



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**CIVIL SUIT NO. 189 OF 2014**

**HUZEFA AMIRALI.....1<sup>ST</sup> PLAINTIFF**

**ARWA FIROZ TAYBJI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF UASIN GISHU.....1<sup>ST</sup> DEFENDANT**

**THE CHIEF OFFICER LANDS,**

**HOUSING AND PHYSICAL PLANNING**

**COUNTY GOVERNMENT OF UASIN GISHU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 9<sup>th</sup> June 2014 the plaintiffs herein sued the defendants seeking for the following orders:

- a) A declaration that the Plaintiffs are the absolute proprietors of the leasehold interest in title number ELDORET MUNICIPALITY BLOCK 14/2027 and a declaration that the defendant's actions in interfering with the plaintiff's development of the said land is illegal and in bad faith.
- b) A permanent injunction restraining the defendants from demolishing the building erected on the said land.
- c) Costs and interest.

The plaintiffs filed an application for injunction contemporaneously with the plaint which was heard and the court granted the orders as prayed. The matter was listed for hearing and the plaintiff and the defendant testified in support of their case.

**Plaintiffs' Case**

It was the plaintiff's case that they are the registered proprietors of a leasehold interest comprised in the land parcel Eldoret Municipality/Block 4/2027. PW1 stated that they purchased this land on 16<sup>th</sup> August 2012 from the previous registered owner at a consideration of Kshs. 3,200,000/= and the land was then transferred into their names whereby they decided to develop it.

PW 1 further stated that they drew up a development plan and forwarded the same for approval which was approved on diverse dates by the District Physical Planner, the Municipal Engineer, the Chief Public Health Officer of the now defunct Municipal Council of Eldoret, and the National Environmental Management Authority (NEMA).

PW 1 also stated that they then embarked on developing the land, which was at various stages, supervised and inspected by the County Engineer of Uasin Gishu County and inspection cards were issued and signed by the County Engineer. PW1 stated that despite all this, the defendants and their officers in the month of March 2014 started making calls to the plaintiffs asking for proof of approval of their development which led to meetings being held to table all their approvals but later the defendants started demanding lease documents to the suit land and the original sub-division plan of the original parcel.

The plaintiffs stated that they were not the original allottees of the suit land and therefore did not have these documents as the sub-divisions were done by the Director of Surveys and Director of Physical Planning with the involvement of the Municipal Council of Eldoret and therefore the defendants must be in possession of the documents. PW1 further stated that they nevertheless embarked on looking for the said

documents but while they were looking for these documents, the defendants ordered the plaintiffs to stop construction on the suit property on 23<sup>rd</sup> May 2014. PW1 produced a sale agreement, copies of green card, certificate of lease, development plan and approved plans by the Municipal Engineer, District Physical Planning officer

It was PW1's further evidence that they attempted to hold meetings to amicably settle the matter but while this was ongoing, the defendants went to the property on 6<sup>th</sup> June 2014 and earmarked it for demolition at a time when the plaintiffs were about to complete construction of the ground floor and take in tenants and that the stop order greatly prejudiced them. It is the plaintiffs evidence that the conduct of the defendants has been oppressive and in violation of the plaintiffs' fundamental rights to own property. The plaintiff therefore urged the court to grant the orders as prayed in the plaint.

### **Defence Case**

The defendants filed a defence to the suit and averred that the request for documents was done in good faith for verification and authentication and that these documents were not available in the defendants' file. DW1 testified and claimed that the suit land is on a public utility and that the registration of the plaintiffs as proprietors is suspect. He also stated that that the plaintiffs were forewarned before starting to put up structures on the plot. They urged the court to dismiss the plaintiffs' case with costs to the defendant.

### **Plaintiff's Submissions**

Counsel for the plaintiffs reiterated the brief facts as set out in the plaint and that the plaintiffs have proved their case by production of the sale agreement, the transfer documents, the certificate of lease issued in the joint names of the plaintiffs, copies of the green card and a registry index map of the suit land as exhibits before the court.

Counsel also submitted that the plaintiffs sought approvals which were done by the District Physical Planning Officer, the Chief Public Health Officer of the Municipal Council of Eldoret on 28<sup>th</sup> September 2012 respectively and by the Municipal Engineer of the Municipal Council and 16<sup>th</sup> October 2012. Counsel also submitted that the development plan was approved by the National Environment Management Authority (NEMA) and the license issued to that effect on 14<sup>th</sup> March 2014 including the inspection cards duly signed by the County Engineer of the 1<sup>st</sup> defendant confirming supervision of the developments and construction at the various stages.

Counsel submitted that the plaintiffs are entitled to protection under Article 40 of the Constitution of Kenya. Counsel cited the case of **Rutongot farm Ltd v Kenya Forest Service & 3 others (2018) eKLR** in support of the plaintiff's case. Counsel also took issue with the defendant's statement of defence which he stated that does not allege fraud on the part of the plaintiffs with regards to acquiring and seeking the statutory approvals for the construction work to be carried out on the suit land.

Counsel therefore submitted that it is trite law that a certificate of lease issued by the Registrar is prima facie evidence of ownership especially in circumstances where purchasers exercised due diligence at the point of acquisition. That the plaintiffs are bona fide purchasers for value without notice of defect in title as they were not allotted the land from the government but purchased the land from one Sylus Kiprop Limo who happened to have a certificate of lease.

Counsel submitted that the plaintiffs' title to the suit land is indefeasible and further that the land registration process in Kenya is a product of the Torrens system and cited the case of **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority and 4 others (2019) eKLR** to buttress this position.

Counsel cited section 26(1) of the Land Registration Act on the indefeasibility of title and submitted that the plaintiff are absolute indefeasible owners of the suit land since the defendants have not proven fraud, illegality and /or corrupt schemes leading to the registration and issuance of the certificate of lease.

Counsel submitted that the plaintiffs are entitled to compensation of Kshs, 150,000/ per month making a total of Kshs. 450,000/ which would have been rental income had the defendants not stopped the construction. Counsel relied on the case of **Felix Mathenge v Kenya Power & Lighting Company Ltd (2008) eKLR**.

### **ANALYSIS AND DETERMINATION**

The issues for determination in this case are:

- a) Whether the plaintiffs were bonafide purchasers for value without notice of defect in title
- b) Whether the plaintiffs have indefeasible title to the suit land.
- c) Whether the plaintiffs are entitled to damages for the estimated income lost due to the defendants' actions

On the first issue as to whether the plaintiffs were bona fide purchasers for value without notice, the principles on who a bona fide purchaser is are well laid down in the case of **Katende v. Haridar & Company Limited (2008) 2 E.A.173**, where the court held as follows:

**“..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:**

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

**A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”**

From the evidence on record and the documents produced it is clear that the plaintiffs fall under this category of bona fide purchasers. The plaintiffs have demonstrated that they conducted an official search and did their due diligence before they bought the property in question. The defendants just alleged that the property was for public utility but gave no evidence to support their claim. Mere claim that a property is for public utility without proof or foundational basis come to nought. The defendants should have gone further by producing documents to show that the land in dispute was reserved for public utility. This was not the case. I find that the plaintiffs are bona fide purchasers.

On the second issue as to whether the plaintiffs have indefeasible title to the suit property, having found above that the plaintiffs bought the suit land without notice of any defect and are therefore bona fide purchasers, it follows that the plaintiffs’ title is indefeasible as per section 26 of the Land Registration Act which enjoins the court to treat a certificate of title issued by the Registrar as prima facie evidence of ownership but it has a rider that the same should not have been procured fraudulently, illegally, unprocedurally or through corrupt scheme.

Section 26 of the Land Registration Act provides;

*(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.*

There was no evidence that this title was fraudulently or unprocedurally acquired by the plaintiff and further the defendant did not prove that this parcel was reserved for public utility.

In the case of **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR** the court held;

*It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court’s judgments in Dr. Joseph Arap Ngok V. Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997 and Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallace Muthare (deceased) & 5 others, Civil Appeal 225 of 2006.*

*Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.*

In **Munyu Maina Vs.. Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that: -

*“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”*

I find that the plaintiffs’ title is indefeasible as it was backed by the process of acquisition which was not challenged. If there was proof of any irregularity then the court would not shy away from nullifying or cancelling the same as provided for under the law.

On the last issue as to whether the plaintiffs are entitled to compensation for loss of income from the time the stop order was issued, the

plaintiffs did not plead loss of income and need for compensation. A party is bound by their pleadings and the court will not grant what is not pleaded. Loss of income is a special damage which must be specifically pleaded and specifically proved. I therefore find that this limb fails.

Having considered the pleadings, the evidence on record and the submission by Counsel, I find that the plaintiffs have proved their case against the defendant to the required standard and are therefore entitled to the orders sought together with costs of the suit. I therefore make the following orders:

a) A declaration is hereby issued that the Plaintiffs are the absolute proprietors of the leasehold interest in title number ELDORET MUNICIPALITY BLOCK 14/2027 and a declaration that the defendant's actions in interfering with the plaintiff's development of the said land was illegal and in bad faith.

b) A permanent injunction is hereby issued restraining the defendants from demolishing the building erected on the said ELDORET MUNICIPALITY BLOCK 14/2027.

c) Costs and interest.

**DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF OCTOBER, 2019.**

**M. A. ODENY**

**JUDGE**

Judgment read in open Court in the presence of the Plaintiff and Miss Khandambi and in the absence of the defendant.

Court Assistant – Mr. Mwelem