



REPUBLIC OF KENYA



KENYA LAW
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**Catholic Diocese of Nakuru, Registered Trustees v Lessonet & 4 others;
Equity Bank Limited (Interested Party) (Environment & Land Case
12 of 2019) [2023] KEELC 584 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 12 OF 2019
EO OBAGA, J
FEBRUARY 9, 2023**

BETWEEN

CATHOLIC DIOCESE OF NAKURU, REGISTERED TRUSTEES PLAINTIFF

AND

ALBERT KIPKOSGEI LESSONET 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

LAND REGISTRAR BARINGO COUNTY 3RD DEFENDANT

DIRECTOR OF SURVEYS NAIROBI 4TH DEFENDANT

NATIONAL LAND COMMISSION 5TH DEFENDANT

AND

EQUITY BANK LIMITED INTERESTED PARTY

JUDGMENT

1. By an amended plaint dated September 30, 2019, the plaintiff sought the following reliefs against the defendants:-
 1. That the plaintiff herein be declared the legal allottee of plot No 498/311 now Eldama Ravine Township Block1/199.
 2. That the 3rd defendant be compelled to cancel the leasehold title certificate of lease issued to the 1st defendant for plot No 498/311 now Eldama Ravine Township Block 1/199.
 3. That the 1st defendant be restrained by way of permanent injunction from entering, remaining and or in any way dealing with plot No 498/311 now Eldama Ravine Township Block1/199.



4. That the 3rd defendant be compelled to issue a grant and subsequent registration documents for plot No 498/311 now Eldama Ravine Township Block 1/199 in favour of the plaintiff herein.
5. Costs and interest of the suit at court rate.
6. Any further reliefs that may be deemed necessary for the just determination of this suit.
2. The 1st defendant neither entered appearance nor filed defence.
3. The 2nd, 3rd and 4th defendant filed an amended statement of defence and raised a cross-claim against the 1st defendant seeking the following reliefs:-
 - i. An order declaring the purported allocation, transfer, registration or the issuance of title over LR No Eldama Ravine Township Block 1/199 as null and void *ab initio*.
 - ii. An order declaring title issued over LR No Eldama Ravine Township Block 1/199 as having been acquired unlawfully and are a nullity *ab initio*.
 - iii. An order cancelling title issued over LR No Eldama Ravine Township Block 1/199 in the name of the 1st defendant and any register for the suit property and all or any made in the register.
 - iv. An order declaring that LR No Eldama Ravine Township Block 1/199 is a property of the plaintiff.
 - v. An order of permanent injunction restraining the 1st defendant, his servants, agents and or any other person acting under him from ever laying claim to, interfering with or in any manner dealing with LR No Eldama Ravine Township Block 1/199.
 - vi. Costs of the cross-claim.
4. The 5th defendant filed its defence dated March 19, 2019.
5. The interested party filed its amended defence dated March 13, 2020.

Plaintiff's Case

6. The Catholic Diocese of Nakuru had put up a mission hospital called Mercy Mission Hospital – Eldama Ravine on LR No 498/125. The Diocese intended to put up a school of midwifery within Eldama Ravine. The Diocese identified a vacant plot which was unsurveyed. An application for allotment of the unsurveyed plot was made to the Commissioner of Lands.
7. The application for allotment was acceptable and the Diocese was asked to pay Kshs 477/= for the allotment letter dated January 30, 1978. The payment was made vide a banker's cheque which was forwarded to the Commissioner of Lands vide letter dated February 14, 1978.
8. The Diocese took possession of the allotted property, fenced it and started growing fodder for sale up to date. In or around May, 2018, the Diocese wanted to develop the allotted land which had now been surveyed and designated as LR No 498/311. It was discovered that the 1st defendant had processed title over the same property which had been assigned LR No Eldama Ravine Township Block 1/199.
9. The 1st defendant had gone ahead to secure a loan of Kshs 4,000,000/= from the interested party in favour of Joshua Cheburet Kiptum which he personally guaranteed. When the Diocese sought to know what had happened, they were informed that no new part development plan (PDP) had been prepared and therefore the title held by the 1st defendant was fake and was obtained fraudulently.



1st Defendant's Case

10. The 1st defendant neither entered appearance nor filed defence.

2nd, 3rd and 4th Defendants' Case

11. The 2nd, 3rd and 4th defendants called Ezekiel Kim Kipkorir, a physical planner in charge of Eldama Ravine who works with the County Government of Baringo. This witness testified that he is in charge of all planning records in the County. This witness testified that the suit property had been planned and reserved for Catholic Church staff residential houses. He stated that the land was not available for allocation to any other person or entity other than the Catholic Diocese of Nakuru. He further stated that the land is being used by Mercy Mission Hospital. He further stated that he could not see any PDP which originated plot 199.

12. He went on to testify that he had never seen any allotment in favour of the 1st defendant and that there is no way a plot which had been reserved for the Catholic church staff residential houses could be allocated to the 1st defendant.

5th Defendant's Case

13. Though the 5th defendant filed defence, they did not come to court to testify.

Interested Party's Case

14. Though the interested party filed defence, they did not come to court during the hearing.

Submission by Parties

15. The plaintiff filed their submissions on February 14, 2022. The 2nd, 3rd and 4th defendants filed their submission on March 23, 2022.

Analysis and Determination

16. I have gone through the evidence adduced by the plaintiff and that of the 2nd, 3rd and 4th defendants. I have also gone through the submissions filed by the parties. The main issue for determination in this suit is whether plot No 498/311 now known as Eldama Ravine Township Block 1/199 was hived from land which had been reserved for the Catholic staff residential houses and whether the land was available for allocation to the 1st defendant. The other issue is whether the reliefs by the plaintiff and the 2nd, 3rd and 4th defendants should be allowed.

17. There is no contention that the plaintiff was allotted an unsurveyed plot at Eldama Ravine. The allotment letter dated January 24, 1978 was forwarded vide the Commissioner of Lands' letter dated January 25, 1978. The acreage of the land was 4.856 hectares per the attached map to the letter of allotment. The letter of allotment was accepted and the required payment of Kshs 477/= was forwarded to the Commissioner of Lands vide letter dated February 25, 1978.

18. It was later discovered that the 1st defendant had hived off 4.73 hectares out of the 4.856 hectares which was reserved for the plaintiff's staff residences. The 1st defendant went on to obtain title on October 15, 2001. This property was charged to Equity Bank [Kenya] Limited on May 3, 2018 to secure a sum of Kshs 4,000,000/=

19. There was an approved plan No 34 of 1979, reference No R 30/79/1A. This plan clearly shows that the land was reserved for Catholic staff house. The witness for the plaintiff produced a PDP which



was duly approved. Another PDP prepared in 1992 still showed that the land was still reserved for the Catholic Church staff residential houses.

20. The survey plan of 1982 designated the land as LR No 498/311. The physical planner who testified on behalf of the 2nd, 3rd and 4th defendants stated that there were no other planning records indicating that there was any other PDP which would have changed the initial position.
21. The law is clear that once land which has been reserved for a particular purpose, the same is not available for re-allocation. In *Chemey Investments Limited v Attorney General & 2 other* [2018] eKLR, the Court of Appeal was called upon to determine whether a certificate of lease issued over parcel of land reserved for and housing Uasin Gishu District Hospital was validly issued or whether the process of allocation of land committed for and actually housing a public entity was proper. It was held that since the land was being used for public and housing a public health facility, it was always alienated land and was not available for allocation and Commissioner of Land had erred.
22. In *Nelson Kazungu Chai & 9 others v Pwani University College* [2017] eKLR the Court of Appeal stated as follows:-

“From the foregoing, it is not in doubt that according to the Commissioner for lands and the Director of physical Planning, the land in question was at all material times government land reserved for the institute. It is little wonder therefore, that no PDP was in the offing. Additionally, from the above correspondence, it is clear that once allotted to the institute, the suit land ceased being unalienated land as defined under section 2 of repealed Government Lands Act. Consequently, the Commissioner of Lands could not cause allocation to issue in respect of the same because under section 3 of the Act, the only land that could be so allocated was unalienated land. Therefore, under statutory law, the Commissioner of lands ceased to have the mandate to allocate the land the moment the same was allocated to the institute. Even if the Commissioner were to purport to allocate the land, the same would be null and void. As stated by predecessor of this court in the case of *Said Bin Seif v Shariff Mohammed Shatry*, [1940]19(1) KLR 9; an action taken by the Commissioner of Lands without legal authority is a nullity and such an action, however technically correct, is null and void and is of no effect.”

23. The title in favour of the 1st defendant was obtained fraudulently. His title was curved from the portion which had been reserved for the Catholic staff residential houses. This being the case, the interested party cannot claim to have had a valid charge over it.
24. In *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR, it was held as follows: -

“That having analyzed the totality of the evidence adduced, having found that the title of the 1st defendant was acquired fraudulently, the onus was on the 2nd defendant to challenge the claim of the plaintiff that the title upon which they advanced the loan is tainted with fraud. It did not discharge that duty. It then follows that there was no valid title that was charged to the 5th defendant capable of conveying a legal interest in the suit land by way of a realizable security.”

Disposition

25. From the above analysis, it is clear that the plaintiff's claim has been proved to the required standards. This is the same case with the cross-claim by the 2nd, 3rd and 4th defendants. Consequently, I allow the plaintiff's claim and the cross –claim by the 2nd, 3rd and 4th defendants as prayed.



DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 9TH DAY OF FEBRUARY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Daye for Ms. Wanjiru for Plaintiff.

Mr. Odongo for 2nd 3rd and 4th Defendants.

Court Assistant –Akidor

E. O. OBAGA

JUDGE

9TH FEBRUARY, 2023

