidence

5. The plaintiff adopted his witness statement dated 2nd July 2021 as well as his supporting affidavit of even date, as his evidence in chief. It was his testimony that he is the bona fide owner of the residential plot number LR No. 27772-Athi River by virtue of a letter of allotment issued to him by the Commissioner of Lands in 2007 and that the defendant and his agents have since 2021 encroached onto the land without any explanation. He further told the court that in the process of attempting to register the land to his name, he was informed of a gazette notice that sought to cancel the area where the land was but that there was a judgement that annulled the said cancellation. He claimed that he was the bona fide registered owner of the suit property and has resumed the process of payment of statutory dues and registration of the title thereof. The plaintiff also produced the following documents in support of his case;
 1. Letter of allotment of residential plot LR No.27772 Athi River issued on 18th July 2007.
 2. Part development Plan over LR No.12 of 2018 and 26 of 2019 by the High Court of Kenya, Machakos.
 3. Gazette Notice No. 3454.
 4. Judgment in ELC Petition No. 12 of 2018 and 26 of 2019.
 6. That marked the close of the plaintiff's case. There are no submissions on record for either of the parties, despite court's directions on 13th July 2023 and 20th November 2023 to that effect.

Analysis and determination

7. The court has carefully considered the pleadings and the evidence and the singular issue arising herein is whether the plaintiff has proved ownership of the suit property.
8. This case was not opposed by the defendant. Nevertheless, the plaintiff is under legal obligation to prove his claim because he bears the burden of proof to prove his claim, being the plaintiff in the suit. This burden is static and remains with the plaintiff, whether or not the suit is defended.
9. In the case of *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal held that;

The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof". Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard."



10. The legal basis for the legal burden of proof is anchored in Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. The said section states as follows: -
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
11. In this case, although the plaintiff alleged that he is the registered proprietor of the suit property, no title was produced to prove the alleged registration. The document relied upon by the plaintiff is an allotment letter dated 18th July 2007, wherein the plaintiff was allegedly allocated the parcel of land known as LR No. 27772- Athi River by the Commissioner of Lands. The plaintiff did not plead or produce any evidence of acceptance of the allotment.
12. It is trite that an allotment letter is an offer and does not confer title, but the same is merely a transient right and not a good title to the property.
13. In the case of *Stephen Mburu & 4 others v Comat Merchants Limited & Another* [2012] eKLR, the court held as follows;

...from a legal stand point, a letter of allotment is not a title to property. It is a transient and is often a right or offer to take property.
14. In this case, there is no evidence of acceptance of the offer in the letter of allotment or evidence of payment of the stand premium by banker’s cheque as stated in the allotment letter. Therefore, I am not persuaded that the plaintiff became the owner of the suit property on the basis of the allotment letter herein.
15. Although the plaintiff referred to Gazette Notice No. 2932 dated 17th March 2010, he produced Gazette Notice No. 3354 of 1st of April 2010 and judgments in *Machakos ELC Petition No. 26 of 2019* and *ELC Petition No. 12 of 2018* which referred to parcels other than the suit property. Therefore, I find no probative value in the said documents.
16. In addition, it appears from the allotment letter that the suit property which is LR No. 27772 Athi River, was already surveyed and registered at the point of allotment, as it has a registration number. In allotments done before the 2010 Constitution, the applicable law was the repealed *Government Lands Act* and there was a clear procedure for allocation of Government land. To begin with, only unalienated government land as defined in section 2 of the *said Act*, was available for allocation. Hence alienated land was not available for allocation. In addition, in allotment and allocation, an allotment letter is accompanied by a Part Development Plan (PDP) which has a specific number which is sent to the Department of Survey for purposes of survey. The Director of Surveys authenticates and approves the survey process and a land reference number is then issued.
17. In the case of *Nelson Kazungu Chai & 9 Others v Pwani University* [2014] eKLR, the court elaborated the procedure for allocation of unalienated Government land as follows;

It is trite law that under the repealed *Government Lands Act*, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.”



18. It is clear that planning came before survey, that is why there is a PDP before survey and authentication from the Director of Surveys. Therefore, land that was ordinarily allocated by the Commissioner of Lands was unsurveyed, but planned. In this case, from the allotment letter, it is clear that the suit property was already registered as LR No. 27772 before it was allocated, meaning that it had already been alienated and it is therefore my finding that the allotment letter herein does not conform to the law for want of procedure and cannot be upheld by this court. Therefore, I am not persuaded that the plaintiff owns the suit property.
19. In the premises, the plaintiff has failed to prove his claim on the required standard and the same is hereby dismissed with no order as to costs.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Mutava for plaintiff

No appearance for defendant

Court assistant – Josephine

