



**Busienei v Alphax Colllege Limited; Kenya Forest Service & another
(Interested Parties) (Environment & Land Case 159 of 2015)
[2023] KEELC 20248 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 159 OF 2015
JM ONYANGO, J
SEPTEMBER 28, 2023**

BETWEEN

DANIEL KIPLIMO BUSIENEI PLAINTIFF

AND

ALPHAX COLLEGE LIMITED DEFENDANT

AND

KENYA FOREST SERVICE INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

JUDGMENT

1. The plaintiff instituted this suit by way of a Plaint dated 28th August, 2015 seeking the following reliefs against the defendant:
 - a. An eviction order evicting the defendant, its agents, servants and/or employees from Eldoret Municipality Block 10/183.
 - b. A permanent injunction restraining the defendant, its agents, servants and/or employees from trespassing into land parcel No. Eldoret Municipality Block 10/183 and/or in any other way interfering with the suit land.
 - c. A declaration that the Defendant is a trespasser and in unlawful occupation on the said Land Reference Number Eldoret Municipality Block 10/183 and as such the plaintiff is entitled to damages. The court to assess the damages payable to the Plaintiff.
 - d. Costs and interest of this suit and
 - e. Any other relief the court deems fit to grant.



2. Upon being served with the Plaint and Summons to enter appearance, the Defendant filed a Statement of Defence and Counterclaim dated 2nd July 2015 in which it denied the Plaintiff's claim and stated that the suit property being forest land by virtue of Gazette Notice Number 231 of 1966 was not available for alienation by the Commissioner of Lands and the allocation of the suit land to the Plaintiff was unprocedural, null and void. The Defendant sought to join the National Land Commission, Kenya Forest service and the Chief Land Registrar and the Attorney General in the suit.
3. In its Counterclaim the defendant alleged that the Plaintiff's title was acquired fraudulently, unlawfully and unprocedurally and prayed that the said title be cancelled. In essence the Defendant sought the following reliefs in its Counterclaim:
 - a. A declaration that the suit land described as Eldoret Municipality Block 10/183 forms part of Eldoret forest.
 - b. A declaration that land parcel number Eldoret Municipality Block 10/183. Eldoret Municipality Block 10/183 was unlawfully, unprocedurally wrongfully, illegally and fraudulently allotted to the plaintiff.
 - c. A permanent injunction restraining the plaintiff, his servants, agents, employees and/or any other person claiming or acting on the plaintiff's instructions from entering, occupying, ploughing, farming, selling, leasing, charging or disturbing the Defendant's occupation of the suit parcel of land as a licensee and/or in any other way dealing with the suit parcel of land.
 - d. An order for cancellation of the title deed to land parcel number Eldoret Municipality Block 10/183.
 - e. An order directing the plaintiff to surrender the title deed issued to him in respect of Eldoret Municipality Block 10/183 to the Chief Land Registrar and/or any other officer in the office with authority for cancellation.
 - f. An order directing the Chief Land Registrar and/or Uasin Gishu County Land Registrar to cancel the title deed to land parcel number Eldoret Municipality Block 10/183 and rectify the official record and/or register in respect of land parcel number Eldoret Municipality Block 10/183 which forms part of Eldoret forest.
4. Upon being joined in the suit the 1st Interested Party filed a Defence and Counterclaim dated 16th march 2017 denying the plaintiff's claim and stated that the suit land is public land and that the Plaintiff acquired it unlawfully. In its Counterclaim the 1st Interested party prayed that the Plaintiff's title be cancelled.
5. In its Defence and Counterclaim dated 5th November, 2018, the 2nd Interested Party also denied the Plaintiff's claim and stated that vide Legal Notice No. 258 of 1966, the whole of the land measuring approximately 281.5 acres was reserved and gazetted as Eldoret forest and was not available for further alienation or allocation to anyone including the plaintiff. The 2nd Interested party prayed for a declaration that the plaintiff's title was acquired unlawfully and fraudulently and the same should be cancelled. The 2nd Interested party similarly prayed for a permanent injunction to restrain the plaintiff from interfering with the suit property.
6. The suit was set down for hearing and all the parties called their witnesses who testified and produced their exhibits.



Summary Of Plaintiff's Evidence

7. The Plaintiff adopted his witness statement and produced the documents in his List and bundle of documents. It was his evidence that he was issued with a letter of allotment dated 1st September, 1995 for an Unsurveyed plot measuring 0.0155 Ha. He paid for the same in 2014 and he was subsequently issued with a Certificate of lease dated 22nd December, 2014 for land parcel number Eldoret Municipality Block 10/183 measuring 0.1908 Ha. He also produced a Rates Clearance Certificate dated 6th April, 2015 showing that he had paid the rates in respect of the suit property. He stated that the Defendant had encroached on half an acre of his land and constructed some structures on a small portion thereof.

Summary Of Defendant's Evidence

8. The Defendant called its director Kenneth Okwara who testified as DW1. He testified that the Defendant had had obtained a license from Kenya Forest Service (1st Interested Party) to operate a college on the suit property for a period of 25 years. He produced a copy of the license and gazette notice no.251 of 1966. He stated that the land belonged to Kenya Forest service. It was his evidence that Legal Notice No. 258 of 1966 had two sections; one section comprising of 383 acres was de-gazetted as forest land while the second section measuring 281 acres where the college was situated was still forest land. He denied that they had encroached on the plaintiff's land as the portion occupied was part of forest land.

Summary Of The Interested Parties' Case

9. The 1st Interested party relied on the defendant's evidence and opted not to call any witness.
10. The 2nd Interested party called Evans Kegode, the Head of Survey and Mapping, Kenya Forest Service who testified at the suit property. He told the court that the suit property belonged to Kenya Forest Service. He stated that it was gazetted as a forest vide Legal Notice No. 258 of 21.6. 1966 and Proclamation No. 44 of 1932. He produced the Legal Notice, Proclamation and Boundary Plan as exhibits. He pointed out the beacons marking the beginning of the forest and stated that the college was within the disputed land. He explained that before forest land could be alienated, it had to be de-gazetted and a fresh survey done. He told the court that in this case no fresh survey was carried out. He stated that the plaintiff's title was illegal as land fell within the forest. He confirmed that the college was licensed by Kenya Forest Service.
11. He stated that the National Land Commission had recommended that the plaintiff's title be revoked. He maintained that the process of excising the land for alienation was not followed as there was no Gazette notice de-gazetting the land as a forest to create the plaintiff's title.
12. After the close of the Defence case, the parties filed and exchanged their submissions.

Plaintiff's Submissions

13. Learned counsel for the plaintiff submitted that the plaintiff lawfully acquired the suit property, having been the allotted the same by the Commissioner of Lands after which he made the necessary payment and was issued with a Certificate of Lease by the County Government of Uasin Gishu. He submitted that before the Certificate of Lease was issued to the plaintiff, the Registry Index Map was amended accordingly. He relied on sections 24 and 26 of the [Land Registration Act](#) which vests ownership of land to the person registered as the owner of the land.



14. In particular Section 24 provides that

“The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto subject to all implied or expressed agreements, liabilities or incidents of a lease”.

Section 26 provides that :

“26 The Certificate of title issued by the Registrar upon registration, or to a purchaser 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 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 grounds of fraud, or misrepresentation to which 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”.

15. He also relied on the case of Joseph Letuya v Attorney General & 5 Others (2014) eKLR where the court held that :

“The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title or of certain transactions that confers beneficial interests in land in the absence of a legal title of ownership.

16. Counsel further submitted that the Defendant and interested parties had not proved that the suit land was gazetted forest land. It was his contention that whereas the defendant had in his statement referred to Gazette Notice No.231 of 1966, he had in his evidence produced Gazette Notice No.258 of 1966. He was of the view that since parties are bound by their pleadings, the plaintiff’s exhibit did not match his pleadings.

17. He further submitted that according to Gazette Notice no. 258 of 1966 and Proclamation no. 44 of 1932 relied on by the Interested Party the suit land was shown not to fall within the forest area.

18. He submitted that the plaintiff had not been able to develop the suit land owing to the defendant’s act of trespass as the defendant entered the suit land in 2007. He therefore submitted that he was entitled to general damages for trespass.

Defendant’s Submissions

19. On his part, learned counsel for the Defendant submitted that the plaintiff has no valid title to the suit land as he acquired the same illegally and irregularly and that the same should be cancelled. He submitted that the suit land falls within Eldoret Forest which was gazetted as a forest vide Gazette notice no. 231 of 1966. He contended that no valid excision of the land had been undertaken to allow for private alienation to the plaintiff. He argued that the root of the plaintiff’s title had been challenged, it was incumbent upon him to adduce evidence to show that the process of acquisition of his title was lawful. He relied on the case of Munyu v Hiram Gathiha, Civil Appeal No. 239 of 2009 for the



proposition that when the owner's root of title is challenged, the registered owner must go beyond the title to prove that the process of acquisition was lawful.

20. He submitted that the plaintiff had used his position as a Court Assessor to acquire forest land with the assistance of a person known as Oduori. It was his submission that neither Mr. Oduori nor the Commissioner of Lands had the authority to alienate public land which was gazetted as forest land. He pointed out that the plaintiff was issued with a Certificate of Lease in 2014 while the Defendant had been issued with a license by Kenya Forest Service in 2007. He argued that since the Defendant had demonstrated that the suit land was forest land, the burden was on the plaintiff to show that the suit land did not form part of the forest. He relied on the case of *Funzi Island Development Ltd & 2 Others v County Council of Kwale* (2014) eKLR.
21. On whether the defendant was a trespasser, counsel submitted that the defendant was legally occupying the suit land pursuant to an agreement between Alphax College Limited and Kenya Forest Service in accordance with Section 21(1) and (2) of the Forest (Participation in Sustainable Forest Management) Rules.

Interested Parties' Submissions

22. The Senior State counsel who filed submissions on behalf of the Interested Parties, submitted that forest land measuring approximately 281 .5 acres was reserved and gazette by legal Notice No. 258 of 21st June, 1966 and boundary plan no. 175/113 as confirmed by the site visit. He further submitted that the said Legal Notice had never been de-gazetted and the boundary plan varied as suggested by the Plaintiff. He contended that the procedure for de-gazetting forest land laid down in the repealed Forest Act had not been followed and the suit land therefore remained part of the gazetted forest land. He relied on the case of *Timothy Ingosi & 87 Others v Kenya Forestry Services & 2 Others* (2015) eKLR where the court held that due process had not been followed in de-gazetting the forest land and therefore the titles issued to the plaintiffs were null and void.
23. By the same token counsel submitted that the allocation of the suit land to the Plaintiff was illegal, null and void as the suit land was not available for alienation.
24. It was counsel's contention that under the repealed Government Lands Act Cap 280, the President and Commissioner of Lands had powers to allocate unalienated public land. However, if land was reserved for a particular public purpose or was occupied by a public entity it was not available for allocation. He relied on *ELD CACA No. 288 of 2010: Kipsirgoi Investments Ltd v Kenya Anti-Corruption Commission; Chemey Investment Limited v Attorney General & 2 Others* (2018) eKLR and *Kenya Anti- Corruption Commission v Lima Limited & 2 Others*.
25. On whether the plaintiff's title was valid, counsel submitted that the process of acquisition of the plaintiff's title was not proper as he failed to comply with the conditions laid down in the letter of allotment. After being issued with a letter of allotment in 1995, the plaintiff did not demonstrate that he had accepted the offer and made the necessary payment within 30 days as required. It was his contention that by the time the plaintiff made the payment in 2014, the offer had already lapsed. He relied on the case of *Bubaki Investment Company Ltd v National Land Commission & 2 Others* (2015) eKLR.
26. Counsel further placed reliance on *Republic v land Registrar Kilifi & Another ex-parte Daniel Ricci* (2013) eKLR for the proposition that a title deed is an end product of a process and for a title to be protected by the law, the holder thereof must establish that he followed the laid down procedures in acquiring it. The court adopted a similar position in *Funzi Island Development Ltd & 2 Others v County Council of Kwale* (2014) eKLR and held that a court of law cannot, on the basis of



indefeasibility of title, sanction an illegality or give its seal of approval to a title that was obtained illegally or irregularly.

27. It was counsel's contention that the plaintiff had failed to prove that he was entitled to the reliefs sought. Conversely, he submitted that the Defendant and Interested Parties had proved that the suit property was public land since it was gazetted as a forest. He therefore urged the court to cancel the plaintiff's title.

Issues For Determination

28. After careful consideration of the pleadings, oral and documentary evidence as well as the parties' submissions, the following issues emerge for determination;
- i. Whether the plaintiff holds a valid title to land parcel No. Eldoret Municipality Block/10/183
 - ii. Whether the suit land is gazetted as forest land.
 - iii. Whether the defendant holds a valid licence to the suit land
 - iv. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.
 - v. Whether the Defendant is entitled to the reliefs sought in the Counterclaim.

Analysis And Determination

29. I will deal with the first and second issues concurrently.
30. It is the plaintiff's case that he holds a valid title to land parcel No. Eldoret Municipality Block/10/183 measuring 0.1908 Hectares and that the Defendant has encroached on a portion thereof measuring about 0.5 of an acre. He produced a Certificate of Lease and a Certificate of Official Search showing that the said parcel of land is registered in his name. It was his evidence that he was issued with an allotment letter dated 1.4. 1995 and he paid the stand premium, survey fees and other charges stated in the said letter in 2014. He also produced a consent to transfer and a letter by the Director of Surveys dated 28.11.2014 stating that the Registry Index Map had been amended to create his title.
31. On his part the Defendant maintained that the suit property was part of the land that was gazetted as forest land vide Gazette Notice No.231 of 1966. The said Gazette Notice which was produced by DW1 as Defence Exhibit 1 states as follows:

“In exercise of the powers conferred by section 4(1) of the Forests Act, the Minister for Natural Resources hereby declares –

- a. That the area specified in the first schedule hereto shall cease to be a forest area;
and
- b. That the area described in the second schedule hereto shall be a forest area.

First Schedule

Eldoret Forest

The whole of the Forest area known as the Eldoret Forest, consisting of six areas together containing approximately 383 acres lying within and forming part of the Eldoret Municipality which was declared to be a Forest area by Proclamation No. 44 of 1932, the boundaries of which are more particularly delineated on Boundary plan No. 75/18 deposited in the survey Records office, Survey



of Kenya, Nairobi, a copy of which is on record at the office of the Forest Department, Nairobi.

Second Schedule

Eldoret Forest

Those two pieces of land of approximately 281.5 acres and 82.2 acres respectively lying within and forming part of the Eldoret Municipality and adjoining the northern and eastern boundaries of the Eldoret Municipality in the Uasin Gishu District, Rift valley Province, the boundaries of which are more particularly delineated edged green, on boundary Plan no. 175/11 which is sealed with the seal of the Survey of Kenya and is deposited in the Survey Records office, Survey of Kenya, Nairobi, a copy of which is on record at the office of the Forest Department, Nairobi and a copy of which may be inspected at the office of the Conservator of forests, Eldoret.”

32. The above –mentioned Legal Notice is similar in wording to Legal Notice No. 258 of 21st June, 1966 which was produced by DW 2 as I.P Exhibit 2.
33. The defendant explained that the suit land forms part of the 281.5 acres described in the second schedule and that the same had never been de-gazetted. DW 2 who testified at the suit land produced Boundary Plan No. 175/113 which clearly shows that Alphax College is within the boundaries of the 281.5 acres. During the site visit DW2 pointed out the beacons marking the boundary of the forest. He stated that before the land could be alienated it had to be de-gazetted as forest land and this had not been done. Indeed apart from the letter dated 4.3.2014 from the National Land Commission to the Director of Surveys requesting him to amend the Registry Index Map to reflect parcel no. 183, the Plaintiff did not produce any Gazette Notice to show that the forest had been de-gazetted. This means that the suit land still forms part of Eldoret Forest which is public land and it was therefore not available for allocation.
34. Even assuming that the portion of the forest where the suit land is situated was de-gazetted, which is not the case, it was incumbent upon the plaintiff to demonstrate that he acquired the land lawfully and procedurally. Under the Government Lands Act Cap 280 (repealed), the President had the power to allocate unalienated public land. The procedure for such allocation is also set out in the said Act and it involves various steps including the issuance of an allotment letter which must be accepted and payments stated therein made within a specific period.
35. In this case the Plaintiff produced a Letter of Allotment dated 13.4.1995. Condition 2 of the said letter envisages that the allottee should accept the conditions in the offer letter within 30 days of the postmark. The proviso on page 2 of the letter of allotment provides that:-

“ if acceptance and payment respectively are not received within the said thirty (30) days from the date hereof the offer herein contained will be considered to have lapsed”.
36. It has been submitted by counsel for the Interested Parties that the proprietary interest in the property could only crystallize when all the conditions of the offer letter have been complied with within the stipulated period and that failure to comply with any of the conditions automatically terminates the offer.



37. In the case of *Bubaki Investment Company Ltd v National Land Commission & 2 Others* (2015) eKLR where the petitioner made payment after a period of 5 months the court held as follows:

“Thus in my view the petitioner did not comply with the terms and conditions of the letter of allotment dated 30th May 1997 and that as at the time the petitioner made payment of the charges stipulated under the letter of allotment the offer had lapsed and was therefore ineffectual.

38. Similarly, in the present case the Plaintiff admitted that he could not remember if he made a written acceptance of the offer and that he made payment of the charges stipulated in the letter in 2014 which is 19 years after the letter of allotment was issued. It is therefore my finding that the offer had lapsed and the Plaintiff's title is invalid as it was issued unprocedurally.

39. In arriving at the said finding I am fortified by the decision in *Republic v Land Registrar Kilifi & Another ex-parte Daniel Ricci* (2013) eKLR where the court held that a title is an end product of a process and that for a title deed to find protection under the law, the holder of the title deed has to establish that he followed the laid down procedures in acquiring it.

40. What then is the effect Plaintiff of the Plaintiff's title? The law is extremely protective of title and provides limited circumstances in which a title may be impeached. For this court to cancel a title, the conditions in section 26 of the [Land Registration Act](#) must have been fulfilled. The said section provides as follows:-

Section 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser 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.

41. The import of Section 26 of the [Land Registration Act](#) was considered in the case of *Elijah Makeri Nyangwra _vs- Stephen Mungai Njuguna & Another* [2013] eKLR where Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

42. Having held that the Plaintiff's title was acquired unprocedurally and unlawfully, it follows that the said title has to be cancelled.



43. I will now move on the third issue which is whether the Defendant holds a valid license to the suit land. The Plaintiff 's claim is that the Defendant has trespassed on his land. This claim was disputed by the Defendant. The Defendant's director who testified as DW1 told the court that the Defendant is on the land legally pursuant to a license issued to the Defendant by Kenya Forest Services to operate a college on a portion of Eldoret Forest measuring 5 acres for a period of 25 years with effect from 11th July, 2007. The said license was produced as Defence Exhibit 1.
44. The said license was issued "subject to the provisions of the Forest Act No. 7 of 2005 and Rules made thereunder and to any amendments thereto in force at any time during the currency of the license whether enacted prior to or subsequent to the grant thereof and the conditions therein"
45. As submitted by counsel for the Defendant, Kenya Forest Service has the power to issue a special license to persons to undertake activities in the forest for the benefit of the public.
46. In particular, Rule 21 of the Forest (Participation in sustainable Management) Rules provides as follows:
 1. A person who wishes to undertake an activity inside a state forest whose primary purpose is to benefit the public in transportation, communication, energy, water supply, research and education or such other purpose as the Service may approve, may apply to the Service in writing for a special use- license.
 2. The Service shall evaluate the application received under paragraph (1) and may after completion of any environmental impact assessment required under the law, issue a special-use licensee if satisfied that the proposed activity is in the public interest.
47. Since Defendant' license which was issued in 2007, for a period of 25 years has not been revoked by the Kenya Forest Service, the same is valid and the Defendant is therefore not a trespasser o the suit land.
48. The fourth issue is whether the plaintiff is entitled to the reliefs sought in the Plaint. The plaintiff seeks an order of eviction against the defendant and its agents; a permanent injunction restraining the defendant and its agents from trespassing on land parcel number Eldoret Municipality Block/10/183 and or in any other way interfering with the suit land; a declaration that the defendant is a trespasser and in unlawful occupation of land parcel number Eldoret Municipality Block/10/183 and general damages for trespass.
49. Having failed to prove his case on a balance of probabilities, the plaintiff is not entitled to the aforesaid reliefs.
50. On the other hand, the Defendant and 1st Interested Parties have proved that the suit property was unlawfully allotted to the plaintiff as it forms part of Eldoret Forest.
51. Consequently, I dismiss the Plaintiff's claim and enter Judgment for Defendant on its Counterclaim and make the following orders:
 - a. A declaration is hereby issued that the suit land described as Eldoret Municipality Block 10/183 forms part of Eldoret forest.
 - b. A declaration is hereby issued that land parcel number Eldoret Municipality Block 10/183, was unlawfully, unprocedurally, wrongfully, illegally and fraudulently allotted to the plaintiff.
 - c. A permanent injunction is hereby issued restraining the plaintiff, his servants, agents, employees and/or any other person claiming or acting on the plaintiff's instructions from entering, occupying, ploughing, farming, selling, leasing, charging or disturbing the



Defendant's occupation of the suit parcel of land as a licensee and/or in any other way dealing with the suit parcel of land.

- d. The plaintiff is hereby directed to surrender the title deed issued to him in respect of Eldoret Municipality Block 10/183 to the Chief Land Registrar and/or any other officer in the office with authority for cancellation.
- e. The Chief Land Registrar and/or Uasin Gishu County Land Registrar is hereby directed to cancel the title deed to land parcel number Eldoret Municipality Block 10/183 and rectify the official record and/or register in respect of land parcel number Eldoret Municipality Block 10/183 which forms part of Eldoret forest.
- f. The Plaintiff shall bear the costs of this suit and counter claim.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF SEPTEMBER 2023.

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J.M ONYANGO

JUDGE

In the virtual presence of;

Miss Nderitu for the Plaintiff

Miss Koskei for Miss Odwa for the Defendant

No appearance for the Interested parties

Court Assistant: A. Oniala

