



**Kenya Railways Corporation v Kuinet Hardware Limited & 5 others;  
Oriental Commercial Bank Ltd (Interested Party) (Environment & Land  
Case 663A of 2012) [2023] KEELC 18896 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18896 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 663A OF 2012**

**SM KIBUNJA, J**

**JULY 25, 2023**

**BETWEEN**

**KENYA RAILWAYS CORPORATION ..... PLAINTIFF**

**AND**

**KUINET HARDWARE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LALJI VISHRAM ..... 2<sup>ND</sup> DEFENDANT**

**GODAFREED LALJI HIAN ..... 3<sup>RD</sup> DEFENDANT**

**NDALAVIEW SERVICE STATION ..... 4<sup>TH</sup> DEFENDANT**

**THE COMMISSIONER FOR LANDS ..... 5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**ORIENTAL COMMERCIAL BANK LTD ..... INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff commenced this suit vide the plaint dated the November 12, 2010 against the defendants, filed through Ms Tom Mutei Advocates, seeking for;
  - a. A declaration that the allocation, registration of the lease in favour of the 1<sup>st</sup> defendant, subsequent transfer and registration of the lease in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in respect of Eldoret Municipality Block 3/56, suit property, is illegal, null and void.



- b. A declaration that the plaintiff is the rightful owner of the suit property, and an order cancelling the certificate of lease in respect of suit property be issued.
- c. An order for the 5<sup>th</sup> defendant to rectify the register of the suit property in accordance with prayer (b) above be issued.
- d. A permanent injunction to restrain the defendants, their servants and or agents from interfering with the plaintiff's use and occupation of the suit property.
- e. Costs of this suit plus any other relief the court may deem fit to grant.

The plaintiff averred that it is the absolute proprietor of the land along the Railway lines and in particular the land along Eldoret Railway Station by virtual of the Kenya Railways Corporation (Vesting Order) 1986. That it got surprised to learn from the Eldoret Land Registry that part of the said land had been allocated by the 5<sup>th</sup> defendant to the 1<sup>st</sup> defendant, registered as Eldoret Municipality Block 3/56, and certificate of lease issued on the May 22, 1996, and subsequently transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as proprietors in common on the June 17, 1996, and subsequently transferred to the 4<sup>th</sup> defendant on the October 24, 1996. That the said transactions over its land was done without its consent and or consultations, and was therefore illegal, fraudulent, null and void. The plaintiff has set out the particulars of fraud, illegality and or nullity at paragraph 7 of the plaint as follows;

- i. The allocation by the 5<sup>th</sup> defendant of the plaintiff's land to the 1<sup>st</sup> defendant without consultation and consent from the plaintiff was fraudulent.
- ii. The 3<sup>rd</sup> defendant exercise of his powers to allocate land was misplaced as the land in issue was not government land.
- iii. The 1<sup>st</sup> defendant's transfer of the land in question to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and subsequently by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the 4<sup>th</sup> defendant was both mischievous and fraudulent and only meant to defeat the due process of the law.
- iv. Substantial part of the land in issue is still in use by the officers of the plaintiff as on it stands the Railway station, Railway Staff houses, playground and land reserved for operation and expansion.
- v. The said allocation was done without the consent of the plaintiff.
- vi. The plaintiff was not paid monetary compensation for the acquisition of the said land.

The plaintiff further averred that the 4<sup>th</sup> defendant has entered onto the suit property and erected structures that pose a danger to the safety of Railway transport. That there has been no previous proceeding between the parties and over the same subject matter. That the demand and notice to sue has been issued.

2. The record confirms that interested party applied to be joined in the suit through the notice of motion dated the June 24, 2011.
3. The plaintiff's claim is opposed by the 1<sup>st</sup> to 4<sup>th</sup> defendants through their statement of defence dated the December 21, 2010 filed through Ms Ngigi Mbugua & Co Advocates. They averred inter alia that the suit land belonged to the Government of Kenya and was lawfully transmitted to the 4<sup>th</sup> defendant without notice of the plaintiff's claim over it. That the plaintiff was aware of the transaction as far



back as 2002. They denied the plaintiff's allegations of fraud insisting that they had acquired the suit property lawfully, for valuable consideration and without notice of the plaintiff's interest whatsoever. That the utilization of the suit land by the 4<sup>th</sup> defendant was consistent with the proprietorship under the law and was not in any way a danger to railway transport. That the plaintiff never owned the suit property and has no basis of claiming it. That the suit offends the provisions of Limitation of Actions Act, Government Lands Act, Public Authorities Limitations Act. That the 4<sup>th</sup> defendant has charged the suit property to Delphis Bank Ltd and a suit between them being Eldoret HCCC No 6 of 1999 is pending before court. They denied demand being issued before filing of the suit and averred the suit is premature, and the court without jurisdiction. They prayed for the plaintiff's suit to be dismissed with costs.

4. The Commissioner of Lands and the Attorney General, being the 5<sup>th</sup> and 6<sup>th</sup> defendants respectively, filed the statement of defence dated the July 25, 2014 through Mr Joseph Ngumbi, Litigation Counsel, in which they inter alia averred that the allocation and registration of the suit property in the names of Kuinet Hardware Ltd, 1<sup>st</sup> defendant, who later transferred it to Lalji Vishram and Godfreed Lalji Hian, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, as proprietors in common and to Ndala View Service Station, the 4<sup>th</sup> defendant as bona fide purchaser, was not illegal, fraudulent, null or void but was done in accordance with the law and in good faith. That the plaintiff's suit offends the Limitation of Actions Act, Chapter 22 of Laws of Kenya, and Public Authorities Act Chapter 39 of Laws of Kenya. That the suit is therefore incompetent, untenable, frivolous and should be struck out or dismissed with costs.
5. The hearing of the plaintiff's case commenced on the December 5, 2017 with Victor Wahome, a surveyor with the plaintiff, testifying as PW1. He adopted his statement filed on the November 1, 2013 as his evidence and produced the documents in the list of documents filed on November 1, 2013 except the photographs as exhibits. During cross examination the witness stated that he is also a planner. That he did not have a surveyor's practicing certificate from the institute in 2013 when working for the plaintiff and in 2017 though he is authorized to act as a surveyor by the plaintiff. That the plaintiff had discovered the transactions involving the suit property eight (8) years before filing the suit. That though he had authority from the board of directors of the plaintiff to appear in court for it, he had not filed it with the court. That the plaintiff's land had not been registered. When the hearing resumed on the June 3, 2021, the learned counsel for the plaintiff informed the court that PW1 had been interdicted even though his testimony had not been completed. The plaintiff then called Duncan Mwangi, a surveyor with the plaintiff, who testified as PW2. He adopted the contents of his statement dated the June 17, 2020 as his evidence in chief. It is his testimony that the suit land belonged to the plaintiff through the 1986 vesting order and that the plaintiff had not surrendered it to the Government for reallocation to the defendants. That in case the plaintiff wanted to sell the suit land, the approval of the government and the plaintiff's board would first be obtained before drawing of the PDP. The PDP would then be approved before completion of the sale or alienation and that there was no such PDP in the transactions leading to the allocation of the suit property herein. PW2 produced the documents in the lists dated July 30, 2018 and September 30, 2020 as exhibits. During cross examination PW2 stated that he had been authorized to testify for the plaintiff through the letter dated the May 27, 2020 by the Managing Director even though it did not refer to the board minutes or have the corporation's seal. That he knew the Central Bank of Kenya Eldoret is not within the plaintiff's land, but is not aware where the General Post Office [GPO] and the Central Police Station are located. That the suit land was registered in 1996 and could not tell why the plaintiff did not file the suit before 2010. That the RIM produced as exhibit 4 confirms that the suit land was within the plaintiff's land. That the plaintiff got to know about the transactions over the suit property in 2002 and filed a caution. That the Eldoret Railway Station land is demarcated by Unga Street to the South, Oloo Road to the East, but to the West there are no notable features.



6. A consent order was then entered on the June 3, 2021 for the Deputy Registrar and County Surveyor to visit the suit property in the presence of the parties and or their counsel and confirm its ground position and boundaries in relation to the plaintiff's land and file a report in court. The Surveyor's report dated the October 13, 2021 was filed on the November 11, 2021 and its author, Emmanuel Kipkurui Keitany, testified as PW3. He confirmed that the suit property was supported by a survey plan and had all beacons intact. That the relevant registry map had been procedurally amended and that the suit property was within the Eldoret Station land as per the 1925 survey map. PW3 produced the report dated the October 13, 2021 as exhibit. During cross examination, PW3 explained that an approved PDP precedes the allotment letter which is followed by the authority to survey the land. Thereafter the survey report is directed to the Director of Survey where it is given a File Reference [FR] number. That the survey for the suit land is under FR No 300/98 after demarcation from the Railway Station land that is reflected under FR No 24 of November 30, 1925. That there was no irregularity in the creation of the suit property. That he could not confirm whether the plaintiff is the owner of the land described as Railway Station Land.
7. During the subsequent hearing of November 14, 2022, the learned counsel for the parties present adopted the consent recorded in ELC No 632 of 2012 to the effect that the parties are to rely on their filed pleadings, documents, witness statements and evidence already taken; proceed to file and exchange submissions and thereafter have the file transmitted to Justice Kibunja to write the judgement. The record shows that the order to forward this file to Justice Kibunja was eventually made on the April 24, 2023. It is important for record purposes to state that Justice Kibunja had left the station on transfer to Mombasa ELC in September 2022.
8. The record confirms that for the plaintiff, the only other witness whose statement had been filed but did not testify was Stanley Gitari, who had filed a statement dated the July 27, 2018. That for the 1<sup>st</sup> to 4<sup>th</sup> defendants, one Japheth Kipkemboi Magut had recorded undated statement filed on the January 20, 2015. The court will consider the contents of their statements and documents filed by the 1<sup>st</sup> to 4<sup>th</sup> defendants that were admitted through the case stated consent of the November 14, 2022.
9. The learned counsel for the plaintiff, 1<sup>st</sup> to 4<sup>th</sup> defendants, 5<sup>th</sup> and 6<sup>th</sup> defendants and Interested party filed their submissions dated the December 14, 2022, February 28, 2023, April 20, 2023 and February 1, 2023 respectively which the court has considered.
10. The following are the issues for the determinations by the court;
  - a. Whether the court has jurisdiction to hear and determine this suit.
  - b. Whether the suit property was hived/excised from land reserved for the plaintiff, and if so, whether it was available for allocation by the 5<sup>th</sup> defendant to the 1<sup>st</sup> defendant.
  - c. Whether the transfer of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the subsequent transfer to the 4<sup>th</sup> defendant conferred good title to the suit property.
  - d. Whether the 4<sup>th</sup> defendant was a bona fide purchaser of the suit property for value and without notice.
  - e. Whether the plaintiff is entitled to the prayers, or any of the prayers sought.
  - f. Who pays the costs.



11. The court has carefully considered the parties' pleadings, evidence tendered, submissions filed by the learned counsel, superior courts decisions cited thereon and come to the following determinations;

- a. The court's jurisdiction has been objected to by the defendants on the ground that the plaintiff's suit is statute time barred and offends the provisions of the Limitation of Actions Act, Government Proceedings Act, Government Lands Act and the Public Authorities Limitations Act.

From the contents of the statements filed by Victor Wahome, Stanley Gitari and Duncan Mwangi dated the September 9, 2013, July 27, 2018 and June 17, 2020 respectively, and the testimonies of PW1 and PW2 before the court, the suit property was demarcated from the plaintiff's land without following the due process and illegally allocated to the 1<sup>st</sup> defendant in 1996. PW2 confirmed that the green card for the suit land indicated that the plaintiff had on April 4, 2002 filed a caution against the suit property's title, but could not tell why the plaintiff waited until 2010 to file the suit. However, neither PW1 nor PW2 or Stanley Gitari disclosed in their statements and or testimonies the specific date the plaintiff got to know that the suit property had been excised from its land, allocated and registered in the name of the 1<sup>st</sup> defendant and later transferred to the other defendants. In support of the 1<sup>st</sup> to 4<sup>th</sup> defendants' case, Japheth Kipkemboi Magut recorded his evidence in the undated statement filed on the January 20, 2015, among others detailing how the suit property was allocated through the letter of allotment dated the February 12, 1996 to 1<sup>st</sup> defendant, later transferred to 2<sup>nd</sup> and 3<sup>rd</sup> defendants and is currently in the name of the 4<sup>th</sup> defendant. That before filing this suit, the plaintiff had tried to have the suit land's title cancelled through the 5<sup>th</sup> and 6<sup>th</sup> defendants. That from the foregoing, the plaintiff witnesses position is that the plaintiff only got to know about the demarcation of its land to create the suit land shortly before it filed this suit. However, the fact that the plaintiff had filed a caution against the title to the suit property on the April 4, 2002, leaves no doubts that the plaintiff knew of the transactions over the suit property before that date.

- b. The learned counsel for the plaintiff has extensively submitted that their claim is based on fraud attributed to the defendants, and therefore the time prescribed by section 7 of the Limitation of Actions Act started running in 2002 when it discovered the fraud and filed the caution. That the twelve (12) years within which the plaintiff had to take action was to lapse in 2014 and as this suit was filed in 2010, then the issue of limitation does not arise. The counsel submitted that the plaintiff had complied with section 13A of the Government Proceedings Act to issue a 30 days' notice by serving the Attorney General with the notice on the April 1, 2010. A copy of that notice is attached as document 3 in the plaintiff's list of documents dated the 27<sup>th</sup> July and filed on the July 30, 2018. The counsel further referred the court to the Court of Appeal decision in the case of David Njenga Ngugi versus Attorney General [2016] eKLR, where the provisions of section 13A of the said Act was considered alongside Article 159 (2) of the Constitution and the court made a finding that failure to issue the statutory notice should not impede a party's access to justice, and therefore a suit should not be said to be incompetent for lack of the said notice. On the provisions of section 136 of the Government Lands Act that provides that;

' 136.

- (1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards.
- (2) Notice in writing of the action and the cause thereof, shall be given to the defendant one month at least before the commencement of the action.'



The plaintiff's counsel submitted that the requirement of filing suit within one year has been settled through the leave granted in Eldoret HC Misc Appl No 279 of 2010 on the November 2, 2010. That this court being of equal status to the court that granted the leave, it lacks jurisdiction to overturn that order. The plaintiff's counsel also submitted that there is no provision for time limits in instituting suits against the government involving land in the [Public Authorities Limitation Act](#).

- c. The learned counsel for the 5<sup>th</sup> and 6<sup>th</sup> defendants submitted inter alia that the evidence by the County Surveyor confirmed that the suit land was demarcated from the Eldoret Station Yard, that was part of the land set aside for the plaintiff according to the survey plans. That the 1<sup>st</sup> to 4<sup>th</sup> defendants may have obtained title to the suit land from the 5<sup>th</sup> and 6<sup>th</sup> defendants, but the title is not protected under Article 40 of the [Constitution](#) and as the land was not available for allocation. The counsel therefore, supported the plaintiff's suit in its entirety. It is important to note that the learned counsel's submissions supporting the plaintiff's suit is clearly at variance with the 5<sup>th</sup> and 6<sup>th</sup> defendants' pleadings in their statement of defence dated the July 25, 2014 in which they had defended the allocation of the suit property to the defendants.
- d. For the interested party, their learned counsel submissions defended the allocation of the suit property to the 1<sup>st</sup> defendant, its subsequent transfer of the title ending with the 4<sup>th</sup> defendant as a bona fide purchaser for value without notice and the charge with the interested party.
- e. The plaintiff's further list of documents dated the July 27, 2018 has among others a copy of the order issued on November 2, 2010 in Eldoret HC Misc Appl No 279 of 2010, that has the same parties as those in this suit. It has the following orders;
  1. 'Leave be and is hereby granted to the plaintiff/applicant to file suit against the defendants/respondents out of statutory time.
  2. The plaintiff/applicant be and is hereby allowed to file suit against the defendants/respondents within 14 days from November 2, 2010.'

That the defendants' onslaught on the plaintiff's suit for reason of being statute time barred therefore fails in view of the leave granted on November 2, 2010 in Eldoret High Court Misc Appl No 279 of 2010. In any case, this suit being over the recovery of public land, limitation was not an issue in view of the provision of section 42(1)(d) of the [Limitation of Actions Act](#) chapter 22 of the Laws of Kenya that provides that;

' This Act does not apply to a proceeding by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connection with any such recovery.'

- f. The court is aware that the protection of right to property that has been unlawfully acquired is not protected under Article 40(6) of the [Constitution](#). The learned counsel for the parties have cited several superior court decisions in that area. The evidence presented by the plaintiff leaves no doubt that the suit land was surveyed from Eldoret Railway Station area that was vested in the Kenya Railways Corporation, the plaintiff. The land allocated by the 5<sup>th</sup> defendant to the 1<sup>st</sup> defendant, registered as Eldoret Municipality Block 3/56, and certificate of lease issued on the May 22, 1996, and subsequently transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as proprietors in common on the June



17, 1996, and subsequently transferred to the 4<sup>th</sup> defendant on the October 24, 1996. All those transactions took place without the plaintiff having surrendered the land back to the Government or consenting to the allocation. The land was unavailable for allocation and the said transactions over the suit land was done without the plaintiff's consent and or consultations, and was therefore illegal, fraudulent, null and void. The allocation of the land to the 1<sup>st</sup> defendant, and transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and finally the 4<sup>th</sup> defendant did not confer on them or any of them with good title to the land, in view of the recent decision of the Supreme Court of Kenya in the case Dina Management Ltd versus County Government of Mombasa & 5 Others Petition No 8 (E010) of 2021, where it was inter alia held at paragraph (111) that;

' Article 40 of the Constitution entitles every person to right to property, subject to the limitations set therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.'

It follows that the certificate of title of the suit land that the Interested Party is holding as security for the financial facilities it accorded the 4<sup>th</sup> defendant is not worth anything more than the value of that paper.

- g. It is noted that though the 5<sup>th</sup> and 6<sup>th</sup> defendants appeared to support the allocation of the suit land hence effectively vouching for the legality of the other defendants' title in their filed statement of defence, they changed that position in their submissions by supporting the plaintiff's claim.
  - h. That flowing from the provisions of section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya that the costs should follow the events unless where for good cause the court orders otherwise, the defendants will pay the plaintiff's costs.
1. The upshot of the above findings is that the plaintiff has proved its claim against the defendants. The court therefore enters judgement for the plaintiff against the defendants and orders as follows;
    - a. A declaration be and is hereby issued that the allocation and registration of the lease in favour of the 1<sup>st</sup> defendant, the subsequent transfer and registration of the lease in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and thereafter to the 4<sup>th</sup> defendant in respect of Eldoret Municipality Block 3/56, suit property, was illegal, null and void.
    - b. A declaration be and is hereby issued that the plaintiff is the rightful owner of the suit property, and the certificate of lease issued to 4<sup>th</sup> defendant in respect of suit property is cancelled.



- c. A permanent injunction be and is hereby issued to restrain the defendants, their servants and or agents from interfering with the plaintiff's use and occupation of the suit property.
- d. The defendants to pay the plaintiff's costs.

13 It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 25<sup>th</sup> DAY OF JULY 2023.**

**S. M. Kibunja, J.**

IN THE PRESENCE OF:

Plaintiff : M/s Moraa Advocate.

Defendants : Mr. Simiyu Advocate.

Interested Party : Mr, Makora Advocate.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

