



REPUBLIC OF KENYA



Cherutich v Mburu & 4 others; Equity Bank Limited (Interested Party) (Environment & Land Case 4 of 2013) [2022] KEELC 3355 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 4 OF 2013**

MAO ODENY, J

MAY 11, 2022

BETWEEN

SHADOCK CHEPKIYENG CHERUTICH PLAINTIFF

AND

SAMMY MUIRURI MBURU 1ST DEFENDANT

HESBON MOKONO 2ND DEFENDANT

DAVID SONGOK LAGAT 3RD DEFENDANT

DISTRICT LAND REGISTRAR, UASIN GISHU 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

AND

EQUITY BANK LIMITED INTERESTED PARTY

JUDGMENT

1. By a plaint dated December 10, 2012 and amended on February 21, 2014, the Plaintiff herein sued the defendants jointly and severally seeking the following orders:
 - a. A declaration that the plaintiff is the rightful owner of that parcel of land known as Eldoret Municipality Block6/320.
 - b. An order compelling the 4th defendant to rectify the register of the suit property by cancelling the irregular title issued to the 3rd defendant and registering the plaintiff in his place.
 - c. Costs of this suit.
 - d. Any other or further relief this Honourable Court may deem fit to grant.



Plaintiff's Case

2. PW1 adopted his witness statement and stated that vide an allotment letter dated October 1, 1991 the Commissioner of Lands allocated him the suit property of which he paid the requisite premium charges and took possession thereof.
3. PW1 testified that he wrote a letter of acceptance dated November 13, 1991 to signify his acceptance and willingness to comply with the terms and conditions of the allotment letter. PW1 also produced the letter of allotment with a PDP attached, payment receipts dated November 13, 1991, 26th July 200, letters dated February 22, 2007, December 30, 1993, September 16, 1991, August 23, 2007 and November 1, 2010 as exhibits to demonstrate compliance with the conditions and that the suit property was demarcated upon payment of the premium.
4. It was PW1's evidence that while awaiting the issuance of a lease over the suit property he was shocked to learn that the 4th defendant had prepared a fraudulent title in favour of 2nd defendant who immediately transferred to the 3rd defendant who also transferred to the 1st defendant who in turn proceeded to charge the title notwithstanding the fact that the PW1 had cautioned the property and was in occupation of the same to date.
5. PW1 stated that upon learning of the registration he lodged complaints with the Permanent Secretary Ministry of Lands, offices of the 3rd defendant, Commissioner of Lands and the Chief Land Registrar who asked him to supply him with the forwarding letter and the lease document used in the registration.
6. PW1 further told the court that he went to the Lands registry where he was informed that the relevant file was missing but was later traced after 3 years with records showing that the land had been transferred to Sammy Mburu which prompted him to file complaints.
7. It was PW1's evidence that Land Registrar then summoned the defendants to produce their documents but they failed to show up, hence the Permanent Secretary Lands directed that the register be rectified to expunge the names of the Defendants.
8. PW1 stated that his documents in respect to the suit property were stolen from his car in 2007 and that he reported the matter to Eldoret Police Station whereby he was issued with a Police abstract.
9. On cross examination by Mr Kimani counsel for the 1st Defendant, PW1 stated that by the year 2000 when the said Hesbon was issued with a lease, he had not completed payment of the premium. PW1 added that he placed a restriction on the suit property in 2006.
10. On cross examination by Mr Odongo for the 4th and 5th Defendants, the PW1 stated he had applied for allocation of Plot No 4 as it was available for allocation. PW1 also stated that he took the surveyor to the suit property on July 26, 2007 and that Plot No 4 was later given Plot No 320.
11. PW2 Petronila Chesang, a Police Officer from Eldoret Police station told the court that PW1 reported the loss of his allotment letter in respect of Plot No 4 Eldoret Municipality, which was stolen from his vehicle No KAT 147Y on May 29, 2007. She stated that the report was captured in OB No889-29/5/07 and an abstract issued on 13th June 2014.
12. PW3 Robert Simiyu a Principal Lands Administration Officer took the court through allotment processes and issuance of certificate of lease. He stated that once an allottee has made payment of the required premium, the Commissioner for Lands would write to the Director of Surveys confirming payment and instructing the surveyor to survey the plot. That upon the survey being done, the Director



- of Surveyor would write back to the Commissioner confirming the survey and the number given to the plot, and asking the Commissioner to call for an amended Registry Index Map (RIM).
13. PW3 testified that upon receipt of the RIM, the Commissioner of Lands then prepares a lease which is forwarded to the District Land Registrar to prepare a certificate of lease which is issued to the allottee.
 14. PW3 confirmed that the allotment letter in their records was in favour of the Plaintiff Zaddock Chepchieng Cherutich. He also stated that there was another allotment letter dated May 16, 1991 for Plot No 10 which was cancelled by the Commissioner of Lands by issuing the allotment letter dated October 31, 1991.
 15. It was PW3's evidence that that on December 30, 1993, a letter was written by Director of Surveys to the Commissioner of Lands indicating that the suit property had been surveyed under Block 6 and given plot No 320 and the RIM was subsequently amended as seen in the correspondence between the Commissioner of lands and the Director of survey.
 16. PW3 further stated that on November 11, 2011, the District Land Registrar then wrote to the Commissioner of Lands informing him that a title had been issued in favour of Hesbon Mukono, who transferred it to David Songok Lagat and eventually to Sammy Muiruri Mburu who charged the same to Equity Bank. He stated that the Commissioner of Lands sought to be supplied with the related documents from the Land Registrar *vide* letters dated March 30, 2011 and May 15, 2012 but the same were never supplied.
 17. PW3 produced a letter dated February 9, 2012 from the Permanent Secretary informing the District Land Registrar that the suit property belongs to the Plaintiff and any lease or transfer should be deemed as fraudulent hence should be expunged from the record. It was his testimony that there was no lease that was prepared, hence there could be no certificate of lease to be issued.
 18. PW3 further produced copies of payment receipts by the plaintiff and stated that the same was not done out of time since the government had accepted part payment. He also stated that there was already a contract with the plaintiff and that the suit property was still available. That if it was not available, then the Commissioner of Lands could not have accepted the payment.
 19. On cross examination by Mr Kimani, PW3 stated that once an allotment letter was given, and the acceptance and payment not received within 30 days, then the offer was considered to have lapsed.
 20. On cross examination by Mr Momanyi counsel for the 3rd Defendant, PW3 confirmed that no lease had been issued in favour of the Plaintiff. He emphasized that there must be a lease for a Land Registrar to issue a title.
 21. PW3 further stated in re-examination that the Plaintiff requested to make payment in instalments which was approved by the committee. He confirmed that there was no other allotment letter in their records except that in favour of the Plaintiff.

1st Defendant's Case

22. DW1 adopted his witness statement and stated that he bought the suit property from David Songok Lagat the 3rd defendant herein *vide* an agreement dated 20th November 2005 at a consideration of Kshs 2Million of which he paid a deposit of Kshs 400,000/. That he paid the balance of Kshs 1.6 Million and did a search and found that the property belonged to the vendor who gave him the original title to the suit property.



23. It was DW1's testimony that the Plaintiff became a trespasser on the suit property from March 29, 2006 when he was registered as the sole proprietor of the suit property and sought for a permanent injunction against the plaintiff and a declaration that he is the proprietor of the suit property.
24. DW1 stated that he took possession but found two structures on the suit land and that there were two people on the land but did not ask them to move as he was not yet ready to develop it. He further stated that he took a loan of Kshs 1.6million in 2000 and later topped it up in 2008, and 3011 respectively which he cleared on February 8, 2021. It was his evidence that he did not fraudulently acquire the title to the suit land and urged the court to dismiss the plaintiff's case with costs.
25. On cross examination by Mr Kuria, DW1 stated that he conducted a search which proved that there was no restriction against the suit property. On further cross examination by Mr Kibii for the Plaintiff, DW1 confirmed that he neither had a search certificate nor any document from the bank showing payment of the purchase price.
26. The 2nd defendant neither filed a defence nor testified. The 3rd defendant filed a defence but neither filed a witness statement nor testified therefore their cases were closed.

4th and 5th Defendants' Cases

27. DW2 Sarah Muthoni Njoroge a Land Registrar at Uasin Gishu Land Registry explained that a Land Registrar would receive a lease and a forwarding letter from the Commissioner of Lands, thereafter the Land Registrar would then proceed to open a white card and green card, register the land and subsequently issue a certificate of lease.
28. It was her evidence that the white card to the suit property was opened on June 20, 2000 with the first entry being in favour of Hesbon Mukono who surrendered his certificate of lease when he transferred the suit property to David Songok Lagat on November 8, 2005 and subsequently to Sammy Muiruri Mburu on March 29, 2006.
29. DW2 produced a copy of the transfer between Hesbon and David received at the registry on November 8, 2005 and the transfer between David and Sammy Mburu.
30. DW2 confirmed that indeed her office received a request from the Chief Land Registrar to forward copies of all documents in relation to the suit property, which they did but there was no response.
31. On cross examination by Mr Kimani, DW2 stated that back in 2006, leases were issued by the Commissioner of Lands which duty has been taken over by the Director Land Administration and that the transaction was legal
32. On cross examination by Mr Kibii, DW2 testified that a forwarding letter and a lease must be sent to the Land Registrar before a certificate of lease can be issued. She confirmed that there was no such forwarding letter in the parcel file and that there was a restriction at entry No 8 in the white card but it was not numbered.

Plaintiff's Submissions

33. Counsel filed submissions and relied on the case of Falcon Global Logistics Co Limited v Management Committee of Eldama Ravine Boarding Primary School [2018] eKLR together with Section 26 (1) of the *Land Registration Act*, the Plaintiff submitted that registration of a title could be challenged on the grounds of fraud or misrepresentation and where the certificate was acquired illegally and unprocedurally or through a corrupt scheme.



34. Mr Kibii submitted that the Plaintiff demonstrated how he acquired his interest in the suit property as opposed to the Defendants and cited the following cases *Mary Wangui Muthoga v Samuel Ndung'u Chege & another* [2016] eKLR; *Esther Ndegi Njiru & another v Leonard Gatei* [2004] eKLR; *Mongeri Mirieri Nyanganyeria v District Land Registrar Thika & 2 other* [2018] eKLR; *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR; and *Kibiro Wagoro Makumi v Francis Nduati Macharia & another* [2018] eKLR in support of the plaintiff's case. Counsel therefore submitted that the plaintiff has proved his case on a balance of probabilities and therefore judgment should be entered as prayed in the plaint.

1st Defendant's Submissions

35. Counsel for the 1st Defendant identified three issues for determination as follows: whether the Plaintiff acquired any interest in the suit land, whether the 1st defendant is a bona fide purchaser and lastly the reliefs available to the plaintiff.
36. On the first issue as to whether he plaintiff acquired any interest on the suit land, counsel submitted in the negative for failure to complete the of the payment of the stand premium within the specified period in the allotment letter and cited the case of *Bubaki Investment Company Limited v National Land Commission & 2 others* [2015] eKLR.
37. On the second issue as to whether the 1st Defendant is a bona fide purchaser for value without notice, counsel submitted that the 1st Defendant prior to entering into the sale agreement with the 3rd Defendant, conducted due diligence and paid for the suit property; and upon the transfer procedures being done, he was issued with a title.
38. Mr Kimani relied on the cases of *Zebak Limited v Nadem Enterprises Limited* [2016] eKLR; and *Tarabana Company Limited v Sehmi & 7 others* and submitted that the Plaintiff failed to prove fraud on the part of the 1st Defendant.
39. Counsel submitted that the plaintiff having failed to prove any cause of action against the 1st defendant, the case should be dismissed with costs to the defendant and relied on the case of *IEBC & another v Stephen Mutinda Mule & 3 others* [2014] eKLR.

4th and 5th Defendants' submissions

40. Counsel identified three issues for determination as follows: whether the allocation to the plaintiff had lapsed, whether the plaintiff has proved fraud and whether the orders sought can be granted.
41. On the first issue whether the plaintiff's allocation lapsed, counsel submitted that the plaintiff did not pay the stand premium within 30 days as was required hence did not comply with the terms and conditions of the allotment letter.
42. Mr Kuria cited the cases of *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others* [2014] eKLR and *Bubaki Investment Company Limited v National Land Commission & 2 others* [2015] eKLR. (supra) to emphasize the submission that the plaintiff failed to pay the premium with the stipulated 30 days hence the allocation had lapsed.
43. On the last issue as to whether fraud was proved counsel relied on the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR and submitted that where fraud is pleaded, a party must tender evidence to prove the specific acts of fraud and that the plaintiff failed to do so. Counsel therefore urged the court to dismiss the plaintiff's claim with costs.



Analysis and Determination

44. The issues for determination that flow from the pleadings and the evidence on record are whether the plaintiff is the rightful owner of the suit land, whether the certificate of lease held by the 1st defendant was acquired legally and lastly, whether the 1st defendant is a bona fide purchaser for value.
45. On the first issue whether the plaintiff is the rightful owner of the suit land, It is not in dispute that the plaintiff was allocated the suit land by the Commissioner of Lands vide an allotment letter dated October 1, 1991 having made an application for allocation. It is further not in dispute that the allotment letter was accompanied by a PDP and conditions for payment of stand premium which the plaintiff paid in full.
46. What is in dispute is whether the payment was done within 30 days stipulated in the terms and conditions in the allotment letter. The evidence on record is that the plaintiff wrote a letter of acceptance of the offer dated 13th November 1991 and made the initial payment of Kshs 10,000/ and later paid the balance of Kshs 23,240/ on February 22, 2007.
47. Meeting the terms and conditions in an allotment letter is mandatory unless you have applied and obtained exception or the time within which to comply is extended or approved by the Commissioner of Lands or the relevant body dealing with such allocation.
48. In this case it is clear that the plaintiff partially paid the stand premium upon indicating his acceptance of the allotment letter on November 13, 1991. It is also on record that the plaintiff wrote a letter dated February 22, 2007 to the Commissioner of Lands forwarding the balance of the premium requesting that his payment be accepted and on March 12, 2007 the Advisory Committee recommended the acceptance of the plaintiff's payment and the same was approved on April 4, 2007 with the remarks "approved accept payment"
49. This was corroborated by PW3 Principal Land Administration Officer who stated that the late payment was approved by the Advisory Committee which meant that the land had not been allocated to anybody else. A perusal of a certified letter dated February 22, 2007, from the Plaintiff to the Commissioner, confirms that indeed payment was accepted.
50. In the case of *Suleiman Murunga v Nilestar Holdings Limited and Another* [2014] eKLR and *Rukiya Ali Mohamed v David Gikonyo Nambacha & Another* Kisumu HCCA No 9 of 2004 it was held that once a letter of allotment has been issued and the allottee meets the conditions therein, the land the subject of the letter of allotment is no longer available for allocation to any other person unless the first allotment has been cancelled or revoked by the allotting authority.
51. Therefore, the issue that the defendants hinged their defence on, that the plaintiff did not comply with the 30 days period of payment of the stand premium flops as a defence.
52. From the pleadings and the evidence on record the suit property was first registered in favour of the 2nd Defendant on June 20, 2000. The 2nd Defendant transferred the same to the 3rd Defendant on November 8, 2005, who subsequently transferred the suit property to the 1st Defendant who is the current registered owner as per the white card exhibited. The last two transfers were supported by the transfer documents produced by DW2. What is in contention herein is how the 2nd Defendant acquired the suit property from the government in the first place.
53. DW3 took the court through an elaborate process of how allocation is done and how leases are forwarded with a cover letter to the Land Registrar for processing of a lease certificate. He stated that once an allottee has made payment of the required premium, the Commissioner for Lands would



- write to the Director of Surveys confirming payment and instructing the surveyor to survey the plot. That upon the survey being done, the Director of Surveyor would write back to the Commissioner confirming the survey and the number given to the plot, and asking the Commissioner to call for an amended Registry Index Map (RIM).
54. PW3 confirmed that the allotment letter in their records was in favour of the Plaintiff Zaddock Chepchieng Cherutich. He also stated that there was another allotment letter dated May 16, 1991 for Plot No 10 which was cancelled by the Commissioner of Lands by issuing the allotment letter dated October 31, 1991.
 55. PW3 was a crucial witness who shed light on the allotment of the suit land and that the Commissioner of Lands sought to be supplied with the relevant documents from the Land Registrar vide letters dated March 30, 2011 and May 15, 2012 but the same were never supplied.
 56. It should be noted that the Permanent Secretary Ministry of Lands wrote a letter dated February 9, 2012 informing the District Land Registrar that the suit property belongs to the Plaintiff and any lease or transfer should be deemed as fraudulent hence should be expunged from the record.
 57. PW3's evidence also confirmed that there was no lease prepared or forwarded to the Land Registrar as required by law and procedure. This was also corroborated by the DW2 the Uasin Gishu Land Registrar who testified that they did not have the lease in their records in respect of the suit land. This points to one conclusion that the certificate of lease that was issued to the 2nd defendant was fraudulent null and void as no lease certificate can be issued without a lease. The question is how did the 4th defendant issue a certificate of lease without a lease forwarded by the Commissioner of Lands.
 58. The fact that there was no lease answers the issue as to whether the 1st defendant's certificate of lease was acquired legally or not. The answer is in the negative as the 2nd and 3rd defendants had no valid title to pass to him. The defendants did not pass a good title hence the title held by the 1st defendant was null and void.
 59. The root of a title is very important as was held in the Court of Appeal case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR as follows:

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."
 60. Where a title is challenged, a party whose title is challenged must demonstrate, through evidence, that the Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts regarding the process.
 61. The 2nd Defendant did not file any document in this case. There was no explanation given by him on how he became an owner of the suit property. This begs the question, how then did the District Registrar process a Certificate of Lease in favour of the 2nd Defendant?
 62. Section 26 (1) of the *Land Registration Act*, 2012 provides that :

Certificate of title to be held as conclusive evidence of proprietorship.



1. The certificate of title issued by the Registrar upon registration, or to a purchaser
 2. of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
63. The 1st Defendant claimed that he was a bona fide purchaser for value without notice. For a person to rely on this doctrine, he must prove the following ingredients as was enunciated in the case of *Katende V Haridar & Company Limited* [2008] 2 EA 173 where the Court of Appeal in Uganda held that:
- "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, ... (he) must prove that:
- a) he holds a certificate of title;
 - b) he purchased the property in good faith;
 - c) he had no knowledge of the fraud;
 - d) he purchased for valuable consideration;
 - e) the vendors had apparent valid title;
 - f) he purchased without notice of any fraud;
 - g) he was not party to any fraud."
64. It is evident that the 1st Defendant holds a certificate of title to the suit property but it should be noted that the transfer of lease dated March 26, 2006 in favour of the 1st Defendant was not signed by the Land Registrar. The 1st Defendant exhibited a copy of a hand written sale agreement dated November 20, 2005 between himself and the 3rd Defendant. According to the agreement, the 1st Defendant paid cash Kshs 2,000,000/ upon execution. However, this was not what he told the court. The 1st Defendant testified that he paid Kshs 400,000/ upon execution, and cleared the balance of Ksh 1.6 Million thereafter. Again, there was no proof of payment of the said purchase price.
65. The 1st defendant cannot qualify as an innocent purchaser for value without notice as the vendors had no apparent valid title. This is due to the fact that the defendants had no valid title to pass. Why did the 2nd and 3rd defendants not participate in the case and yet they were the ones who sold the land to the 1st defendant who is currently the registered owner.



66. The court is empowered under Section 80(1) of the Land Registration Act, 2012 to order the rectification of a register by directing that a registration be cancelled or amended. Section 80(1) of the Land Registration Act No 3 of 2012 provides: -

"Subject to subsection (2), the court may Order rectification of the registrar by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."

67. I have considered the pleadings, the evidence on record, the documents produced and the relevant authorities and find that the plaintiff has proved his case on a balance of probabilities. I therefore enter Judgment in the following terms:

- a. A declaration is hereby issued that the plaintiff is the rightful owner of that parcel of land known as Eldoret Municipality Block 6/320.
- b. An order is hereby issued compelling the 4th defendant to rectify the register of the suit property by cancelling the irregular title issued to the 1st 2nd and 3rd defendants and registering the plaintiff in their place.
- c. Costs of this suit to be borne by the defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

