



Cheruiyott v Chemweno & 3 others; Commissioner of Lands, District Land Registrar, Uasin Gishu (Third party) (Environment & Land Case 649 of 2012) [2022] KEELC 13752 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 649 OF 2012
EO OBAGA, J
OCTOBER 27, 2022**

BETWEEN

STEPHEN KIBIWOTT CHERUIYOTT PLAINTIFF

AND

LUKE CHEMWENO 1ST DEFENDANT

PERIS JELAGAT LIMEO 2ND DEFENDANT

CHARLES KIPROTICH TANUI 3RD DEFENDANT

CHOGE BARTUIYOT 4TH DEFENDANT

AND

**COMMISSIONER OF LANDS, DISTRICT LAND REGISTRAR, UASIN
GISHU THIRD PARTY**

JUDGMENT

Introduction

1. The plaintiff in this case originally sued the 4th defendant as the sole defendant in a plaint filed on October 7, 2010. The plaintiff later brought in the third parties through a third party notice filed on April 4, 2011. By an amended plaint filed on June 14, 2012, the plaintiff brought in three new defendants in which he sought the following reliefs:-
 - a. An order for the defendant to vacate or be evicted from plaintiff's parcel No Eldoret Municipality Block 12/324.
 - b. A permanent injunction to restrain the defendant or their agents, or servants from dealing or interfering in any way with the plaintiff's parcel No Eldoret Municipality Block 12/324.



- c. A declaration that all the documents held by the 1st to the 4th defendant over land parcel number Eldoret Municipality Block 12/324 are null and void *ab-initio* and do not confer legal interest on the 4th defendant over the said parcel of land.
 - d. A declaration that the plaintiff is the rightful owner of the suit land and subsequently an order for cancellation of certificate of lease issued to the defendants in respect of Eldoret Municipality Block 12/324.
 - e. Cost of this suit and interest.
 - f. Any other relief this court deems fit and just to grant.
2. Prior to the amendment of the plaint which was filed on June 14, 2012, the sole defendant who is now the 4th defendant in the amended plaint had filed a defence and raised a counter claim in which he sought the following reliefs:-
- a. A declaration that the plaintiff's title to land parcel No Eldoret Municipality Block 12/324 is fraudulent, irregular and illegal and the certificate of lease issued to the plaintiff on December 7, 2009 is fake
 - b. A declaration that the defendant is the sole registered owner of all that parcel of land known as Eldoret Municipality Block 12/324.
 - c. Damages occasioned by the injunctive order granted to the plaintiff on October 7, 2010.
 - d. Costs of the counter claim.
3. The genesis of the present suit are two certificates of leases issued in respect of Eldoret Municipality Block 12/324 (suit property). The plaintiff was issued certificate of lease dated March 29, 2010. The 1st defendant was issued certificate of lease dated October 17, 2005. The plaintiff's certificate of lease is based on a letter of allotment dated August 4, 1995 whereas the one of the 1st defendant is based on a letter of allotment dated January 6, 1999.
4. The 1st defendant sold the suit property to the 2nd defendant who obtained title on August 13, 2007. The 2nd defendant in turn sold the suit property to the 3rd defendant who obtained title on May 29, 2008. The 3rd defendant finally sold the suit property to the 4th defendant who obtained title on August 14, 2009. The 4th defendant has put up a three storey building comprising of 24 units of two bedroomed each which are occupied by tenants.

Plaintiff's Case

5. The plaintiff testified that sometime in 1995, he applied for allocation of plot No Block 12/324 within Eldoret Municipality. He was later given a letter of allotment dated August 4, 1995. He paid the required stand premium and rent together with other charges amounting to Kshs 53,320/= on the December 5, 2007. He was given a lease and later processed and was issued with a certificate of lease.
6. Sometime in 2010, he went to the suit property and found the 4th defendant who was constructing on the same. he asked his lawyers to seek clarification from the lands office. It was found out that the 1st defendant had obtained a certificate of lease over the suit property and that the 1st defendant had sold the same to third parties finally ending up with the 4th defendant. The plaintiff contends that the certificate of lease in favour of the 1st defendant was obtained fraudulently.



First Defendant's case

7. The 1st defendant stated that he was allocated the suit property *vide* a letter of allotment dated January 6, 1999. He paid stand premium and rent including other charges amounting to Kshs 56,470/= on January 24, 1999. He was thereafter given a lease which he duly executed after which a certificate of lease was processed. He later sold the suit property to the 2nd defendant. He contends that the documents held by the plaintiff are forgeries.

Second Defendant's Case

8. The 2nd defendant testified that she purchased suit property from the 1st defendant after she was satisfied that the same was registered in the 1st defendant's name. She paid Kshs 900,000/= for the same and later on sold it to the 3rd defendant who proceeded to obtain a certificate of lease.

Third Defendant's Case

9. The 3rd defendant testified that he purchased the suit property from the 2nd defendant after carrying out due diligence through his lawyer. He thereafter obtained certificate of lease in his name. He later on sold the suit property to the 4th defendant at Kshs 2,000,000/=. The 4th defendant successfully had the suit property transferred to him and he obtained certificate of lease.

The 4th Defendants' Case

10. The 4th defendant testified that he purchased the suit property from the 3rd defendant after he carried out due diligence and confirmed that the same had been registered in the 3rd defendant's name. He was given a certificate of official search which confirmed that the suit property was registered in the 3rd defendant's name. The 4th defendant also looked at the white card and confirmed the history of the suit property which began with registration of the 1st defendant who then sold it to 2nd defendant. The 2nd defendant sold it to 3rd defendant who in turn sold it to him.
11. The 4th defendant thereafter applied for building approval to put up a block of apartments. The approvals were granted and he started construction in March, 2010. In October, 2010, the 4th defendant received a phone call that one lady who identified herself as pastor Rhodah had gone to the property claiming that she was the owner. He spoke to the lady and informed her that if she had any documents, the documents were fake.
12. The 4th defendant was later served with an injunction order stopping the construction. He immediately stopped construction for three weeks which cost him 3,016,710/=. The building was 80% complete as at the time he stopped. He thereafter commenced construction after the injunction order lapsed. He states that he paid Kshs 2,000,000/= for the purchase of the suit property.
13. The inquiries by the 4th defendant revealed that the plaintiff had obtained a lease and certificate of lease based on a letter of allotment which had expired. The 4th defendant contends that the documents held by the plaintiff are fraudulent. He states that should he lose the suit property, the third parties should indemnify him to the tune of Kshs 21,560,000/= being the market value of the suit property.

Third Parties Case

14. It is the third parties case that they issued title documents in favour of the plaintiff who misrepresented facts that he had a valid allotment letter pursuant to which he was given a lease and thereafter certificate of lease was issued in his favour. The third parties argue that the 4th defendant cannot seek indemnity



from them as there is no privity of contract between him and the third parties and that in any case the 4th defendant during the hearing stated that he did not have any claim against the third parties and that he had abandoned his claim against them.

Analysis And Determination

15. The plaintiff filed his submissions on May 9, 2022. The 1st defendant filed his submissions on June 20, 2022. The 2nd defendant filed her submissions on June 29, 2022. The 3rd defendant filed his submissions on June 29, 2022. The 4th defendant filed his submission on June 29, 2022. The third parties filed their submissions on July 9, 2022.
16. I have carefully considered the evidence adduced by the parties herein as well as their submissions. The issues which emerge for determination are the following:
 - a. Whether the plaintiff obtained a valid title over the suit property.
 - b. Whether the 1st defendant obtained a valid title over the suit property.
 - c. Whether the 1st defendant passed over a good title to the 2nd defendant which was finally transferred to the 4th defendant.
 - d. Which reliefs can be granted in this suit.
 - e. Which order should be made as to costs.

Whether The Plaintiff Obtained A Valid Title Over The Suit Property.

17. The plaintiff testified that he was given a letter of allotment over the suit property on August 4, 1995. The letter of allotment clearly indicated that he was supposed to pay the stand premium, rent and other charges stipulated therein within 30 days. He did not pay the required amount within 30 days. It therefore means that the allotment letter lapsed and the only way it should have been revived if allocation had not been made to another person was by asking the Commissioner of Lands to allow him to make late payment.
18. The plaintiff did not ask the Commissioner of Lands to allow him to make late payments. What the plaintiff did was to write an undated letter several years later thanking the Commissioner of Lands for allocating him the suit property and promising to pay all the monies which the government required. This letter appears to have been received by the Commissioner of Lands in or around November 2007. There was no stamp to signify receipt of this letter.
19. When the plaintiff's undated letter was received, there are remarks by one Ndungu who wrote remarks on the said letter to the effect that the suit property was already committed under file No 173686. The said Ndungu wrote the remarks on behalf of the senior plan records officer. The records department is the one which has all records pertaining to allocations. Over seven months later after the records office had indicated that the suit property was committed, an unidentified officer on behalf of the Commissioner of Lands authorized the process to go on. The authorization to proceed was made on July 22, 2008.
20. The plaintiff paid the amount required in the letter of allotment on December 5, 2007. The payment was made even before the office of the commissioner gave a go ahead for the process to proceed. As at the time the plaintiff made the payment for his allocation, already the 1st defendant who had been allocated the suit property on January 6, 1999 had processed and obtained certificate of lease which was issued on October 17, 2005.



21. The letter of allotment which was given to the plaintiff indicated that the acreage of the suit property was 0.21 hectares. This acreage was later changed by hand to read 0.2066 hectares. When PW1 Robert Simiyu a Chief Land Administration Officer was being cross-examined by Mr Yego for 4th defendant, he stated that it is improper for one to alter documents.
22. The issue of the plaintiff's signature on the lease document and that appearing on the verifying affidavit in support of the plaint and the one on his witness statement came up during cross-examination of the plaintiff. The plaintiff stated that he had two signatures. He maintained that he is the one who appended the signature on the lease document. While being re-examined by his counsel Mr Tororei, the plaintiff stated that he had a longer and shorter version of his signature. Apart from the signature appearing on the lease document, the plaintiff did not produce any other document where a similar signature appears. The plaintiff had accepted during cross examination that the signature on the statement he recorded and the one on the verifying affidavit were different from the one on the lease document.
23. The white card in respect of the plaintiff was opened on December 7, 2009 and certificate of lease was issued on March 29, 2010. According to the Chief Land Administration Officer Robert Simiyu, this was not normal. This witness stated that no late payment could be made before the commissioner of lands could authorize the same. in the instant case, the plaintiff conceded that he had not applied to the commissioner to allow him to make late payment. The undated letter which he addressed to the Commissioner of Lands shows that the Commissioner of Lands through Deputy Commissioner gave his authority on July 22, 2008. As at the time of giving this authority, the plaintiff had already paid on December 5, 2007. It is therefore clear that payment was made before the requisite authority was given.
24. The offer given to the plaintiff had already lapsed and as there was no authority to make late payment which would have revived the letter of allotment, the suit property was available for allocation to any other person.
25. During his testimony, the 4th defendant stated that as he was going on with construction of his apartments on the suit property, he was informed that one pastor Rodah had been to the suit property claiming that she was the owner. She went away and soon thereafter, the 4th defendant was served with an order of injunction stopping the construction.
26. There are documents in this file though they were not produced show that there was a cartel which was out to obtain parallel allotment letters where there were already existing other allotment letters. Some of those people are facing criminal charges before the Chief Magistrate's Court at Eldoret. What emerges from the said document link the plaintiff to those cartels. There is a letter dated November 27, 2007 written by Pastor Rodah J. Bett. This letter was addressed to the Commissioner of Lands and was seeking authority to make payment in respect of two plots. This letter is attached to the further affidavit of the 1st defendant sworn on April 27, 2021. The signature appearing on this letter is the same signature appearing on the lease of the plaintiff; it is the same signature appearing on the undated letter of the plaintiff to the Commissioner of Lands and is the same signature on a letter dated June 10, 2010 authored by one Terah Kipkorir which was seeking authority of the Commissioner of Lands to make late payment in respect of plot No Block 12/343 Eldoret.
27. The handwriting in the plaintiff's undated letter addressed to the Commissioner of Lands, the one by Terah Kipkorir and the one by Rodah J. Bett are strikingly similar. The 1st defendant and the 4th defendant had made application to have their cases which had been closed re opened so that they give evidence of a document examiner regarding the documents which I have alluded to herein above. The applications were rejected on grounds that they had been brought too late in the day.



28. I am not a handwriting expert. I am also aware that documents which have not been produced formally cannot be considered in evidence. Here we are dealing with documents which are generated over others. The remarks of the senior plan records officer are clear that the suit property had been committed. If the suit property was available for registration, the Senior Plan Records officer would not have made those remarks. It appears that the remarks of the Senior Plan Records officer were ignored and a lease was generated when there was another one in existence. This lease was not executed by the plaintiff. It was instead executed by Rodah J. Bett who appears to have been the mastermind of the cartel as she is the one who went to the suit property claiming to be the owner.
29. The letter of allotment given to the plaintiff had expired. He did not apply to the Commissioner of Lands for late payment. There are a number of cases which deal with the effect of not complying with the conditions in the letter of allotment. In the case of *Philma Farm produce & Supplies & 4 others v Attorney General & 6 others* (2012) eKLR Justice Majanja stated as follows:-
- “The petitioners’ claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the petitioner’s claim must fail.
- The petitioner did not comply with the terms of the offer contained in the letter and the offer lapsed in 1995. It was therefore not necessary for the Commissioner of Lands to inform them that the offer had lapsed in view of the very clear terms of the allocation letters.”
30. It is therefore clear that the letter of allotment given to the plaintiff having expired and there being no application for extension of the same with a view to compliance, the plaintiff did not have any valid allotment the basis of which he would have had a valid lease which would have culminated to issuance of a valid certificate of lease.
31. In the case of *Rukaja Ali Mohamed v David Gikonyo Nambachia & another* HCCA 9 of 2004, Warsame J (as he then was) stated as follows:-
- “...once allotment letter is issued and the allottee meets the conditions therein, the land is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest.”
32. The plaintiff was given an allotment whose terms he did not meet. I have demonstrated that all the documents which the plaintiff started to pursue 12 years after allotment were not genuine and were meant to deceive. I therefore find that the plaintiff did not obtain any valid title over the suit property.

Whether The 1st Defendant Obtained A Valid Title Over The Suit Property

33. The 1st defendant was given an allotment letter to the suit property on January 6, 1999. He paid the amount required under the allotment letter and a receipt was issued on January 24, 1999. He was thereafter given a lease followed by a certificate of lease dated October 17, 2005.
34. As at the time the 1st defendant obtained a certificate of lease, the plaintiff had not paid for the allotment which had been given to him on August 4, 1995. When the plaintiff purported to seek the Commissioner of Lands’ permission to make late payment, the senior plan records officer remarked



- on the letter that the land was already committed. Things went quiet until seven months later when the Commissioner of Lands office purported to give a go ahead for plaintiff to make payment.
35. DW5 Wanderi Mark Muigai was Land Registrar Uasin Gishu county. He produced documents which the Lands office had. He stated that he had a lease in favour of the 1st defendant but he did not have the lease in respect of the plaintiff. Though this witness stated that the 1st defendant's lease did not have a presentation book number, he conceded while being cross examined by Mr Yego for 4th defendant that he did not have the presentation book number. The lease for the plaintiff was missing from the land's office at Uasin Gishu Lands Office. Without this evidence, it cannot be assumed that the 1st defendant's lease was not genuine.
 36. PW1 Robert Simiyu, a Chief Land Administration Officer based then at Ardhi House Nairobi testified that he had a lease for plaintiff in their records but that there was no lease for the 1st defendant. This was the opposite position when it came to the records at Uasin Gishu Lands office.
 37. There is a letter dated January 14, 2011. This letter was written by Tom M. Chepkwesi who was then a District Land Registrar, Uasin Gishu. The letter was addresses to the Chief Land Registrar, Nairobi. It was in reference to the Chief Land Registrar's letter reference No UGU/A/37/Vol IV/41. The date of the letter being referred to was not given. The letter seemed to suggest that the registration of the 1st defendant was not based on any formal lease since there was no evidence in the presentation book to support entries made in the register.
 38. This Land Registrar went on to state in his letter that subsequent dealings were properly captured in the presentation book and were based on trust that the first registration was done properly. When DW5 who was then a Land Registrar in Uasin Gishu, while being re-examined by Mr Odongo stated that the letter Mr Chepkwesi was referring to was not in the file and that he did not know on what basis Mr Chepkwesi wrote the letter.
 39. Mr Chepkwesi was out to discredit the documents by the 1st defendant for his own selfish interest. This is because he is the one who prepared the certificate of lease for the 3rd defendant on May 29, 2008. As at this time, he had all the documents in the file which showed that the original registered proprietor of the suit property was the 1st defendant who in turn sold it to the 2nd defendant who in turn sold it to the 3rd defendant who finally sold it to the 4th defendant.
 40. A search conducted on September 16, 2010 was signed by Mr Chepkwesi. This search showed that the plaintiff was the registered owner of the suit property. In the previous year specifically on June 18, 2009, another search had been signed by Mr Chepkwesi which showed that the suit property was in the name of the 3rd defendant. It is therefore ironical that Mr Chepkwesi would turn round and claim that the subsequent registrations were done based on trust that the initial registration was done properly. The truth of the matter is that Mr Chepkwesi was trying to register fraudulent documents which were procured by the plaintiff in a fraudulent manner.
 41. The movement of the lands office to Ardhi House, Eldoret cannot be blamed for missing documents. Searches were being done based on the entries in the physical files. There is no way a property which had been registered in 2005 and which had changed hands four times as at August 14, 2009 would become available for another registration on March 29, 2010.
 42. Mr Chepkwesi's letter of January 14, 2011 which had no basis is the one which led to the one dated April 3, 2012 from the Commissioner of Lands asking that the 1st defendant's documents be expunged from the records. The 1st defendant's documents were not expunged as the same Land Registrar who



was being asked to do so knew the true position in the file as he was the one who registered most of the leases and transfers and signed searches.

43. The particulars of fraud attributed to the 1st defendant were never proved. The 1st defendant had a letter of allotment. He made the requisite payments under the letter of allotment. As at the time he was given a letter of allotment, the suit property was available for allocation as the plaintiff had not paid for the allotment. The plaintiff only started processing payment for the allotment after the 1st defendant had obtained title and transferred the same to a third party who also transferred the same to another one until the property rested with the 4th defendant.
44. As has been demonstrated hereinabove, the plaintiff's documents were forgeries. The lease was not signed by him. The plaintiff conceded that the signature which appeared on the lease was different from the one he appended on the verifying affidavit. From a naked eye, the signature on the lease was made by same person known as Roda who also made the same signature on the document by Terah Kipkorir.
45. The letter by Mr Chepkwesi that the 1st defendant's lease was not based on any supporting documents was a scheme to discredit the documents. I have demonstrated hereinabove that Mr Chepkwesi's letter had no basis. He was trying to assist the plaintiff who had miserably failed in his scheme to manufacture fake documents in support of his allotment. I therefore find that the 1st defendant obtained a valid title devoid of any fraudulent activity or corrupt scheme.

Whether the 1st Defendant passed over a good title to the 2nd Defendant which was transferred to the 3rd Defendant and finally to the 4th Defendant

46. I have already found that the 1st defendant obtained a good title. This being the case, he was capable of passing the good title to the 2nd defendant. DW5 testified that there was a transfer of lease from the 1st defendant to the 2nd defendant who in turn transferred the lease to the 3rd defendant. The 3rd defendant transferred the lease to the 4th defendant. All the transfers were captured in the entries in the register. Certificate of leases which were issued were also captured.
47. DW2 Peris Chelagat Limeo testified that she purchased the suit property from the 1st defendant at a consideration of Kshs 900,000/=. A transfer was duly executed and she obtained a certificate of lease. She later sold the suit property to DW3 Charles Kiprotich Tanui who later sold it to DW4 Dr Erick Choge Bartuiyot. DW3 paid stamp duty and had a transfer of lease in his favour. He was issued with certificate of lease.
48. DW4 purchased the suit property at Kshs 2,000,000/=. this is after he conducted a search which revealed that DW3 was the registered owner of the suit property. He obtained all the necessary consents after which a certificate of lease was issued in his name. He applied for building approvals from the municipal council of Eldoret which he obtained. He proceeded to construct a block of 24 apartments which are now occupied by tenants.
49. There was absolutely no collusion between the 1st defendant and the 2nd, 3rd and 4th defendants. None of the particulars of fraud attributed to the 2nd, 3rd and 4th defendants were proved by the plaintiff. The 2nd, 3rd and 4th defendants were purchasers who have given a full account of how they purchased the suit property which is now registered in the 4th defendant's name.

Which Reliefs Should Be Granted In This Case

50. In his plaint amended on June 14, 2012, the plaintiff sought an order of eviction against the 4th defendant. As has been clearly stated herein above, the 4th defendant lawfully purchased the suit property from the 3rd defendant. He went ahead to obtain building approvals. He has built a block



containing 24 apartments. I have already found that the 1st defendant who was the original registered owner had a good title. There was no collusion between him and any of the other three defendants. The 4th defendant having purchased the suit property lawfully, he cannot be evicted from the same.

51. The plaintiff is also seeking a permanent injunction against the 4th defendant. The 4th defendant cannot be enjoined from his own property which he lawfully purchased. The plaintiff is also praying for a declaration that the documents held by the 1st to 4th defendants are null and void and are incapable of conferring any interest on the 4th defendant. I have demonstrated hereinabove that the transaction between 1st defendant all through to the 4th defendant was above board and all the documents which the four defendants had were capable of conferring an interest in the 4th defendant.
52. The plaintiff sought registration by way of fraud. The lease was not signed by him. The allotment if at all it was genuine was pursued after a decade. There was no payment of the required amounts within the stipulated time. The plaintiff did not bother to ask for extension of time to pay. There is therefore no basis upon which he can be declared as the rightful owner of the suit property. Equally, there is no basis upon which the 4th defendant's title can be cancelled.
53. During the hearing, the 4th defendant abandoned his claim against the third parties. In his counter-claim the 4th defendant prayed that the plaintiff's title to LR No Eldoret Municipality Block 12/324 be declared as fake and the same be cancelled. The 4th defendant listed six particulars of fraud and illegality against the plaintiff. The 4th defendant during the hearing managed to adduce evidence to prove the particulars enumerated in the counter-claim. The suit property had already been registered in the 4th defendant's name but the plaintiff went ahead to obtain a registration in his name as well. The plaintiff concealed the fact that the suit property had a title and was occupied by the 4th defendant. I therefore find that the 4th defendant has proved his counter-claim against the plaintiff on a balance of probabilities.

Disposition

It is clear from the above analysis that the plaintiff in the main suit has failed to prove his case on a balance of probabilities. The plaintiff's suit is dismissed with costs to the 1st, 2nd, 3rd and 4th defendants. On the other hand, I find that the 4th defendant has proved his counter-claim against the plaintiff in the main suit on a balance of probabilities. Consequently, I order that the title held by the plaintiff in the main suit be cancelled forthwith. The plaintiff shall pay the 4th defendant costs for the counter-claim. I make no order as to costs regarding the 4th defendant's claim against the third parties.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 27TH DAY OF OCTOBER, 2022.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Tororei for Plaintiff.

Mr. Rotich for Mr. Njuguna for 1st Defendant.

Mr. Yego for Mr. Birir for 2nd Defendant.

Mr. Ogongo for 3rd Defendant.

Mr. Yego for 4th Defendant.

Court Assistant -Albert



E. O. OBAGA

JUDGE

27TH OCTOBER, 2022

