



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET**

Civil Suit 12 of 2005

NATIONAL HOUSING CORPORATION..... PLAINTIFF

V E R S U S

THE COMMISSIONER OF LANDS1st DEFENDANT

THE CHIEF LAND REGISTRAR2nd DEFENDANT

JOSEPH KIMITEI KWAMBAI3rd DEFENDANT

MARGARET JESANG KOECH4th DEFENDANT

MUSTAFA KIPROP5th DEFENDANT

CAROLINE KIPLAGAT 6th DEFENDANT

ULTRA EUREKA FARM LTD.7th DEFENDANT

ROSE AKOTH NYAMORI8th DEFENDANT

RULING

National Housing Corporation, which I shall hereinafter refer to as ‘NHC’, which claims to have been allocated with 14.65 hectares of land within the Eldoret Municipality, vide plan number LND. TP4/3/1X/78A, by the Commissioner of Lands, and on which property it has caused the development of several units, some of which it has already sold, while it intends to complete the development of what it refers to as Phase III of its project. It avers in its plaint that the 1st defendant has now embarked on the allocation of what it considers as its property to the 3rd to the 8th defendants.

It therefore seeks judgment against the defendants and for the following orders:

(a) A declaration that the whole land measuring 14.65 hectares in Eldoret Municipality comprised in the plan No. LND TPA/3/1X/78A as per the 1st defendant’s letter Ref. TP4/3/1X/134 dated 13th day of February, 1980 is the property of the plaintiff and was from the said 13th day of February, 1980 not available for allotment or other disposition to anybody else.

(b) A declaration that the purported allotment by the 1st Defendant of portions of the suit land to the 3rd, 4th, 5th, 6th, 7th and 8th defendants and/or other persons and the purported registrations of portions of the said land as Eldoret Municipality/Block 13/449, 473, 478, 486, 487 and 496 are

null and void and should be revoked and/or cancelled.

(c) An order that the 1st defendant cease forthwith from making any or further allotments of plots or parcels of land to any party out of or out of part of the parcel of land comprised in the plan No. LND TP 4/3/1X/78A as per the 1st defendant's letter Ref. TP 4/3/1X/134 dated 13th February, 1980 and that any allotments if any are already made by the 1st defendant be revoked.

(d) An order compelling the 1st defendant to revoke the allotments of the parcels of land now known as Eldoret Municipality/Block 13/449, 473, 478, 486, 487 and 496.

(e) An order compelling the 2nd defendant to cancel the registrations of the parcels of land known as Eldoret Municipality Block 13/449, 473, 478, 486, 487 and 496 in the names of the 3rd, 4th, 5th, 6th, 7th and 8th defendants and/or other persons whatsoever.

(f) An order compelling the 1st defendant to issue a letter of allotment in favour of the plaintiff of the whole of the land comprised in the plan No. LND TP4/3/1X/78A as per his letter Ref. TP4/3/1X/134 dated 13th day of February 1980.

(g) An order restraining the 2nd defendant from registering any interests against titles Eldoret Municipality Block 13/449, 473, 478, 486, 487 and 496 and restrain the 3rd, 4th, 5th, 6th, 7th and 8th defendants their nominees, representatives, attorneys or legal representatives from alienating or encumbering the said titles to the detriment of the plaintiff or otherwise interfering with its interests therein whatsoever and howsoever.

(h) A permanent injunction to restrain the 3rd, 4th, 5th, 6th, 7th and 8th defendants whether by themselves their agents or servants or otherwise from encroaching or remaining or otherwise trespassing on portions on the plaintiff's land comprised in the plan No.LND/TP4/3/1X/78A and currently irregularly, wrongly and unlawfully registered in the names of the 3rd, 4th, 5th, 6th, 7th and 8th defendants as parcels numbers Eldoret Municipality/Block 13/449, 473, 478, 486, 487 and 496.

NHC simultaneously filed a Notice of Motion under section 28 of the Registered Land Act, section 3A of the Civil Procedure Act, Order L rules 1,2,3,8 and 11 of the Civil Procedure Rules and all enabling provisions of the Law, in which it seeks an order to restrain the 3rd, 4th, 5th, 7th and 8th respondents either by themselves, their servants or agents or any one of them howsoever from “*alienating, disposing or entering upon or occupying or developing and from in any other way whatsoever interfering with the parcels of land Eldoret Municipality/Block 13/449, 473, 378, 386, 387 and 496 until the hearing and final determination of the main suit or until further orders of this Honorable Court*”. I shall now refer to all the aforementioned parcels as ‘the subject properties’.

Though the 1st and 2nd defendants were served with the application, they were not represented at the hearing. Mr. Wasuna learned counsel for NHC conceded that he had been unable to serve the 4th, 5th 6th and 7th defendants with the plaint, summons and this application, but that he intended to proceed with the application against the other two defendants as his client's position was highly prejudiced.

I shall therefore proceed with the application, which is the matter now before me only in as far as it relates to the 3rd and 8th defendants. It would appear from the pleadings that these two defendants were allocated with parcel numbers Eldoret Municipality/Block 13/449 and Eldoret Municipality/Block 13/496, (which I shall now refer to as ‘the subject parcels’). These two defendants have however raised preliminary objections to the Motion.

Though the 3rd defendant had initially raised eight grounds of objection, Mr. Kuloba, its learned counsel chose to abandon all except three of them which read as follows:

“THAT *the application and the entire suit discloses no reasonable cause of action as it purports to challenge the title held by the 3rd Defendant which title has already vested under the Registered*

Land Act and that this offends the provisions of Section 28 and 29 of the said Act”.

“THAT the suit is incompetent for not complying with the provision of Order VII Rule 1 (e) read together with Order III Rule 2 (c) of the Civil Procedure Rules”.

“THAT the application is defective as the same was dated after the filing of the pleadings in Court particularly that the plaint, the application, the affidavits in support were all filed on 9/1/2005 yet the said documents were dated 8/2/2005..”

It was Mr. Kuloba’s submission that under the Registered Lands Act Cap 300 of the Laws of Kenya (‘the Act’), his client holds the first registration over Eldoret Municipality/Block 13/449, and his Title is thus indefeasible unless fraud is established on his clients part, and in this connection, he pleaded section 143 of the Act, and stated further that since no fraud has been alleged against his client, the Register cannot be rectified with a view to canceling the Title.

Though the 8th defendant had brought forth five grounds, Mr. Gumbo, its learned counsel abandoned all except the ground that *‘the application is vexatious and the orders sought are not obtainable’*, and while he chose to associate himself with Mr. Kuloba and also made submissions to the effect that there have been several suits between the same parties on the same matters, as evidenced by paragraph 17 of the plaint, which in his opinion, contradicts section 6 of Civil Procedure Act, and in which case, this suit should be stayed for duplicity.

Mr. Wasuna, learned counsel for the plaintiff was however of the opinion that the 3rd defendant’s ground 1 is misplaced, as sections 28 and 29 of Act only state the rights of the proprietor of land registered there-under and that in any event, the aforementioned sections do not prohibit the revocation of such Titles. It was also his submission, that section 143 of the Act falls under part IX (sic), whose heading is “RECTIFICATION AND INDEMNITY”, which he believe is clear, and that it would deal with a situation where a suit has been brought to rectify a register, and in which case, except for the details of the ownership or acreage, the registration of parcel would otherwise remain unaltered. He pointed out that NHC does not pray for rectification, but that it seek declaratory orders, as the parcels were not available for allotment or disposition to anybody else at the material time, that it also seeks orders to restrain the 1st defendant from making any further allotments, and that it also seeks an order for the revocation of the contentious allotments, as well as orders for the cancellation of the registrations as per prayers (a) – (e) above.

He went on to submit that revocation is very different from rectification that in any event, section 143 aforementioned, does not prohibit revocation.

He finally urged the court, to find that a preliminary objection should be raised only on matters which are not disputed otherwise the court should order that the matter proceeds to trial where evidence would be adduced by the parties.

It is important that I do at the outset, determine whether this suit is properly before me, a matter that forms part of the preliminary objection, for according to the 3rd defendant, though the suit was filed on 9/1/2005, the verifying affidavit was sworn almost a month thereafter on 8/2/2005, which Mr. Kuloba believes, renders both the suit and the affidavit incompetent, and for which reasons he feels that the plaintiff ought to withdraw the defective pleadings, otherwise the court should strike it out with costs to his client. Mr. Wasuna however urged the court to find that it was a mistake of the court registry, and that he was not to blame.

A perusal of the pleadings and the file reveals that the plaint and it’s verifying affidavit are dated 8/2/2005, so is the Notice of Motion, which as aforesaid was filed simultaneously with the suit. However, the receipt which was issued upon payment clearly indicates that it is number 0022903, and that it was issued on 8/2/2005, and the only credible explanation would be what counsel pleaded, that the month on the registry stamp had not been changed. I agree with him, and for that reason, I find that the mistake of the registry should not be visited on litigants. The pleadings were filed correctly and that ground of

objection cannot be sustained.

I have also perused the plaint and it is clear that the suits which these defendants refer to, and in which case they plead section 6 of the Civil Procedure Act are between plaintiff and other parties on titles other than those mentioned in this suit, and in the circumstances, the said section 6 would not readily apply, and that ground of the preliminary objection cannot be sustained.

Be that as it may, and though a registered proprietor has an indefeasible title as envisaged under sections 27 and 28 of the Act, this right is however subject to sections 142 and 143 thereof, whereby either the Registrar can rectify the Title or the court can order the rectification in the specified instances. But the issue that arises in this suit revolves around revocation of titles. It is evident that the Attorney General has on previous occasions dealt with similar matters conclusively, as per the exhibits, in which the Attorney General had confirmed to counsel for NHC that other similar erroneous allocations of land parcels that had been originally allocated to NHC, had been cancelled after NHC had moved the court for orders of certiorari and mandamus. It is thus evident that section 142 and 143 of the Act do not deny the Commissioner of Lands or the Chief Land Registrar the power to revoke, annul, cancel or even reverse Titles, however obtained.

In my humble opinion all the issues raised in the preliminary objections would require that parties adduce evidence.

I need not re-emphasize that it is trite that preliminary objections can only be taken on strict issues of law, or in instances where the facts are not disputed. I find that the issues raised in the preliminary objections cannot lie as they revolve around issues which would require that evidence be taken so that the court can establish the same.

The upshot of all this is that the preliminary objections cannot be sustained. They are thus dismissed with costs.

Dated and delivered at Eldoret this 28th day of July 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Kuloba for the 2nd defendant, Mr. Omondi holding brief for Mr. Wasuna for plaintiff,

No appearance for all other defendants.