



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 275 OF 2012

[Formerly Eldoret Hccc No. 106 of 2006]

KISEKEM LTD.....PLAINTIFF

VERSUS

MICHAEL KIPKERING CHERWON.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

Kisekem Ltd, (hereinafter referred to as the plaintiff) has come to court against **Michael Kipkering Cherwon, the Commissioner of Lands, the Chief Lands Registrar and the Attorney General (hereinafter referred to as the defendants)** claiming that the plaintiff is registered as the Lessee from the Government of Kenya for a period of 99 years from 1st January, 1984 of that parcel of land registered as Eldoret Municipality Block 6/231 and is entitled to possession and use of the suit land to the exclusion of anybody else. He claims that sometimes in the year 2004, it came to the attention of the plaintiff that the 1st defendant was laying a claim to a portion of Eldoret Municipality block 6/231.

That on making inquiries at the Lands office at Eldoret, the plaintiff found that the 1st defendant had been registered as the lessee from the Government of Kenya for a period of 99 years from 1.10.1991 of parcel of land registered as Eldoret Municipality Block 6/306 which had been unlawfully created over a portion of Eldoret Municipality block 6/231.

That by a letter dated 30.03.2006, the District Lands Officer, Uasin Gishu District acknowledged that the land parcel registered as Eldoret Municipality Block 6/306 had been created erroneously over land parcel registered as Eldoret Municipality Block 6/231. The plaintiff avers that the purported creation of Eldoret Municipality Block 6/306 and the registration of the 1st defendant as Lessee thereover was done by mistake and is null and void.

The particulars of mistake of 1st defendant is thus applying for allocation of Eldoret Municipality Block 6 when he ought to have known or knew that the same was not available as it was a creation over Eldoret Municipality Block 6/231. Accepting a lease over Eldoret Municipality Block 6/306 when he ought to have known or knew that the lease could not have been registered over land already existing as Eldoret Municipality Block 6/231 and already registered in favour of the plaintiff. Failing to carry out a due diligence exercise before applying for and accepting the lease registered as Eldoret Municipality Block 6/306.

Particulars of mistake of the 2nd defendant are purporting to issue the 1st defendant with a letter of allotment of land already allotted to the plaintiff in whose favour a lease existed. Accepting premiums from the 1st defendant for a property already under lease. Executing a lease in favour of the 1st defendant over land already leased to the plaintiff. Instructing or authorizing the 3rd defendant to register the lease in favour of the 1st defendant over Eldoret Municipality Block 6/306 when a lease over the same land and registered as Eldoret Municipality Block 6/231 in favour of the plaintiff existed. Failing to know that Eldoret Municipality Block 6/306 was created over Eldoret Municipality Block 6/231 which was already leased in favour of the plaintiff. Ignoring the fact that Eldoret Municipality Block 6/231 was already registered in favour of the plaintiff and therefore no portion thereof was available for allotment or lease.

The particulars of mistake of the 3rd defendant is purporting to register a new lease over Eldoret Municipality Block 6/306 when the property was superimposed on a portion of land registered as Eldoret Municipality Block 6/231 and a lease registered in favour of the plaintiff. That the 1st defendant has on the strength of the illegal lease over Eldoret Municipality Block 6/306 entered and is trespassing on the plaintiff's land parcel, Eldoret Municipality Block 6/231.

By reason of the matters stated above, the plaintiff has been denied his right to possess and use the suit land and continues to be so denied wherefore he has suffered and continues to suffer loss and damage.

The 4th defendant is joined to this suit pursuant to the provisions of the Government Proceedings Act (Chapter 40 of the Laws of Kenya). The plaintiff had made demands to the defendants to make amends to the situation but in vain. There is no suit pending and there have been no previous proceedings between the parties concerning the subject matter herein.

The plaintiff prays for judgment in terms of:

(a) A declaration that the plaintiff is the proprietor as lessee from the government of Kenya over Eldoret Municipality Block 6/231 and is entitled to immediate possession and use thereof to the exclusion of the 1st defendant or anybody else.

(b) A declaration that the lease issued and the certificate extracted therefrom in favour of the 1st defendant over Eldoret Municipality Block 6/306 was obtained by mistake and is therefore null and void ab initio and confers no title to the 1st defendant.

(c) A declaration that the 1st defendant is a trespasser on property Eldoret Municipality Block 6/306.

(d) An order directed at the 2nd defendant to revoke the lease issued in favour of the 1st defendant over Eldoret Municipality Block 6/306.

(e) An order directed at the 3rd defendant to cancel the registration of the 1st defendant as proprietors as lessees of Eldoret Municipality Block 6/306.

(f) A permanent injunction restraining the 1st defendant, itself, its servants, agents or representatives or any person howsoever acting on its behalf from occupying or remaining in occupation, possession or in any other way whatsoever trespassing on Eldoret Municipality Block 6/231.

(g) General damages for trespass.

(h) Costs of this suit.

The 1st defendant on his part states in his statement of defence filed on 7.11.2006 dated 6.11.2008 that he is the first registered proprietor of land number Eldoret/Municipality Block 6/306. That the land parcel known as Eldoret Municipality Block 6/231 referred to in the Plaintiff does not refer to the same land as Eldoret Municipality Block 6/306 and that Kisekem Limited was not a legal entity or in existence at the time the alleged land parcel known as Eldoret Municipality Block 6/231 was allegedly registered in its name on 4.11.1985. The plaintiff was incorporated on 24.1.1989.

The 1st defendant avers that if there is any mistake then the same was caused by the plaintiff by attempting to lay a claim on the 1st defendant's parcel of land known as Eldoret Municipality Block 6/306 and purporting to allege that Kisekem Limited was registered on 4.11.1984 and not 24.1.1989. Purporting to indicate that there are two companies in existence sharing the same name Kisekem Limited with different registration numbers and that Kisekem Limited shares the same registration number C25562 with Pew Lex Palkers Limited at the company's registry. Purporting that land parcel Eldoret Municipality Block 6/231 was allocated and registered in its name before it was incorporated.

That the 1st defendant avers that the plaintiff has never been in possession of land parcel known as Eldoret Municipality block 6/306 and the same has been in the exclusive possession of the 1st defendant.

In reply to paragraph 1 of the Plaintiff, the 1st defendant avers that he was legally allocated land parcel known as Eldoret Municipality Block 6/306 and therefore, he is not a trespasser as alleged.

He further avers that the suit is res-judicata since the matter had been determined vide Eldoret CMCC No. 1082 of 2004 and the appeal from the said suit is pending before this Honourable Court vide Eldoret HCCA No. 107 of 2004 involving the same subject matter and the same parties. The 1st defendant further avers that the suit is time barred.

The 1st defendant raises the following preliminary points of law:

(a) Leave to commence the suit herein was improperly obtained.

(b) The suit is time barred.

(c) The matter is res-judicata.

(d) The plaintiff is not a legal entity to commence these proceedings.

(e) The 1st defendant has been wrongly enjoined in this suit.

(f) The suit is scandalous, frivolous and vexatious and discloses no reasonable cause of action against the 1st defendant.

The 2nd, 3rd and 4th defendants' in their statement of defence deny the averments in the plaint.

THE PLAINTIFF'S EVIDENCE

PW1, Willy Rotich Kamuren testified that he is a businessman engaged in hotel business and farming. He resides in Nairobi and also farms in Uasin Gishu. He is the director Kisekem Ltd and produced the certificate of incorporation of Kisekem Ltd indicating that the plaintiff was registered on 8.4.1983. He produced the resolution to give evidence made by Kisekem Ltd.

According to PW1, the plaintiff was allocated un-surveyed plot numbers 4, 5, 6, 7, 8 and 9 combined in Eldoret Municipality measuring 0.2730 hectares. The letter of allotment required the plaintiff to pay Kshs.49,310 to the Commissioner of Lands. The plaintiff paid the money on 11.11.1984. After paying the money, the plots were consolidated into one plot in the name of Kisekem Ltd.

The plaintiff was issued with the title to the property known as Eldoret Municipality Block 6/231 and a lease document was executed. The title is with the National Bank of Kenya as security for a loan taken by the plaintiff. He produced the certificate of lease. He produced the certificate of official search of Eldoret Municipality Block 6/231 showing the owner of the land as Kisekem Ltd. The date of registration was on 4.11.1985. He states that later, overlapping plots were created on the land, thus, Eldoret Municipality Block 6/301, Eldoret Municipality Block 6/302 and Eldoret Municipality Block 6/306. Plot No. 306 is superimposed on Eldoret Municipality Block 6/231.

On cross examination by Mr. Gicheru, learned counsel for 1st defendant, he states that his company was incorporated in 1983 and the allocation was done in 1984. However, the letter of allotment does not have a date. He further states that there is a letter that indicates that Pew Lez Ltd was registered on 8.4.1983 under company No. C 25562, the same company number of the plaintiff. He admits that the plaintiff has another certificate number thus 39265. He states that the correct certificate is C25562. He is not aware of the other certificate number. He was granted by the court leave to file suit out of time. On cross examination by Mr. Ngumbi, he states that he gave notice to the Attorney General to file the suit. He states that the other documents in respect of Kisekem Ltd are fraudulent.

On re-examination by Mr. Gachie, he states that the documents in respect of Pew Lez Company Ltd are a ploy to steal land from Kisekem Ltd. He knew in 1993 that Plot No. 306 had been excised from Eldoret Municipality Block 6 231.

PW2, Mr. Wilson Francis Ojunju, a Senior Surveyor with the Survey of Kenya in Ruaraka states that he was assigned by the Director of Surveys to appear in court and give evidence. He appeared due to summons issued by the court. However, he had dealt with the land before the summons. The Commissioner of Lands had written to the director of survey asking for the survey plan. He states that the three parcels of land exist but their existence is not proper. Parcel number EM/Block 6/301 was partly a road. The Eastern boundary encroached on 231 by 14 metres. On 306, he states that it encroached on the road by 9 metres and 14 metres of parcel number 231, 301 and 306 ate into 1/8 of an acre into EM/Block 6/231. Parcel number 231 was given a new number EM/Block 6/302. According to PW2, parcels number 306 and 301 overlap on parcel number 231 which had an earlier title. He states that the survey of parcel number 231 was illegal as it was done without the owner's consent. There was no application to subdivide parcel number 231. The Chief Land Registrar wrote to the District Land Registrar for the titles Nos. 301, 302, 306 to be expunged.

Mr. Ngumbi for the Attorney General adopted the evidence of PW2 so that he would not recall him.

On cross examination by Mr. Omusundi, he states that the Registration Index Map cannot have parcel number Eldoret Municipality Block 6/231 because it is the amended copy. He states that there was no proper subdivision of parcel number Eldoret Municipality Block 6/231 as consent of the owner was not sought and given. Parcels No. Eldoret Municipality Block 6/301, 306 were superimposed and encroached on parcel number Eldoret Municipality Block 6/ 231. The procedure was followed but the product was wrong as it fell on another parcel of land and a road. That was the close of the plaintiff's case.

The defendants called DW1, ***Francis Kiago Ndirangu***, a state counsel in the office of the Attorney General in the Department of Justice who testified that he was at that time deployed in the Office of the Registrar General as an Assistant Registrar of Companies. He had worked in the office for 3 years. He was to produce record of companies' number C25562 and C39265. He had the original registration. The first registration was from entry number 39082 to 39480. Company No. 39265 fell within the register. The 2nd registration was from C25373 to C25763 where Company No. 25562 fell. Company Number C39265 is at page 184 whilst C25562 appears at page 194. Company C25562 according to the register is called Pew Lex Palkers Ltd. The date of registration was 8.4.1983. Company number 39265 is Kisekem Ltd.

The date of registration is 24.1.1989. It is not permissible for Companies to be registered with the same name and same number.

When shown PEx7 he states that it looked like an original certificate of incorporation. The number is C25562. The certificate was not signed but had initials of the officer who executed the same. It reads Kisekem Ltd. The name does not conform with the register. The date is 8.4.1983. According to the DW1, Kisekem Ltd exists as number 39265 registered on 24.01.1989 and not C25562.

On cross examination by Mr. Ngumbi, he states that no company registered as Kisekem Ltd existed on 8.4.1983. On cross examination by

Mr. Onyango, on PEx.7, he states that he does not know whether the document came from his office.

He states that if the Registrar who issued the original certificate is present, he would sign the certified copy, if he is not there, no one signs the certificate instead only the initials of the Registrar who issued the original would be noted. He could not confirm whether the signature was for one of the registrars but it resembled the signature of Mr. Gikonyo one of the registrars. The certificates have the seal and signature. He could not authenticate the seal was from the Registrar of Companies as it is incomplete. There was no double allocation of the No. C25562.

On cross examination by Mr. Gachie, he states that any of the Assistant Registrars could deal with the files of Kisekem Ltd or Pew Lez Ltd. He has never seen the file of Kisekem. He states that digitization began in 2010 yet the print out is in 2006.

DW2, Michael Kipkering Cherwon states that he is a farmer at Kasperit and director of Trans National Bank Ltd. He owns land No. Eldoret Block 6/306. He had a certificate of lease issued in December, 1992. The area of the land is 0.062 hectares. He produced the certificate of lease and the certificate of official search. He further produced an extract of the register. He produced the lease document that indicates the lease term of 99 years from 1.10.1991. He took possession of the land in 1993 and fenced. He sought temporary structures and was renting them out without objection from anyone.

However, when he started constructing the permanent structure and had done the basement, an order for injunction was issued. He states that Kisekem Ltd does not exist and if it existed, it was fraudulently registered. He applies that the suit be dismissed.

On cross examination by Mr. Ngigi, he states that by the time the lease was issued, the land had been surveyed. On cross examination by Mr. Ngumbi, he states that the registered owner for Block 6/231 is Kisekem Ltd. There is no indication that the land was subdivided. He applied for allocation in the name of Grandine Ltd.

On cross examination by Mr. Gachie, he states that there is a deed plan for his land. He was given a letter of allotment but he did not produce it. He paid stand premium before being given the lease. However, the receipt is not in his name. The payment is for unsurveyed plot C and not Block 6/306. He does not know where parcel 231 is located. He states that he came to know that the plaintiff was not registered in the year, 2008 and yet he filed his defence in 2006.

On re-examination, he states that the land was unsurveyed. The receipt is in the name of Grandine Ltd. He admits a survey was done in 1985 and tile issued to Kisekem Ltd. The other titles were generated in 1991.

Strangely, having adopted the evidence of PW3, the 2nd – 4th defendants called a witness thus, **2nd DW1, Prescilla Njeri Wango**, a Surveyor working with the directorate of Survey, Ministry of Lands and Physical Planning. She received a letter from the Attorney General to attend court and give evidence. She compiled a report. She states that Eldoret Block 6/231, survey was carried out in April, 1995. After survey, the Registration Index Map was amended and a title issued. In 1991, there was re-planning and a resurvey that created Block 6/301, 306 and 302.

She confirms that there is a road. Parcel Number 302 is what is supposed to be parcel Number 231. 231 is no longer in existence. The roads were reduced in re-planning. She insists that parcel number 231 was never subdivided. It was replanned. No notice was issued to the owner, Kisekem as there was no need for notice. The Commissioner of Lands exercised his right to re-enter and had the land re-planned because it was not developed. The re-planning was done by the allocating authority as the property had not been developed for a period of 8 months. The letter of allotment had special conditions. She states that Block 6/231 was in existence before re-planning. There was no subdivision but re-planning. On cross examination by Mr. Aseso, she states that the PDP was done in 1991.

On cross examination by Mr. Gachie, she states that she has read the report by Mr. Ojunju. The conclusions by Mr. Ojunju are different from her conclusions. Mr. Ojunju is her senior.

SUBMISSIONS

The gravamen of the plaintiff's submissions is that the plaintiff's right to property is protected by Article 40 of the Constitution of Kenya, 2010.

The previous constitution had section that protected right to property thus, section 75 of the said constitution. According to the plaintiff, DW3 confirmed that the State forcefully took the property of the plaintiff. The plaintiff submits that section 77(1) of the GLA repealed was not complied with. The said section is in *peri materia* with section 31 of the Land Act No. 6 of 2012.

The land was Arbitrarily taken from the plaintiff without following the procedure of the Land Acquisition Act Cap. 295, Laws of Kenya (repealed) read with Act 110(1) of the Land Act.

The gravamen of the 1st defendant submissions is that there is a disconnect between the plaintiff's pleadings, evidence and submissions as fraud is not pleaded and proved.

Moreover, that the plaintiff company was non-existent at the time of allocation. Furthermore, that title to Block 6/306 is valid title as there is a lease document and certificate of lease. He submits that in the white card produced by DW3, Eldoret Municipality Block 6/231 is not mentioned. The 1st defendant further submits that there is no nexus between Eldoret Municipality Block 6/306 and Eldoret Municipality Block 6/231.

The 1st defendant submits that the suit is time barred having been filed more than 14 years after the cause of action accrued. Section 27 and 28 of the Limitation of Actions Act do not contemplate the orders of extension of time issued. Moreover, that the suit is res-judicata.

The 2nd to 3rd defendants submit that the plaintiff's claim is based on mistake but evidence of DW3 is more compelling than that advanced by PW2 hence probably there can be no error in the entire re-planning exercise. The Attorney General submits that condition 2 of the letter of allotment waived section 77 of the GLA and provisions of the Land Act including section 31 is irrelevant.

ANALYSIS AND DETERMINATION

The indisputable facts of this case are that Eldoret Block 6/231 was surveyed in April, 1985 as per survey plan (SR 172/1). The area measured 0.2750 Ha. The amendment was done at the first entry of the registry index map (RIM) for Eldoret Municipality Block 6 on 23.5.1985 and title deed issued to Kisekem Limited on 4.11.1985.

In 1991, there was re-planning as per the part development plan No. Eldoret 17/91/39 of 4.9.1991. Parcel Number Eldoret Municipality Block 6/231 was never subdivided but re-planned and extinguished. The reason for re-planning was because the parcel of land was not developed as per the condition of the allocating activity. After re-planning and resurvey, parcels numbers 301, 302 and 306 were created. The RIM was amended on 8.5.1992 and parcel number 301 was created. Parcel number 306 was surveyed on 5.9.1992 and the RIM amended on 16.10.1992 and a title issued. Eldoret Municipality 6/302 was reserved for parcel number 6/231. This case revolves on the above facts and provisional objection that the court shall address later.

The first issue the court should deal with is whether the re-planning and re-survey was within the law. It is worth noting that parcel number 231 was registered in the name of Kisekem Ltd under the RTA and it is worth noting that the first survey created parcel number 231 which was registered in the name of Kisekem Ltd. Having been registered in the name of Kisekem Ltd, the land was not available for a re-survey because it became private land. The term re-planning of private property is not supported by any law in Kenya.

The argument by the defendants is that the Commissioner of Lands exercised his powers under special condition No. 2 of the lease. This court finds that the special condition was subject to the rule of law that requires a party to be heard before a decision is made. The action of the commissioner of lands was an affront to the rule of law and the principle of legitimate expectation. **Section 77(1) of Government Lands Act Cap 280, Laws of Kenya (repealed)**, which states that:

77. (1) If the rent or royalties or any part thereof reserved in a lease under this Act is at any time unpaid for the space of thirty under this Act is at any time unpaid for the space of thirty days after the same has become due, or if there is any breach of the lessee's covenants, whether express or implied by virtue of this Act, the Commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the High Court for the recovery of the premises, and, on proof of the facts, the High Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the Commissioner may re-enter upon the land.

Which section is *pari materia* with section 31(1) of Land Act that provides:

Forfeiture of lease if rent unpaid or for breach of covenant(1) If any part of the rent or royalties reserved in a lease under this Act is unpaid for a period of twelve months after becoming due, or if the lessee breaches any express or implied covenant, the Commission may—(a)serve a notice upon the lessee, specifying the rent or royalties in arrears or the covenant of which a breach has been committed; and(b)commence an action in Court for the recovery of the land at any time at least one month after serving the notice contemplated in paragraph(a).(2) In an action commenced under subsection (1)(b) on proof of the facts, the Court shall declare the lease forfeited, subject to relief upon such terms as may appear just.(3) If the Court has declared a lease to be forfeited under subsection (2), the Commission may re-enter upon the land. (4) In exercising the power of granting relief against forfeiture under this sub-section (1), the Court shall be guided by the principles of the doctrines of equity

This provision did not allow the re-planning and re-survey of parcel number 231 that was already registered in the plaintiff's name. This court finds that the re-planning, re-survey extinguished parcel number 231 unprocedurally, illegally and deprived the plaintiff of his parcel of land. The said re-planning is a nullity in law. Surprisingly, the Attorney General adopted the evidence of Mr. Ojunju that the transaction creating 301, 302 and 306 was a nullity but went ahead to call 2nd DW1, Prisca Wango who contradicted the evidence of Mr. Ojunju. Her theory of re-planning and re-surveying farfetched and not supported by any law as condition number 2 was to be read with section 77(1) of the GLA.

On the issue of limitation of time, I do find that the order of extension of time was made pursuant to the provision of section 27 and 28 of the Act, which provides for extension of time due to ignorance of material facts. The court heard the plaintiff and granted orders of extension of time. I do find that the action was based on mistake which is a tort and therefore leave was properly obtained. In any event, the defendants have not seriously demonstrated that leave was not properly obtained.

The issue of res-judicata as pleaded and submitted by the defendants was not demonstrated as there was no evidence that this matter has been fully determined as required by law to satisfy this principle.

On the issue, as to when Kisekem Ltd was registered, I do find that the certificate of incorporation speaks for itself on the date of registration. Though it is not signed by hand, the name of the Registrar who issued the certificate is imprinted. The evidence of Francis Kiago Ndwango was full of suppositions and proposals and he admitted that sometimes mistakes occur in the office of the Assistant Registrar. Moreover, he did not come out clearly on how the plaintiff was issued with the certificate of incorporation. He did not produce the file of the plaintiff to demonstrate when she was registered. The evidence of DW1 was not reliable as he appears not to have investigated thoroughly how the plaintiff obtained the certificate of incorporation. He did not produce the duplicate certificate of incorporation of the

plaintiff which is supposed to be kept in the file.

I do find that the plaintiff has demonstrated that the creation of parcels number Eldoret Municipality Block 6/301, Eldoret Municipality Block 6/302 and Eldoret Municipality Block 6/306 on parcel number Eldoret Municipality Block 6/231 was a mistake, illegal and unprocedural.

I do grant a declaration that the plaintiff is the proprietor as lessee from the government of Kenya over Eldoret Municipality Block 6/231 and is entitled to immediate possession and use thereof to the exclusion of the 1st defendant or anybody else.

Furthermore, I do declare that the lease issued and the certificate extracted therefrom in favour of the 1st defendant over Eldoret Municipality Block 6/306 was obtained by mistake and is therefore null and void ab initio and confers no title to the 1st defendant.

This court orders that the 2nd defendant do revoke the lease issued in favour of the 1st defendant over Eldoret Municipality Block 6/306.

The 3rd defendant is directed to cancel the registration of the 1st defendant as proprietors as lessees of Eldoret Municipality Block 6/306.

Last but not least, I do grant a permanent injunction restraining the 1st defendant, itself, its servants, agents or representatives or any person howsoever acting on its behalf from occupying or remaining in occupation, possession or in any other way whatsoever trespassing on Eldoret Municipality Block 6/231. Costs of this suit to the plaintiff.

Dated and delivered at Eldoret this 18th day of July, 2019.

A. OMBWAYO

JUDGE