



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 215 OF 2012

WILLIAM SUTER.....1ST PLAINTIFF

FRANCIS CHEPLAIT.....2ND PLAINTIFF

VERSUS

COUNTY COUNCIL OF KEIYO.....DEFENDANT

JUDGMENT

By a plaint dated 18th July 2005 the plaintiffs sued the defendant seeking for orders of injunction against the defendant restraining them from interfering with parcel No. L/A No. 65617/V/84 PDP No. ITN/242/96/6 within Iten township.

PLAINTIFF'S CASE

PW1 Francis Cheplaiti adopted his statement and stated that there was an empty plot in Iten Township which belonged to Iten County Council. PW1 further stated that together with others they applied for allocation of the suit plot and the same was done by the Commissioner of Lands vide an allotment letter date 4th December 1996 which was marked as PMFI 9 but not produced as an exhibit.

It was PW1's evidence that in 2000 the County Council subdivided the plots and allocated them to other council officials but later when they went to the District Commissioner to complain they were told that their documents were genuine. PW1 stated that they started processing the title deeds which began from the letter of acceptance dated 23rd July 2002 and payment of Commissioner of Lands dues of Kshs. was 30,000/- on 25th July 2003.

PW1 also testified that they got approvals and started construction on the suit land but were stopped by the Council in 2003 prompting the filing of this case.

On cross examination PW1 stated that the suit plot had previously been allocated to National Housing Corporation (NHC) in 1986, reserved for the construction of staff houses for Item-Tambach Town Council. He went further to state that there are houses on the suit land that were constructed in 1973 by NHC,

It was PW1 's evidence that if the allotment to NHC had not been cancelled they would not have been allotted the plot.

PW2 Mr. William Randie Suter stated that he was a Councillor of Iten County Council for the period running from 1983 to 1991 and that the Council built two houses on the suit land.

It was PW2's testimony that the suit land which is unsurveyed belongs to the County Council and that the they wanted to build rental houses thereon. He reiterated PW1's evidence on how they were allocated the suit land and the construction that they did but were later stopped prompting them to come to court.

On cross examination, PW2 stated that he had written a letter dated 16th February 2004 indicating that he should not be involved in the current case but later changed his mind. He further stated that the land is not public land.

DEFENDANT'S CASE

DW1 Nathan Kipkurui gave evidence and stated that the suit parcel of land known as Parcel No. L/A NO. 65617/V/84 PDP NO ITN/242/96/6 is a public utility land/ trust land that was earmarked for the construction of staff rental houses for (now) Elgeyo Marakwt

County Government,

DW1 also testified that there are houses on the suit land constructed by NHC and that the land is a security in favour of NHC for a loan which was advanced to the county Council and produced a Letter of Allotment to demonstrate that the land was allotted to NHC.

It was DW1's evidence that Keiyo County Council has been servicing the loan it owed NHC and that it cleared it in 2008 as shown by the statements produced by him. DW 1 stated that vide a letter dated 16th February 2004 which was produced as Dex 7 the plaintiff disassociated himself from any claim concerning the suit land. The defendant therefore urged the court to dismiss the plaintiffs' claim with costs.

Counsel for the plaintiffs did not file submissions as was ordered by the court.

DEFENDANT'S SUBMISSIONS

Counsel for the defendant reiterated the evidence on record and submitted that the parties are in agreement that the suit parcel of land is a public land and that the same was allocated to NHC for construction of staff houses for the county Council who had put up some houses.

Counsel submitted that the suit land was therefore a reserved land for public use and not for private use which was confirmed by the letter of allotment dated 30th July, 1986 Dex no 3b issued to NHC (for RENTAL HOUSING SCHEME - ITEN TOWN COUNCIL.) That the said letter of allotment was issued to NHC by the Commissioner of Lands and with the consent of the defendant which letter of allotment has not been cancelled and or revoked.

Mr. Wafula relied on the case of **Karen Roses Limited v Attorney General & 4 others [2019] eKLR** where the court captured the definition of government land as per the Government Land Act as:

"Government land which is not for the time being leased to any other person, or in respect of which the Commissioner had not issued any letter of allotment"

Counsel therefore submitted that the suit land was not available for alienation to the plaintiffs as it had been reserved and allocated to NHC (an entity of the government) for construction of staff houses for the county council. Mr Wafula submitted that it is trite law that once Government land has been reserved for a particular purpose, then the same is not available for further alienation for something else therefore the Commissioner of Lands had no legal authority to allocate it again.

Counsel cited the case of **Kipsirgoi Investments Ltd v Kenya Anti-Corruption Commission [2011] eKLR** where the court held that:

"...reservation for a particular purpose renders that alienated"

Mr. Wafula also cited the case of **Paul Nderitu Ndung'u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996)** where it was held that:

"the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated"-

Counsel further relied on the case of **Republic v, Commissioner of Lands 4 others exparte Associated Steel Limited, High Court at Nairobi, Misc. Civil Suit Nov 273 of 2007 (2014) eKLR**, the Court held that:

a public road which was in dispute — was a public road and was therefore not available for allocation or alienation, The Court went further to hold that in order to convert a public utility land into private hands, the Commissioner of Lands needed to follow the provisions of Section 12 and 13 of the G.L,A and further hold consultations with all stakeholders,

The Court further held that

'It is thus our holding that the disputed plot having already been set aside as a public utility plot the same was held in trust by the 1st respondent (Commissioner of Lands) for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot"

Counsel therefore urged the court to dismiss the plaintiff's case with costs to the defendant as the land was not available for alienation.

ANALYSIS AND DETERMINATION

The background to this case is as per the plaintiffs and the defendant's evidence enumerated above. The issues for determination is whether the plaintiff is entitled to orders of injunction against the defendant, whether the plaintiffs have proved to have proprietary rights on the suit land and whether the suit land was available for alienation to the plaintiffs.

For the plaintiffs to be granted an order of injunction they must establish a case for grant of such orders. The plaintiffs claimed that they were

allocated the suit parcel of land vide an allotment letter dated 4th December 1996 which letter was marked for identification but not produced as an exhibit before the court. Does a document marked for identification and not produced as an exhibit form part of the evidence on record? The answer is no as was held in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR**, where the court held as follows:

The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.....

Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

The defence on the other hand produced an allotment letter to National Housing Corporation which allocation was for purposes of construction of staff houses. It is on record which is admitted by both parties that other houses had been constructed by NHC on the plot allocated to them.

Further in the Nigerian case of **Michael Hausa –vs- The state (1994) 7-8 SCNJ 144**, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence. It follows that the documents that the plaintiffs relied on but were merely marked for identification and not produced as evidence do not form part of the evidence on record.

The plaintiffs gave convoluted evidence on how they were allocated the land by the Commissioner of Lands after a back and forth with the county council together with the then Provincial Administration. The documents that the plaintiffs referred to showing certain approvals were never produced as evidence before the court to confirm what the plaintiffs were alleging. The plaintiffs had an uphill task to prove any proprietary interest in the suit land.

It should be noted that the 2nd plaintiff had also written a letter disowning the case before the court vide a letter dated 16th February 2004 but when cross examined he stated that he had changed his mind. Since he had written a letter disowning the case, he should have used the same mode of communication to state that he had changed his mind about the case. This was not done and therefore it leaves a lot of questions unanswered.

The question is whether the plaintiffs have proved that they have any proprietary interest worth being protected with an injunction against the defendant. My answer to the question is no as the plaintiffs failed to produce any evidence to show the same.

The plaintiffs did not produce an approved PDP for the suit parcel of land and the approvals for the construction. It is on record that the defendant had secured a loan from NHC which they serviced and completed in 2008 and that the suit land was held as security. How could the plaintiffs have been allocated land that was already alienated and encumbered?

The mere fact that the plaintiffs claimed that they had been allocated the land by the Commissioner of Lands does not mean that the process was done regularly. There are instances when the Commissioner of Lands over stepped his mandate therefore acted ultra vires.

The question is, if the Commissioner of Lands actually allocated the land to the plaintiffs, was the land available for alienation or was it already alienated? From the evidence on record, it is evident that the land was already alienated hence was not available for further alienation as was held in the case of **Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR**

Further in the case of **n NBI, HC. Misc. Appl. 1732 of 2004, James Joram Nyaga & Another –v- Attorney General & Another [2007] eKLR** the court referring to section 3 and 7 of the GLA observed thus:

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registrar of Titles Act Cap. 281 of the Laws of Kenya.”

From the letters issued by the NHC it is clear that the parcel of land in question had been set aside for development of NHC rental houses as per Dex 3 a letter dated 30th July 1986. This shows that the land was not available for allotment. If the Commissioner did allot the land, then he acted without authority.

Having found that the land was not available for alienation, the plaintiffs suit is therefore dismissed with costs to the defendant as they have not proved their case to the required standard.

DATED and DELIVERED at ELDORET this 29TH DAY OF SEPTEMBER, 2020

M. A. ODENY

JUDGE