



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 576 OF 2012**

**(Consolidated with E & L Case No. 577 of 2012)**

**KENYA ANTI-CORRUPTION COMMISSION..... PLAINTIFF**

**VERSUS**

**JOHN KIPLAGAT CHESANGA.....1<sup>ST</sup> DEFENDANT**

**TRANS NATIONAL BANK LTD.....2<sup>ND</sup> DEFENDANT**

**WILSON GACHANJA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

***The Kenya Anti-Corruption Commission (hereinafter referred to as the plaintiff)*** on 25.5.2009 filed a suit seeking to recover all that parcel of land known as ***Eldoret Municipality Block 15/1882 and Eldoret Municipality Block 15/1883***, which had been allegedly irregularly and un-procedurally alienated and or acquired by ***John Kiplagat Chesanga (hereinafter referred to as the 1<sup>st</sup> defendant)*** through actions of ***Wilson Gachanja*** (hereinafter referred to as the 3<sup>rd</sup> defendant). The plaintiff seeks cancellation of title issued to the 1<sup>st</sup> defendant. The suit was consolidated with Eldoret ELC No. 577 of 2012 between the same parties. The original parcel of land had been compulsorily acquired by the Government of the Republic of Kenya for public purposes.

The suit property was part of all that parcel of land formerly Land Reference Number 8148 measuring 617 acres.

On or about May, 1978, the Government of the Republic of Kenya through Gazette Notice compulsorily acquired part of original L. R. 8148 measuring 617 acres from one Mr. Kiptalem Arap Cherunya (deceased) pursuant to the provisions of Land Acquisition Act Cap. 295.

The government only acquired 400 acres leaving the balance of 217 acres to the owner, Mr. Kiptalam Arap Cherunya. The land was acquired on behalf of the defunct Municipal Council of Eldoret, for public purposes (establishment of industries). The government awarded and paid Mr. Kiptalam Arap Cherunya the agreed amount of Kshs. 2,637,500 in compensation for his interest in the 400 acres which had been compulsorily acquired, which amount he duly accepted and received.

According to the plaintiff, for close to 25 years no survey was done to establish the portion of 400 acres due to the government and the boundary delineating its share from Kiptalam's share of the remaining 217 acres. The survey was done in 2005 pursuant to which the governments share had been identified as L. R. 2366 while Kiptalam Arap Cherunya's parcel is known as 2365. That L. R. No. 2366 was not available for alienation.

The plaintiff contends that as long as gazette notices Nos. 1458 of 1978 and 345 of 1980 have never been revoked all that parcel of land being a portion of L. R. NO. 8148 and which is now known as L. R. No. 2336 measuring 400 acres remains government land acquired and set aside for a specific purpose and accordingly not available for alienation. The plaintiff contends that the land was held in trust for the public.

It is alleged by the plaintiff that the defendants illegally and fraudulently alienated the suit land and allocated parcel number Eldoret Municipality block 15/1882 measuring 0.1856 hectares to the 1st defendant. A lease was prepared for 99 years with effect from 1<sup>st</sup> June 1991 and issued by the 3<sup>rd</sup> defendant. The land was subsequently charged to the **TRANS NATIONAL BANK LTD** (Hereinafter referred to as the 2<sup>nd</sup> defendant) for a sum of kshs.600,000.

The plaintiff alleges that the whole transaction was fraudulent as the subdivision, allocation, and transaction was contrary to the law. The plaintiff contends that the allotment, lease and certificate of lease issued in the names of the 1<sup>st</sup> defendant and the charge in the name of the 2<sup>nd</sup> defendant was a nullity.

The plaintiff prays for a declaration that the purported allotment, lease registered, and certificate of lease issued, in respect of parcel number ELDORET MUNICIPALITY/BLOCK15/1882 are null and void ab initio. He further prays for cancellation of the purported allotment, lease, certificate of lease and charge registered in favour of the 2<sup>nd</sup> defendant in respect of parcel number Eldoret Municipality Block15/1882. He urged the court to cancel all transactions and have land revert back to the government for intended public use.

The 1<sup>st</sup> defendant denied all allegations of fraud and illegality and states that after the government acquired the land as stated and that it was surveyed and forms the current block 15 and that what happened in 2005 was a re-survey and cannot override the survey earlier done by the director of surveys.

He further states that after the land was acquired by the government it became government land to be administered under the Government Lands Act and could be alienated under the Act. Moreover, that the gazette notices numbers 1458 of 1978 and 345 of 1980 formalized the acquisition of 400 acres out of L. R. NO. 8148 by the government of Kenya and that the intended purpose for the acquisition was industrial, residential, shopping centers and ancillary purposes and could be alienated by the Government for the intended purposes.

The 1<sup>st</sup> defendant states that in the year 1991 he applied to the commissioner of lands for allocation of land within Eldoret Municipality block 15. The commissioner of lands approved the application and issued a letter of allotment. He accepted the allotment and complied with the conditions of allotment and paid all requisite charges to the government. A lease was made by the commissioner of lands. The consent to charge the land was issued by the commissioner of lands. The 1<sup>st</sup> defendant states that as a citizen of Kenya he is entitled to protection of his fundamental rights and freedoms enshrined in the constitution particularly the protection from deprivation of property.

#### **(b) EVIDENCE ON RECORD**

**PW1 Charles Moemi**, an Assistant Commissioner of lands testified at length on the process of acquisition of land as provided by the law. As regards the suit properties he states that L. R 8148 was registered in the name of Kiptalam Arap Cherunya and that vide gazette notice number 1458, of 19<sup>th</sup> May 1978 the government issued a notice of its intention to acquire land and among the Parcels to be acquired was L. R. NO 8148 adjoining Eldoret Municipality measuring 617 acres. The intention of the said acquisition was for industrial, residential, shopping centres and ancilliary purposes. By gazette notice number 1459 of 19<sup>th</sup> May 1978 a notice of inquiry was published in which notice persons who had interest in the land to be acquired were invited for the hearing of their claims. On the 28<sup>th</sup> September 1978, the government registered a caveat on L. R. 8148 by virtue of Gazette notices number 1458 and 1459 of 19<sup>th</sup> May 1978. Gazette notices numbers 1458 and 1459 were revised by gazette notice number 345 of 8<sup>th</sup> February, 1980 which clarified that the government was acquiring only 400 acres from the 617 acres of L. R. No. 8148 thus leaving the owner with 217 acres. The Registered owner Mr. Kiptalam Cherunya was paid Kshs.2,637,500 in compensation for the acquired land. The 400 acres vested in the government of Kenya. On cross examination by **Mr. Keter, learned counsel** for the 1<sup>st</sup> defendant, he states that the land was meant for industrial, residential and ancillary purposes and that the commissioner of lands had the power to alienate public land for the intended purposes. On cross examination by **M/s Nasiloli, learned counsel** for the 2<sup>nd</sup> defendant, he states that once land is acquired by the state it becomes Government Land and it has to be allocated for the purpose it was acquired.

**PW2, Cyprian Chesire** the Physical planner with the County Government of Uasin Gishu states that L. R. no 8148 measuring 617 acres belonged to a farmer in 1978, however, 400 of the said land was compulsorily acquired by the government leaving behind 217 acres for the farmer. The land was acquired for industrial, residential and ancillary purposes. The uses were to be distributed suitably on the parcel of land. The office of the Physical Planner did not prepare any physical plan for the area. The part Development Plan was not approved.

On cross examination by Mr. Keter, he states that L. R. 8148 has not been converted from RTA to RLA and that he does not have a copy of the plan. He states that there are several entities and individuals occupying the land.

**PW3, Emmanuel Kipkurui Keitany**, the county surveyor Uasin Gishu County states that a survey was done in the year 2005 to subdivide land parcel number L. R. NO. 8148 Eldoret Municipality block 15 into two portions Eldoret Municipality block 15/2365 measuring 87.87 ha and 15/2366 measuring 159.567ha. That the district survey office did the survey and forwarded the field data to the director of survey for the preparation of the survey plan and the amendment of the relevant registry index map. All beacons determining the boundary of the two parcels of land were placed on their correct position as indicated in the survey plan FR NO. 448/159.

According to the witness, survey was done after the purported allocation and allocation cannot be done before the survey.

On cross examination by Mr. Keter, he states that on the 27<sup>th</sup> of August 1992, the director of survey asked the district surveyor to carry out a survey of the unsurveyed plots in Eldoret Municipality but appears not to understand the import of the letter.

**PW4, Dedan Okwema** an investigator with the Kenya Anti-Corruption Commission states that in his investigations, he established that the land was irregularly acquired as there was no planning, no survey and that the parcel was public land. There was no letter of allotment, no application, no Part Development Plan, no minutes of the county government. On cross examination by Mr. Keter, he states that the land was acquired by the government for industrial purposes residential and shopping. He states that once the land became government land it could be allocated to individuals for industrial development. He blames Mr. Chesanga for not following procedure. On cross examination by M/s Nasiloli, he states that the bank cannot be blamed for charging the property as it considered the certificate of official search.

After the close of the plaintiff's case, **DW1, John Kiplagat Chesanga** the 1<sup>st</sup> defendant and a motor vehicle assessor took oath and stated that

he lives at Rivatex Cherunya farm. They were invited to buy the land and wrote a letter to the Commissioner of Lands on 30.4.1991. He signed the letter with other people not before court. He produced the letter as DEX.1. The application was approved by the former Head of State, Daniel Toroitich Arap Moi. They took the letter to the Commissioner of Lands. A letter of allotment was prepared and issued to him and his group. Each person was given a letter of allotment. He paid the fees on 27.8.1992. He paid Kshs. 129,300 as was required and took the surveyors to the land and the land was later surveyed. He was allotted parcel No. Eldoret Municipality Block 15/1834.

After paying and getting the title, he moved into the land. He has subdivided 1834 into 4 pieces. He wrote an application letter to subdivide and it was approved. The lease was registered at Uasin Gishu Land Registry registered on 18.1.1992. A certificate of lease was issued on 20.1.1993. He has a letter of proposed subdivision dated 8.6.1993. It was about subdivision of industrial plots 1833 and 1834. It is written by Mr. Kabiro, a Senior Lands Officer. The subdivisions were approved by Department of Lands. He produced a subdivision scheme approved as DEX.10A and DEX.10B. He paid the subdivision fees. He paid Kshs.104,940. He produced the receipt as DEX.11. The resultant plots were 1882, 1883, 1884, 1885. He got the certificates of lease for title No. 15/1882, 15/1883. He produced certified copies as DEX.12 and DEX.13. He has been paying land rent. He produced the demands as DEX.14A and DEX.14B. The land was acquired for light industries commercial trading centers, school church, residential and shopping Centre. He is an Auto Engineer and intended to put up an industrial plant for Auto repairs. There is nothing going on the land. He has a house on the land. It is residential place.

**On cross examination by Nasiloli**, he states that due procedure was followed in acquiring the certificate of lease. A certificate of lease was issued in his name. He approached the bank to give him a loan in 1995. There was no dispute when he obtained the loan.

**On cross examination by Mrs Natome**, he states that he used to work for different departments of government including the Ministry of Works in 1973 to 1977 as a Senior Mechanic. He joined Kenya Fluorspar from 1977 to 1982, and at one time he was employed at Kenya Ports Authority from 1982 June to 1987. Finally, he joined Moi University from 1987 July to 1990. He resigned and went to private practice. He is the registered owner of plot No. Block 15/1882 and 1883. He has put up rental houses for his tenants. His intention is to put up a factory and light industries on the industrial plot to manufacture spare parts. He has put up a residence to protect the property.

There are temporary structures on the land mainly the main house put up of iron sheets and walls of timber but he has a plan to put up a factory. The sons of the seller came with a tractor and destroyed the structures.

He does not know when the land was surveyed. He heard that Cherunya complained that some people had encroached on his remaining land. He does not know when the land was surveyed but by 1979, the land had been surveyed.

On re-examination by Keter, he states that he has worked with the government but has never worked with the Ministry of Lands. He did not have any powers in the Ministries of Lands. His letter to the Commissioner of Lands was received. He was given a letter of allotment in the application. He has been on the land since 1991 to date, 27 years. He has never received a complaint from the Municipal Council.

**Paul Mwangi Ndegwa**, the Manager of Transnational Bank, Eldoret Branch gave evidence for the 2<sup>nd</sup> defendant that he is familiar with the signature of Mr. Ruto. He produced the charge document and the lease certificate and a letter of consent. According to this witness, the 1<sup>st</sup> defendant has not cleared the loan. He produced the loan statement as 2DEX4. The bank carried its due diligence and confirmed the owner of the land as Mr. John Kiplagat Chesanga. There was nothing on title to show that the land was public land. When charging, they did not know that it was public land. They oppose cancellation of title.

On cross examination by Natome, he states that the bank was presented with the original title, Certificate of official search and Certificate of lease. This was done by Kalya Company advocates in respect to 15/882, 15883, 15/884. The property was charged for Kshs.600,000 each. In this matter, there was a valuation report but he did not have it in court. The charge has not been discharged since 1997.

On Cross-examination by Mr. Keter, he states that they applied for an official search. There was no restriction, no caution. There was consent by Ministry of Lands. They did see the lease document. There was no encumbrance on the title. There is no complaint by Eldoret Municipal Council. No complaint from the Uasin Gishu County. On re- examination, Mr. Kamau states that he is not aware of a court order.

## **(B) SUBMISSIONS BY PARTIES**

The gravamen of the submissions by Mrs. Natome learned counsel for the plaintiff is that the subject properties having been acquired under Section 75(1) of the repealed Constitution of Kenya and can only be used for public good or benefit and not for private benefit. The plaintiff relies on Section 75(1) of the repealed constitution, 6(1) (c) of Land Acquisition Act. The plaintiff relies on the case of **James Joram Nyaga Vs Attorney General and 2 Others HCMA No. 1732 of 2004** at page 18, where the court held:

***“Once the land is compulsorily acquired, it becomes the property of the Government. The land so acquired is for public good and benefit not private. The allocation of the subject matter to the defendant was not for public benefit or public interest but for private benefit. Can allocation for private benefit be justified under Section 75(1) of the Constitution and Section 6 of the Land Acquisition Act?”***

He relies on the case of Commissioner of Lands Vs Coastal Aquaculture Ltd.

In a nutshell, the plaintiff submits that the property was illegally allocated to the 1<sup>st</sup> defendant, a private individual for a private benefit. The allocation was not to a public body or public interest. It is alleged that the suit property is being used for private benefit.

The plaintiff further submits that the land in dispute was public land and that once land is acquired compulsorily, it is held in trust by the Commissioner of Lands for public and there exists the doctrine of trust so that the Commissioner of Lands cannot use it for any purpose other than public.

The plaintiff further argues that the land in dispute could not have been allocated to private persons as it had been acquired for public purposes for construction of industries. Therefore, the allocation of the property to individuals was null and void and therefore, the titles to the property are not sacrosanct and indefeasible. The plaintiff submits that he has proved his case on a balance of probabilities and therefore the titles should be nullified.

***Mr. Keter learned counsel for the 1<sup>st</sup> defendant*** submits that though fraud was alleged, it was not proved. Moreover, that the 1<sup>st</sup> defendant acquired the property lawfully and procedurally. The Eldoret Municipality Council approved all plans and subdivision of the land. The 1<sup>st</sup> defendant submits that the land was acquired for industrial, residential, shopping centers and ancillary purposes. Nothing in the Gazette notice indicates that the land was acquired to be developed by the government.

The gravamen of the 2<sup>nd</sup> defendant's submissions is that the 1<sup>st</sup> defendant is the registered proprietor of the suit land. He refers to sections 24, 25 and 26(1) of the Land Registration Act that provides as follows: -

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 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”.***

He submits that fraud has not been proved as required by law. The 2<sup>nd</sup> defendant conducted due diligence and established that the land was registered in the 1<sup>st</sup> defendant's name. He prays that the suit be dismissed with costs.

### **(C) ANALYSIS AND DETERMINATION**

The incontrovertible facts of this case can be discerned from the paper trail thus that the suit properties are part of land formerly known as L. R. No. 8148 measuring 617 acres. On or about May, 1978 the Government of Kenya through a Gazette Notice Number 1458, of 19<sup>th</sup> May 1978 compulsorily acquired part of L. R. 8148 measuring 400 acres from the owner Mr. Kiptalam Arap Cherunya pursuant the provisions of the Land Acquisition Act, Cap. 295, Laws of Kenya. Mr. Kiptalam Arap Cherunya was paid Kshs. 2,637,500 in compensation for 400 acres.

On the 21<sup>st</sup> of September 1978, pursuant to section 57(3) of the Registration of Titles Act Cap 281 Laws of Kenya (repealed) notice was given to Kiptalam Arap Cherunya by the registrar of titles that he had registered a caveat in favor of the government of Kenya as the absolute owner of the property by virtue of taking possession under land acquisition Act pursuant to gazette notice number 1458 and 1459 of the 9<sup>th</sup> May 1978.

Upon being paid, Mr Kiptalam Arap Cherunya wrote to the then president of the republic of Kenya Daniel Toroitich Arap Moi on 7<sup>th</sup> April 1979 stating: -

**P. O. Box 626**

**ELDORET**

**7<sup>th</sup> April, 1979**

**H. E. Daniel Arap Moi C.G.H., E.B.S., M.P.,**

**President of the Republic of Kenya**

**STATE HOUSE**

**Your Excellency,**

***I feel greatly honoured for you to have accepted to grant me audience today.***

***As you are aware Sir, my land L. R. 8148 which I bought in 1961 was acquired by the government for the development of Eldoret town. I am grateful, Your Excellency, that your Government has duly compensated me and you, Sir, helped me to be left with 217 acres.***

***However, Sir, as I have a large family, I will regard it a great esteem if, Your Excellency, will help me buy land elsewhere.***

***Lastly, Sire, please accept my personal donation of Shs.5,000 to Kabarak High School which I hope will help towards the education of children.***

***Thank you Sir.***

***Yours faithfully,***

***(KIPTALAN ARAP CHERUNYA)”***

On the 19<sup>th</sup> of March 1981, the chief valuer wrote to the director of survey for the property to be surveyed and on the letter, there was an attached plan but the same was not availed to court by the plaintiff. The letter was copied to the chief land registrar and the Assistant Commissioner of lands and Mr. Kiptalam Arap Cherunya.

On 16<sup>th</sup> October 1992, the commissioner of lands wrote to the Director OF surveys requesting for an urgent survey by the director of survey of the portion acquired by the government of Kenya to be able to advise properly on government land and the extent of boundaries. The letter was copied to the district land officer Eldoret. He refers to the letter dated 19<sup>th</sup> March 1981 which has not been availed to court.

On the 18<sup>th</sup> November 1992, the senior lands officer was requested to have the R.I.M amended to enable the ensuring new numbers registered.

Strangely, the next letter is dated 14<sup>th</sup> April 2005 that is 13 years after the letter dated 16<sup>th</sup> October 1992, but the letter refers to the letter by the commissioner of lands dated 16<sup>th</sup> August 1992 which the plaintiff has not availed to court. In the letter, Mr. A. K. Mursoi district surveyor Uasin Gishu requests for enough data from the data book to do a survey and refers to his letter dated 20<sup>th</sup> May, 2003 which has not been availed to this court for interrogation. Moreover, it is curious to note that the District Surveyor Uasin Gishu states that the owner of the remainder has a feeling that the government allocated more than it required from him. This implies that the government had already allocated the parcels in the land compulsorily acquired and was attempting to preempt encroachment in the parcel of land that remained for Kiptalam.

The request of a data book to do a survey implies that the land compulsorily acquired had been surveyed otherwise why would the district surveyor ask for the data book to survey the remaining portion.

On the 29<sup>th</sup> of April 2005, Mr. Paul Kirui for the director of Surveys wrote to the district surveyor in response to the letter dated 14<sup>th</sup> April 2005 stating that:

***“Survey of Kenya***

***P. O. Box 30046,***

***NAIROBI***

***KENYA***

***Date: 29th April, 2005***

***Our Ref: CT/74/Vol.92/53***

*The District Surveyor,*

*P. O. Box 532,*

*ELDORET*

*RE: DATABOOK NO. UG/1/2005 FOR THE SURVEY OF L. R. NO. 8148 (PORTION) ELDORET MUNICIPALITY BLOCK 15*

*Your letter Ref. No. CT/74/R/Vol.IX/86 dated 14th April, 2005 refers.*

*This is to authorize you to carry out the Survey of the remaining plot that is 617 acres less 400 acres.*

*I understand some plots have encroached the remaining portion.*

*It is therefore, advisable to know how much land has been taken up in such a way.*

*Enclosed, please find copies of the following to assist you carry out the survey:-*

*F/R 22/66*

*FR 304/113*

*F/R 242/128*

*RIM for Block 15.*

*PAUL C. KIRUI*

*For: DIRECTOR OF SURVEYS*

*Encl.”*

On the 20<sup>th</sup> May 2005, Mr. A. K. Mursoi, the district surveyor wrote to the director of surveys thus;

*“District Survey Office*

*P. O. Box 532*

*ELDORET*

*Date: 20.5.2005*

*Ref. No. CT/14/D/Vol.IX/80*

*Director of Surveys*

*P. O. Box 00100 – 30046*

*NAIROBI*

**RE: SURVEY OF L. R. NO. 8148 – ELDORET MUNICIPALITY BLOCK 15**

*The above survey is now complete contained therein, please find the following documents for your further action;*

*One file containing:*

- 1. One (1) field note cover page*
- 2. Two (2) field notes leave*
- 3. Sixteen (16) computation sheets.*
- 4. One (1) P.D.P.*
- 5. One (1) Survey plan on dura film paper.*

**K. MURSOI**

**DISTRICT SURVEYOR**

**UASIN GISHU”**

On the other hand, on the 30<sup>th</sup> April 1991, the 1<sup>st</sup> defendant together with others not in this matter applied to the commissioner of lands for a plot in Eldoret Municipality block 15 in the following terms;

**“Ben K. Kositany,**  
**P. O. Box 459,**  
**ELDORET**

**30th April, 1991**  
**The Commissioner of Lands,**  
**P. O. Box 30089**  
**NAIROBI**

**Dear Sir,**

**RE: APPLICATION FOR A PLOT IN ELDORET MUNICIPALITY BLOCK 15**

**We the underlisted wish to humbly apply for unsurveyed plot in Eldoret Municipality Block 15.**

**We are residing in the Municipality and have no any other Plot for business. We should be allocated the plot, we intend to put up Jua Kali sheds to cater for self-employment. We wish to confirm to you that, jointly, we shall construct the sheds with our current savings.**

**Attached is a sketch plan for ease of reference.**

**Yours faithfully,**

**1. Ben K. Kositany**

**2. John K. Chesanga**

**3. Alex S. Korir**

**4. Susan Chebet**

**5. K. Kemboi**

**6. R. K. Bunei**

**7. Festo Kiptoo**

**8. B. M. Chweya**

**9. Enock Kiptanui**

**10. Joseph K. Kimwarei”**

On the 7<sup>th</sup> of May 1991, the application was approved by none other than the president of Kenya at that time as was required by the law.

On the 13<sup>th</sup> June 1991, the 1<sup>st</sup> defendant was issued with the allotment letter for industrial plot 2 in Eldoret Municipality.

On the 27<sup>th</sup> August 1992, the 1<sup>st</sup> defendant paid kshs.129,300 being ksh.100,000 for stand premium, 20000, for survey fees, 6,410 for stamp duty, 2290 for survey fees, 500 for conveyancing, and ksh.100 for registration of title as per the letter of allotment.

On the 27<sup>th</sup> of August 1992, the commissioner of lands wrote to the Director of Surveys informing him that the defendant had formally accepted the offer and instructed the director to proceed with the survey. The director of surveys on his part wrote to the district surveyor to carry out a survey of plots 2 and 3 of the Eldoret town and attached a PDP. He referred the surveyor to F/R. 145/12. The letter was copied to the provincial surveyor and beacon certificate dated 30<sup>th</sup> of September 1992 was availed.

On the 18<sup>th</sup> January 1993, a lease was registered by the land registrar in respect of Eldoret Municipality Block 15/1834 in favor of John K. Chesanga. Clause 5 of the special conditions stipulated that the land and buildings were to be always used for light industrial purposes with

ancillary offices and stores.

On 20<sup>th</sup> January 1993, a certificate of lease was given by the land registrar to John Kiplagat Chesanga. The land was ultimately divided into two to create Eldoret Municipality Block 15/1882 and 1883.

The 2<sup>nd</sup> defendant produced the charge document, lease certificate and letter of consent dated 23.9.1992. Moreover, he produced the statement of account.

There is no dispute that the land was acquired by the government of Kenya for the benefit of the public. Indeed, the land was acquired for residential, industrial development and related purposes. I do not see any mistake committed by the 2<sup>nd</sup> president of the republic of Kenya by issuing a lease to the 1<sup>st</sup> defendant in respect of the suit property for light industrial purposes with ancillary offices and stores as the land was available for allocation. Any contention that the 1<sup>st</sup> defendant does not use the land for the intended purposes would be an allegation of breach of the terms of the lease that can be taken up by the National Land Commission. The contention by the plaintiff that the land could not be allocated to the 1<sup>st</sup> defendant for private benefit is true however, this court finds that the land was available for allocation to the 1<sup>st</sup> defendant for the purposes it was acquired thus industrial and residential purposes. There is no evidence that the property was allocated for private benefit and that it is being used for private benefit.

The case of *James Joram Nyaga V A.G AND 2 OTHERS HCMA NO. 1732 OF 2004* is not relevant because the land in issue in that case had been acquired for the construction of a road and was clearly a road reserve but was allocated for residential purposes. In this case, the land was acquired for residential, industrial and ancillary purposes and is being used for those purposes as stated by the 1<sup>st</sup> defendant that he is utilizing the land for industrial purposes. The doctrine of public trust applies in this case however it was observed when the commissioner of lands allocated the land for the purposes it was acquired and that the 1<sup>st</sup> defendant had a right to be allocated the land pursuant to section 75 of the former constitution of Kenya and Article 40 of the Constitution of Kenya 2010.

On whether the property was available for alienation this court observes that it is not the governments business to engage in the construction of industrial parks, Estates and residential areas, this is the business of private entities and develops. The property in dispute was available to private entities for as long as they developed the same for industrial and residential purposes.

This court finds that the 1<sup>st</sup> defendant followed the right procedure in the acquisition and subdivision of the suit property. Moreover, that the 2<sup>nd</sup> defendant did due diligence in using the suit property as security to a facility advanced to the 1<sup>st</sup> defendant.

The argument by the plaintiff that the property could not have been allocated to private individuals is misplaced as it offends the provisions of section 75 of the repealed Constitution of Kenya and Article 40 of the Constitution of Kenya, 2010.

Article 40 of the Constitution of Kenya provides that:

“40.

**(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— of any description; and in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person— to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27**

**(4) .....**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.**

The import of **Article 40** is to protect proprietary rights which are lawfully acquired. The plaintiff has established on a balance of probabilities that the land in dispute was acquired by the government for public use thus residential, Shopping and industrial purpose and ancillary purposes. The 1<sup>st</sup> defendant on the other hand has demonstrated that he applied for the un-surveyed plot in Eldoret Municipality Block 15. The application was made to the Commissioner of Lands on the 30.4.1991. The application was approved by the 2<sup>nd</sup> President of the Republic of Kenya Daniel Toroitich Arap Moi. A letter of allotment was issued to John K. Chesanga on the 13.6.1991. The land was described as Industrial Plot 2 Eldoret Municipality. It measured 0.8 hectares. Mr. Chesang, the 1<sup>st</sup> defendant paid Kshs.129,300 for the Plot which was described as unsurveyed industrial plot.

On the 27<sup>th</sup> August, 1992, the Director of Surveys wrote to the District Surveyor to carry out a survey of the two portions of land plots 2 and Plot 3 which are described as industrial plots. The beacons certificate was issued on 30.9.1992. The lease for Block 15/1834 was registered on 18.1.1993. The certificate of lease was issued on 20.1.1993.

On the 8.6.1993, District Land Officer, Eldoret wrote to the Commissioner of Lands stating that parcels of land number 1833 was allocated to the 1<sup>st</sup> defendant. The allottees applied for the approval of the plans. The subdivision was to enable them invite different financiers for different light industrial ventures. The subdivision was duly approved by the Commissioner of Lands. The parcel of land known as 1834 was subdivided to create 1882 and 1883 and registered in the 1<sup>st</sup> defendant’s name.

The 1<sup>st</sup> defendant had an inalienable right to apply and be allocated the suit property but could not use it for any purpose other than public good, thus; residential, industrial.

All the processes were undertaken by the government of Kenya after the application by the 1<sup>st</sup> defendant. The application was approved by the President of Kenya. The fact that the area has not been properly planned, cannot be visited on the 1<sup>st</sup> defendant who is innocent in the irregularities by the Commissioner of Lands. The plaintiff has failed to demonstrate that the 1<sup>st</sup> defendant intends to deviate from the purpose the suit land was acquired.

In conclusion, this court finds that the land in dispute was compulsorily acquired for public purpose and thus a lease issued with conditions that the land was to be utilized for public purpose thus for residential plots, industrial plots which is public purpose. There is no evidence of fraud or misrepresentation by the 1<sup>st</sup> defendant in the acquisition of title.

**Section 2** of repealed **Registration of Titles Act** requires the following proof for fraud:

**“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”**

The 1<sup>st</sup> defendant has demonstrated chronologically how he obtained title to the suit property and in compliance with the law and indeed the letters between the director of survey and commissioner of lands demonstrate that a survey was done before he was issued with the title. The survey done in 2005 appears to be the survey for the remaining portion of 217 acres. PEX14 created two parcels namely 2365 and 2366 and was meant to separate the land compulsorily acquired by the government from the remainder. However, it showed that the parcel number 2366 had other parcels within implying that the property had been earlier surveyed. I’m convinced that the property was surveyed sometimes before the year 1992 when the beacons certificate was issued and block 15 created as the block could not be created without a survey. There could be procedural lapses by the Ministry of lands but the 1<sup>st</sup> defendant cannot be blamed for the procedural impropriety of the ministry of lands. The upshot of the above is that the two consolidated suits are dismissed with no costs this being public interest litigation. Orders accordingly.

**Dated and delivered at Eldoret this 9<sup>th</sup> day of August, 2019.**

**OMBWAYO**

**JUDGE**