



**REPUBLIC OF KENYA**

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

**E&L NO 807 OF 2012**

**Formerly HCC 16 OF 2012**

**DAVID KIPKETER BIRGEN .....PLAINTIFF**

**VS**

**OMARE PETER MAAGA.....DEFENDANT**

***(Suit by the plaintiff seeking to have the title of the defendant cancelled on allegation that it was obtained by fraud; plaintiff having lease from the Municipal Council of Eldoret; defendant having become registered as proprietor by presenting a purported lease from the Municipal Council; Lease of the defendant disputed by the Municipal Council and disputed by the Advocate who allegedly prepared the same; Whether title of defendant ought to be cancelled; Defendant not filing any Defence; Plaintiff's suit succeeds; title of the defendant ordered to be cancelled and the plaintiff be registered as proprietor thereof)***

**JUDGEMENT**

This matter was commenced by way of Plaintiff filed on the 2 February 2012.

In his plaint the plaintiff has pleaded that he was, and still is, the lawful owner lessee of the land parcel Eldoret Municipality Block 15/813 from the Municipal Council of Eldoret. He has pleaded that on or about 26th May 2011, he applied to be issued with a certificate of title but was surprised to find a subsisting entry in the Lands Registry in favour of the defendant. Upon further enquiries, he found out that the defendant was issued with a certificate of lease on 7th February 2011. He has contended that the act of the defendant in obtaining title was fraudulent. He has pleaded the following particulars of fraud :-

*(a) Taking possession and/or illegally and/or fraudulently acquiring title over the suit land without the consent of the plaintiff and consequently violating the plaintiff's constitutional right to the peaceful enjoyment of his proprietary rights.*

*(b) Trespassing and/or encroaching into the plaintiff's parcel of land.*

*(c) Failing to comply with the mandatory legal requirements regulating property in land and in particular failing to follow all the procedures precedent to the issuance of certificate of title.*

*(d) Presenting a forged/fake lease purportedly executed by the Municipal Council of Eldoret thereby misrepresenting to the officials at the Uasin Gishu lands registry to issue him with a certificate of lease where none should have issued.*

The plaintiff is now seeking orders to have the title and certificate of lease issued to the defendant in respect of the suit land revoked. He has also sought orders requiring the District Land Registrar- Uasin Gishu District to issue a proper title over the said land in his favour. Additionally, he has sought orders of permanent injunction restraining the defendant from interfering or dealing with the suit land.

The defendant was served with summons but did not enter any appearance nor file defence. The plaintiff thereafter set down the suit for hearing and I heard the same on diverse dates with the defendant being given notice for each date of hearing. However, the defendant never appeared in court on any of the hearing dates.

The plaintiff gave evidence and called three other witnesses. In his testimony, the plaintiff stated that he bought the suit land from one Agnes Muthoni Munywe on 15 April 1996 for a consideration of Kshs. 140,000/=. He produced the sale agreement as an exhibit. He stated that the property is a leasehold for a period of 99 years from 1 November 1989 from the Municipal Council of Eldoret. After he purchased the land, the records at the Municipal Council were altered to reflect the change of ownership. However, when he went to do a search, he found out that the defendant had become registered as owner of the leasehold. The search was produced in evidence. He then sought advice from his advocate who wrote to the Lands Registrar but there was no reply.

PW-2 is Barnabas Cheruiyot. He is an Administrative Officer in the Town Clerk's Department of the Municipal Council of Eldoret. He stated that he was familiar with the history of the suit land. He stated that the Municipal Council of Eldoret allotted the land to Agnes Muthoni Munywe on a leasehold basis. Agnes in turn sold the leasehold title to the plaintiff. The Municipal Council on 6 May 1996 gave consent for the transaction. Barnabas proceeded to testify that the Municipal then instructed its advocates M/s Jim Choge & Company Advocates to draw the formal lease which was drawn and executed. Jim Choge then had to deliver the lease for registration at the lands office for a Certificate of Lease to be issued in favour of the plaintiff.

He testified that there are no records at the Municipal Council showing that the defendant is owner of the lease. He stated that the Municipal Council has not issued any lease to the defendant and he was unable to tell how the defendant came to be registered as owner of the suit land.

PW- 3 Hellen Kharemwa introduced herself as the Lands Registrar Uasin Gishu Land Registry. She stated that she is aware that the suit land is registered at the Uasin Gishu lands registry with the Lessor being the Municipal Council of Eldoret. She stated that the current registered owner of the leasehold is Peter Maaga who became registered on 7 February 2011. She produced a copy of the lease. She testified that it was on the basis of that lease that a Certificate of Title was issued to the defendant.

PW-4 David Rioba Omboto is an Advocate of the High Court of Kenya of 12 years standing practicing in the name and style of M/s Rioba Omboto & Company Advocates in Eldoret. His evidence was centered on the lease produced in evidence by the Lands Registrar for the same indicates that it was drawn by the firm of M/s Rioba Omboto & company Advocates. Mr. Omboto categorically denied ever drawing the lease. He pointed out that the address in the lease is not the address of his law firm. He also denied ever knowing the defendant. He pointed out that the lease is not dated and is not signed by the lessee. He could see a rubberstamp alleging to be his but he stated that the same is a forgery. He testified that there at some point, some persons forged his rubberstamp and signature and that there were criminal proceedings ongoing against the suspects. In brief it was his evidence that the lease is a forgery.

I have considered the pleadings and the evidence on record. The defendants have not called forth any evidence to rebut the evidence of the plaintiff.

The case of the plaintiff is that he is the legal and genuine lessee of the land parcel Eldoret Municipality Block 15/813 and that the defendant got himself registered as lessee by presenting a false lease to the lands office so that he may be registered as proprietor. I have seen that the plaintiff purchased the suit land from the person who was originally allotted the land by the Municipal Council of Eldoret. The Municipal Council of Eldoret is the lessor of the property. PW-2 stated that they have never issued a lease

to the defendant but that they advised their advocates M/s Jim Choge & Company to draw up a lease in favour of the plaintiff and register the same. They only recognize the plaintiff as the lessee.

The Lands Registrar who testified as PW-3 stated that they did register the defendant as lessee based on a lease document that the lands office genuinely believed to have emanated from the Municipal Council of Eldoret. The said lease was purportedly drawn by M/s Rioba Omboto & Company Advocates. However, Mr. Omboto has categorically stated that his office never drew the lease and the signature and rubberstamp which are said to be his are forgeries.

I think the evidence herein speaks for itself. I am convinced from the evidence that the defendant used a forged lease instrument to have himself registered as the lessee of the suit land in place of the plaintiff. The defendant never entered appearance to this suit and never filed defence. The plaintiff's evidence is therefore not contested by the defendant.

To enable me cancel his title as sought by the plaintiff, I have to be convinced that the provisions of Section 26 of the Land Registration Act, Act No.3 of 2012 have been met. Section 26 is drawn in the following terms.

*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.*

As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

For the first limb, it appears to me that the title of the defendant was obtained by fraud or misrepresentation. The only inference I can draw from the evidence is that the defendant must have participated in the fraud. His title can therefore be impeached vide the provisions of Section 26 (1) (a). The defendant could not also have acquired title legally and his title is also impeachable vide the provisions of Section 26 (1) (b). The documents that conveyed title to the defendant were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (a) and (b) have been met and that the title of the defendant is liable to being cancelled.

I therefore proceed to cancel the title of the defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land in place thereof.

On the whole, the plaintiff's case succeeds and I make the following orders.

1. I declare the plaintiff as the legal owner of the leasehold title comprised in the land parcel Eldoret Municipality Block 15/813.
2. I revoke the leasehold title purportedly held by the defendant to the land parcel Eldoret Municipality Block 15/813.
3. I direct that the name of the defendant be removed as proprietor of the land parcel Eldoret Municipality Block 15/813 and further order that the plaintiff be registered in place thereof.
4. I issue a permanent injunction restraining the defendant from entering into, dealing or in any way

- interfering with the land parcel Eldoret Municipality Block 15/813.
5. I further direct the Municipal Council of Eldoret (or its successor) and the Lands Registrar Uasin Gishu District to perform all administrative tasks to give effect to this order.

The plaintiff shall also have costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JUNE 2013

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Read in open Court*

*In the Presence of:-*

*Mr. S.K. Kagunza of Ms Tom Mutei & Company for the plaintiff.*

*N/A for the defendant*