



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 286 OF 2013

WANGARI WANJAU.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....DEFENDANT

JUDGMENT

Wangari Wanjau (hereinafter referred to as plaintiff) has come to court against **County Government of Uasin Gishu** by way of amended plaint dated and filed 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 11/1144 situated at Mwanzo Estate within Eldoret Municipality.

She states 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 sought and was granted a mortgage facility with Kenya Commercial Bank to finance the development and she brought to the site some building materials in readiness for the construction work.

However, 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 11/1144 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's 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 and that by reason of the foregoing, the Plaintiff, as a registered owner, has been deprived of the use of Land Parcel Non Eldoret Municipality Block 11/1143 and has suffered irreparable loss and damage.

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 a Declaration that she is the registered proprietor can use the Land Parcel No. Eldoret Municipality Block 11/1144 as per the conditions on the lease, that 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 quiet enjoyment and use of Land Parcel No. Eldoret Municipality Block 11/1144. Last but not least, the plaintiff prays for costs of the suit.

The defendant filed statement of defense denying the allegation that the plaintiff is the registered owner of the suit property. The defendant denies any knowledge of any loan facility between the plaintiff and Kenya Commercial Bank. The defendant admits that he withdrew the approval of the development plan on the suit parcel and withdrawal was done within the law. The defendant denies the allegation of malice.

When the matter came for hearing, **the plaintiff** stated that she is the registered owner of the residential Plot No. Eldoret Municipality 11/1144 situated in Mwanzo Estate. This is a gift from her Father, John Michael Wanjau. That in order to comply with the terms of the lease terms, and to in order to get income, she planned to build ten (10) one bed roomed units and two (2) bed sitters on the said land. her father, instructed ADDAC CONSULTANTS to do the development plans for her which they did and the same were approved on 23.02.2012 by the relevant authorities.

That in order to get money for the development of her property, she sought and was granted a mortgage facility of Kshs. 4.6 million from

Kenya Commercial Bank, through a letter dated 09.07.2012. All this fell through when the Defendant's agent withdrew the approval to develop the property.

In the month of September, she was ready to start the construction work and purchased and delivered building materials on the site. She bought building stones hardcore and other building materials through her father and general works was going on. Towards the end of the month of September 2013, she 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. She complied with the order. Afterwards, she made several visits to the Municipal Offices to try and resolve the matter but all her efforts proved unsuccessful.

She then instructed her Advocate who then wrote to the Municipal Council of Eldoret on 10.04.2013 and 25.04.2013 asking them to allow her proceed with the construction and those letters were ignored.

The building materials on the ground is wasting, with some being stolen from the site. She had spent about Kshs.400,000 buying the materials and general mobilization.

Her building plan as stated above would have fetched between 7,000 and 8000 per month for the one bed roomed units and between 4000 and 5000 per month per bed sitter. The said building would have been completed by December, 2012 and she was expecting to get her first tenants by January 2013. She has lost over Kshs.2.2 million because of the illegal action by the Defendant.

She is praying for a permanent injunction against the Defendant, payment of damages for their action and a declaration that the stoppage was illegal.

PW2, Emmanuel Keitany, produced a certified copy of the Registry Index Map (RIM) for Eldoret Municipality/Block 11 as PEx9. The Registry Index Map indicates that parcels No Eldoret Municipality 11/1141,

Eldoret Municipality 11/1142, Eldoret Municipality 11/1143 and Eldoret Municipality 11/1144. The four PARCELS originated from parcel No. Eldoret Municipality 11/557. The subdivision was done on 18.9.2010. the survey was done by Ezekiel M. Kongo. The authority of the survey came from the Commissioner of Lands. (Letter No. UG/12/2007 Vol (ii)/43 of 7.9.2010). The folio register is 508/55. The document is certified by Senior Director of Survey Cadastral office.

PW3, 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. Eldoret Municipality/Block11/ 1144 was transferred to Margaret Wanjau the plaintiff herein. A certificate of lease was issued. All leases were prepared by the Eldoret Municipal Council.

The defendant on his part called **Cyprian Chesire** a resident of Eldoret, Uasin Gishu County within the Republic of Kenya, currently working as a Physical Planner with the County Government of Uasin Gishu, who stated that the property/land in question being Eldoret Municipality Block 11/1143 and Eldoret Municipality Block 11/1144 both situated in Mwanzo Estate must have been acquired in an underhand manner because as per the part Development Plan dated 9th February 1984 as approved by the Commissioner of Lands on or about 7th June 1984, the land was set aside for a community center.

That by definition, a community center would in essence be public in nature hence not allotted to private developers. Additionally, the Registry Index Map is clear on the state disputed parcels of land. According to his records, no change of owner or user has ever been effected on the said parcels of land hence any purported lease on the same is not proper. The original block was No.557 and the change to the current number has not been explained.

That noting the discrepancy in the same, the county did write to the Plaintiff inquiring of the withdrawal of the approved pending investigation regarding ownership and use. They also did invite the Plaintiff to attend their offices for clarification which she never did.

The plaintiff submits that she is the genuine owner of Eldoret Municipality Block 11/1144. She is the registered owner and that the defendant has not demonstrated fraud. The defendant's action withdrawing the approval and stopping the construction was not proper.

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 plaintiff has 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 center and therefore, not available for private development.

I have considered the pleadings and the evidence on record and do find that the plaintiff has proved on balance of probabilities that she is the registered owner of the suit property.

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, and the for the defendant to successfully challenge the title of the plaintiff he must on appropriate standard, prove that the plaintiff obtained the title un-procedurally, illegally, and or corruptly. The defendant has not discharged this burden. Moreover, the county land registrar demonstrated that the title to land was procedurally obtained. The defendant has not proved that the plaintiff obtained the title to the suit property fraudulently, corruptly or un-procedurally.

The court finds that the withdrawal of the development plan by the defendant without affording the plaintiff a hearing was in breach of the principle of fair administrative action and the same was not justified and therefore, was illegal.

The court finds further that the plaintiff suffered loss and is entitled to damages. The plaintiff has demonstrated that she had dug the foundation and proved some materials. She was to build residential houses that would earn her Kshs. 96,000 per month. I do award the plaintiff general damages for loss suffered at a global figure of Kshs. 3,000,000. There is no evidence that the act of the defendant withdrawing the approvals was due to malice, ill motive or spite and therefore the court does not award exemplary or aggravated damages.

Ultimately, the court awards a total of Kshs. 3,000,000 as damages for loss suffered by the plaintiff. Costs of the suit to the plaintiff. Orders accordingly.

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

A. OMBWAYO

JUDGE