



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 285 OF 2013

JOHN MICHAEL WANJAO.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....DEFENDANT

JUDGMENT

John Michael Wanjao (hereinafter referred to as the plaintiff) came to court by way of plaint and amended the same on 3.10.2013 claiming that at all material times to this suit, the plaintiff was the registered owner of all the parcel of land known as Eldoret Municipality Block 11/1143 situated at Mwanzo Estate within Eldoret Municipality.

That in order to comply with the lease terms on development of the property, the plaintiff sought for and was granted approval by the then existing Municipal Council of Eldoret on or about 23rd February, 2012. The plaintiff did this by submitting the building plans of the proposed residential to the said Council. Thereafter, the plaintiff proceeded to dig up the foundation and brought to the site some building materials in readiness for the construction work.

That on or about 24th September 2012, the then existing Municipal Council of Eldoret withdrew its approval of the development of land parcel No. Eldoret Municipality Block 11/1143 on the basis that it needed to carry out investigations as on the ownership and use of the said property.

The plaintiff contends that the then existing Municipal Council conduct and action of withdrawal of the building approval and the stoppage of the construction work, is unlawful, illegal, null and void and tainted with malice. That by reason of the foregoing, the plaintiff as a registered owner has been deprived of the use of land parcel No. Eldoret Municipality Block 11/1143 and has suffered irreparable loss and damage.

The plaintiff's claim against the defendant is for a declaration that the defendant's actions were unlawful, illegal and vitiated by the law and for a permanent injunction.

That there is no other suit pending and there have been no previous proceedings between the parties in any court of law over the same subject matter.

That demand and notice of intention to sue has been served upon the defendant but the same has been ignored.

The plaintiff prays for judgment against the defendant for a declaration that he is the registered proprietor can use the land parcel No. Eldoret Municipality Block 11/1143 as per the conditions on the lease, the purported withdrawal of development approval and stoppage of construction work on the said land was/is unlawful, illegal and vitiated by the law and payment of damages.

The plaintiff further prays for a permanent injunction to restrain the defendant either by themselves, their agents and or servants from interfering with the plaintiff's quiet enjoyment and use of land parcel No. Eldoret Municipality Block 11/1143. Lastly, the plaintiff prays for Costs of the suit.

By defence amended on 6.11.2013, the defendant denies each and every allegation of law and or fact set out in the Plaintiff's amended plaint. The Defendant precisely denies that the Plaintiff is or has been the registered owner of all that parcel of land known as Eldoret Municipality Block 11/1143 situated at Mwanzo Estate within Eldoret Municipality and that it approved any plans submitted to it by the Plaintiff.

The Defendant further denies that it had any knowledge of any facility advanced to the Plaintiff by the Kenya Commercial Bank Ltd and or any knowledge of any building materials and or constructions work on the suit parcel. The Defendant admits that it withdrew approval of development on the suit parcel. The Defendant contends that this was done in exercise of the Defendants statutory power to control development within its jurisdiction pursuant to provisions of the Local Government Act and protection of Government land.

The Defendant further contends that the withdrawal of approval was made pursuant to calls on investigations as to validity of title and usage of the suit parcel of land.

The Defendant particularly denies that its actions were tainted with malice and or that the Defendant's said action was illegal, null and void. According to the defendant, the mere fact or allegation that one is the registered owner of a certain parcel of land does not pre-empt the Defendants right from ensuring compliance with provisions of law on utility of Government land and or ensuring proper title. The Defendant denies that the Plaintiff is entitled to the order of permanent injunction and the declaration prayed for in the amended plaint. The defendant contends that the suit land is public land.

When the matter came up for hearing, **PW1, the plaintiff himself, John Michael Wanjau** adopted his statement on oath and testified further that he is a businessman based in Eldoret town and the registered owner of the residential Plot No. Eldoret Municipality Block 11/1143 situated in Mwanzo

Estate. That in order to comply with the terms of the lease, and in order to get income, he planned to build ten (10) one bed roomed units and two (2) bed sitters on the said land. He instructed ADDAC Consultants to do the development plans for the suit property which they did and the same were approved on 23.02.2012 by the relevant authorities.

That in the month of September, he was ready to start the construction work and purchased and delivered building materials on the site. He bought building stones, hardcore and other materials and general works was going on. Towards the end of the month of September 2013, he received a letter from then the Municipal Council of Eldoret dated 24.09.2012 withdrawing their approval of the development plan and thereby stopping the construction immediately which he complied with.

He visited the Municipal Council offices on several occasions to enquire the outcome of the investigations but nothing happened. He went to his advocate who wrote to the Municipal Council to give information on the outcome but there was no response. He has been paying rates. He produced the receipts. He had the original certificate of lease with which he was issued by the relevant authorities. He submitted his plans and the same were approved by the Physical Planning Officer, District Lands Officer, Chief Public Health Officer and Municipal Engineer and on 24.1.2012, 27.1.2012, 23.2.2012 he started building. The approval was withdrawn due to a dispute on ownership. He was planning to put up residential units. The materials are still on the ground. He prays for damages. The building materials on the ground is wasting, with some being stolen from the site. He had spent about Kshs.400,000 buying the materials and general mobilization.

That his building plan as stated above would have fetched between 7,000/= and 8,000/= per month for the one bed roomed units and between 5,000/= per month per bed sitter. The said building would have been completed by December, 2012 and he was expecting to get his first tenants by January, 2013. He has lost over Kshs.2.2 Million because of the illegal action by the Defendant. That he is praying for a permanent injunction against the Defendant, payment of damages for their action and a declaration that the stoppage was illegal.

PW2, Dorothy Chepkogei Leting states that the motherland to this suit property was Eldoret Municipality/Block 11/557. It was closed after subdivision. New numbers emerged. Four (4) new numbers emerged thus Eldoret Municipality/Block11/ 1141, Eldoret Municipality/Block11/1142, Eldoret Municipality/Block11/1143, Eldoret Municipality/Block11/1144. The land was initially owned by Zeddy Kereto, Josphine Chepkemei and Susan Kimaiyo. They were registered as proprietors on 19th May 2006 and issued with the certificate of lease on the same date. The land was transferred on 18.6.2007 to John M. Wanjau. A certificate of lease was issued on the same date.

On the 5.9.2011, a surrender of lease document was registered. New leases for the new parcels were issued. Parcel No. Eldoret Municipality/Block11/ 1141 was registered in the name of John M. Wanjau. Eldoret Municipality/Block11/ 1142 was also opened in the names of John M. Wanjau. Eldoret Municipality/Block11/ 1143 was also registered in the name of John M. Wanjau and a certificate of lease issued. Eldoret Municipality/Block11/ 1144 was opened on 20.9.2011 in the names of John M. Wanjau and a certificate of lease issued. On 15.2.2012, land No. 1144 was transferred to Margaret Wanjau. A certificate of lease was issued. All leases were prepared by the Eldoret Municipal Council.

DW1, Cyprian Chesire, a resident of Eldoret and a Physical Planner engaged with the County Government of Uasin Gishu states that the property in dispute being and Eldoret Municipality/Block11/ 1143 and Eldoret Municipality/Block11/1144 both situated in Mwanzo Estate must have been acquired in an underhand manner because the Part Development plan dated 9th February 1984 as approved by the Commissioner of Lands on or about 7th June 1984 showed that the land was set aside as a community center. According to records no change of user was effected on the original block. on the 24.9.2012, the Municipal Council of Eldoret withdrew its approval of the development plans as the land was public land designed for a community center.

Mr. Marube, learned counsel for the plaintiff submits that he is the genuine owner of Eldoret Municipality/Block11/1143. The property was subdivided and the lease issued reading Eldoret Municipality/Block11/1141, Eldoret Municipality/Block11/1142, Eldoret Municipality/Block11/1143 and Eldoret Municipality/Block11/1144. The defendants have been paying rates to the defendant and the defendant has been receiving the same. The plaintiff submits that the Act of withdrawing the approval and stopping the construction was not proper. The plaintiff states that he has suffered loss and therefore, should be awarded damages.

Mr. Areso learned counsel for the defendant submits that the purported amended plaint be struck out having been filed without leave of the court. Moreover, that the prayer seeking damages be disregarded by the court as it is not pleaded. The defendant argues that the withdrawal of the approval for development was proper in view of the provision of the repealed Local Government Act. Chapter 265 and Physical Planner Act, 1996. The two Acts gave the defendant the power to control development. The defendant argues that the suit parcel of land was a community centre and therefore, not available for private development.

I have considered the pleadings, evidence and submissions of both parties and do find that the plaintiff pleaded for damages and therefore it not proper for the defendant to submit that the plaintiff did not seek damages. However, I do agree with the defendant that the plaintiff did

not precisely seek for either specific or general damages. This court finds that the plaintiffs claim is for general damages. This court further finds that the orders sought are not judicial review orders and therefore no element of administrative law and that the plaintiff seeks a declaration, injunction and damages which do not fall within the ambit of judicial review.

On substantive law, it is clear that Eldoret Municipality/Block 11/557 was closed on subdivision and new numbers were created being Eldoret Municipality/Block11/1141 to Eldoret Municipality/Block11/ 1144. Eldoret Municipality/Block1111/557 was initially registered on 19.3.2006 in the name of Zeddy Kereto, Josephine Chepkemei and Susan Kimaiyo who were issued with the certificate of title on the same date thus on 19.5.2006. On 18.6.2007, the land was transferred in the name of John Michael Wanjau and a certificate of lease was issued on the same date. On the 5.9.2011, a surrender of lease document was registered and new leases were issued for Eldoret Municipality Block 11/1141-1144. All these parcels of land were registered in the name of John Michael Wanjau. Eldoret Municipality Block 11/1144 was transferred to Wangare Wanjau and certificate of lease issued.

The plaintiff was the registered owner of Eldoret Municipality/1143 and intended to do development on the land. He intended to construct residential units on Block 11/1143 and had development plans prepared by ADDC Consultants. It is evident that the development plans were approved on 23.02.2012. It is also evident that the plaintiff brought building stones, hardware to start the construction of the premises. However, the defendant wrote a letter on 24.09.2012 withdrawing their approval of the development plan claiming that the property was public land and hence construction stopped. The plaintiff claims that he lost business and investment.

Section 24 of the Land Registration Act provides that subject thereto: —

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

Section 25 of the Land Registration Act states as follows:-

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: —

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

Section 26 states as follows; -

“(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

Going by Sections 24, 25 and 26 cited above, for the defendant to successfully challenge the title of the plaintiff he must on appropriate standard, prove that the plaintiff obtained the title unprocedurally, illegally, and or corruptly. The defendant has not discharged this burden.

Moreover, the County Land Registrar demonstrated that the plaintiff was registered as the proprietor of the lease hold and certificate of title procedurally issued. The evidence produced by the County Physical Planner was not sufficient to prove that the plaintiff obtained the title illegally or unprocedurally or through a corrupt scheme. The defendant merely placed the Part development plan and Registry index map before the court without demonstrating the element of fraud.

The approval of the development plan was withdrawn without affording the plaintiff a hearing and that to-date the plaintiff has not been heard. The court finds that the withdrawal of the approval plans without affording the plaintiff a hearing was a breach of the plaintiff's right to a fair administrative action and precisely, legitimate expectation that he would be heard.

I do find that the defendant has suffered loss due to the withdrawal of the approval without affording him a hearing. It is not disputed that the plaintiff was going to build residential houses and had received the approval for development. He had poured the building materials. I do find that the plaintiff is entitled to general damages for loss of investment and I do give a global figure of Kshs. 3,000,000. I do further grant a declaration that the plaintiff as the registered proprietor can use the land parcel No. Eldoret Municipality Block 11/1143 as per the conditions on the lease.

This court further grants a permanent injunction to restrain the defendant either by themselves, their agents and or servants from interfering with the plaintiff's quiet enjoyment and use of land parcel No. Eldoret Municipality Block 11/1143. Costs of the suit to the plaintiff. Orders accordingly.

Dated and delivered at Eldoret this 21st day of February, 2019.

A. OMBWAYO

JUDGE