



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 13 OF 2015 CONSOLIDATED WITH PETITION NO 14 OF 2015

IN THE MATTER OF THE CONSTITUTION OF KENYA (2010) ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 AND 47

AND

IN THE MATTER OF THE PIECE OF LAND KNOWN AS ELDORET MUNICIPALITY BLOCK 9/2810 AND SUB-DIVISIONS CREATED THEREUNDER KNOWN AS ELDORET MUNICIPALITY BLOCK 9/3115 TO 3126 INCLUSIVE

BETWEEN

MOSES KIPTOO RONO AND KEVIN KENETH OKWARA.....PETITIONERS

VERSUS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

COUNTY LAND REGISTRAR, UASIN GISHU COUNTY.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

THE DIRECTOR OF SURVEY.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

BEN MUNERIA WESONGA.....6TH RESPONDENT

JUDGMENT

PETITIONERS CASE

1. Moses Kiptoo Rono and Kevin Keneth Okwara (*hereinafter referred to as the petitioners*) have come to this court by way of a petition supported by their own affidavits against the respondents as the owners and registered proprietors as lessee from the Government of Kenya of the Leasehold interest for a period of 99 years from the 1.6.2007 of all that piece of land known as Eldoret Municipality/Block 9/3116 measuring 0.4047 hectares and Eldoret Municipality Block9/3115 measuring 1.842 situate within Eldoret Municipality.

2. The petitioners state that they purchased a leasehold interest measuring 0.4047 and 1.842 Hectares, respectively, of land parcel number ELDORET MUNICIPALITY/ BLOCK 9/2810, from Rehema Koriomat Investment Limited, the registered proprietor, Ibrahim Odhiambo Adero, Luke Kipkemboi Chemweno and Charles Kipkemboi Malakwen and that before purchasing the aforesaid parcel of land, due diligence was done on 31/7/2006 and an Official Search conducted at the Land Registry which showed that land parcel ELDORET MUNICIPALITY/ BLOCK 9/2810 belonged to Rehema Koriomat Investment Limited.

3. According to the petitioners, on or about 19/10/2006, Rehema Koriomat Investment Limited made an application for permission to subdivide land parcel number ELDORET MUNICIPALITY/ BLOCK 9/2810 to the Municipal Council of Eldoret and copied it to the then Commissioner of Lands, the Land Registrar, the Director of Physical Planning and the Director of Survey and that vide a letter dated 14/11/2006, the Municipal Council of Eldoret approved subdivision of land parcel ELDORET MUNICIPALITY/ BLOCK 9/2810. The following day, vide a letter dated 15/11/2006, the Ministry of Lands and Housing stated that they had no adverse comments to make on the proposal to subdivide land parcel ELDORET MUNICIPALITY/ BLOCK 9/2810 and almost one year thereafter, vide a letter dated 14/9/2007, the Commissioner of Lands Approved the aforementioned application for subdivision of land parcel ELDORET MUNICIPALITY/BLOCK 9/2810. Consequently, land parcel number ELDORET MUNICIPALITY/ BLOCK 9/2810 was subdivided giving

rise to land parcels number ELDORET MUNICIPALITY/ BLOCK 9/3115 and 3126.

4. That upon the Petitioners paying the full purchase price, Rehema Koriomat Investments Limited executed transfer forms over land parcel number ELDORET MUNICIPALITY/ BLOCK 9/3116 in favour of the Petitioner. The Petitioner presented transfer documents for purposes of valuation and valuation was done.
5. That upon payment of land Rent and Stamp Duty, the District Land Registrar Eldoret, the precursor of the 2nd Respondent herein, issued the Petitioners with Certificates of Lease for land parcel number ELDORET MUNICIPALITY/BLOCK 9/3116 and Eldoret Municipality/Block 9/3116 respectively. The Petitioners went on to apply for approval of building plans but were surprised on 28/8/2015 to learn that 1st Respondent intends to deprive and dispossess them of parcel number ELDORET MUNICIPALITY/BLOCK 9/3116 and Eldoret Municipality/Block 9/3116 by allotting both to the 6th Respondent under the pretext that the Certificate of Leases issued for the subdivision of ELDORET MUNICIPALITY/ BLOCK 9/2810 and subsequent entries in the Register are null and void ab-initio.
6. The Principal Land Officer has advised the Chief Lands Registrar to notify the Director of Survey to amend the Registry Index Map in favour of a third party, the 6th Respondent and that land parcel No. ELDORET MUNICIPALITY/BLOCK 9/2810 ceased to exist the moment it was subdivided into smaller units of land and new Certificates of Leases issued to different owners of which one of the parcels was subsequently transferred to the Petitioner herein.
7. The 1st Respondent has in contravention of the Petitioner's rights to property purported to cancel the Petitioners' Certificates of Lease and deprive and/or disposes the Petitioners of land parcel ELDORET MUNICIPALITY/BLOCK 9/3116 and Eldoret Municipality/Block 9/3115. The 1st Respondent has also directed the 3rd Respondent to Amend the Registry index map in favour of the 6th Respondent.
8. The Respondents, in contravention of the Petitioner's right to fair administrative action enshrined in **Article 47 of the Constitution of Kenya**, are attempting to deprive the Petitioners their right to property without issuing the Petitioners any notice and/or a hearing.
9. The action and/or decision of the 1st Respondent to revoke and/or cancel the leases and/or titles resultant from subdivision of land parcel ELDORET MUNICIPALITY/BLOCK 9/2810 which resulted in the creation of ELDORET MUNICIPALITY/ BLOCK 9/3116 and Eldoret Municipality/Block 9/3115 amongst others is unlawful and unprocedural, null and void ab initio.
10. The acts of the 1st, 2nd and 4th Respondent of purporting to change records at the Land Registry in respect of land parcel ELDORET MUNICIPALITY/BLOCK 9/2810, which no longer exist and creating titles in favour of the 6th Respondent amount to illegal, unlawful and unprocedural deprivation and dispossession of the Petitioner of its property and is inconsistent with **Article 40 of the Constitution of Kenya**.
11. The aforesaid illegal deprivation and dispossession of the Petitioner's property is a denial, violation and infringement of the Petitioners' Constitutional Rights to property.
12. The Petitioners seek the protection of this Court so that their rights under the Constitution are upheld.
13. The petitioners pray for a declaration that the Petitioners are the registered owner of a leasehold interest over land parcel ELDORET MUNICIPALITY/BLOCK 9/3116 and Eldoret Municipality/Block 9/3115 and that Certificates of Lease issued by the 2nd Respondent bearing the title numbers Eldoret Municipality/Block 9/3115 to 3126 are valid, regular and legal.
14. The petitioners further seek an order of **Certiorari** to quash the decision of the 1st Respondent to cancel the Lease and Certificates of Lease for land parcel number ELDORET MUNICIPALITY/BLOCK 9/2810 which is the mother title of the titles issued in (b) above and the decision to issue leases for Eldoret Municipality/Block 9/2810 to the 6th Respondent contrary to the rights of the Petitioner and to alter, vary and/or change the records of land parcel ELDORET MUNICIPALITY/BLOCK 9/2810 at the Lands Registry in favour of the 6th Respondent.
15. The petitioners further pray for an order of **Certiorari** to quash amendment of the Registry index map for land parcel ELDORET MUNICIPALITY/ BLOCK 9/2810, by the 3rd Respondent's in favor of the 6th Respondent.
16. Furthermore, the petitioners pray for an order of **Certiorari** to quash any title issued to the 6th Respondent over Eldoret Municipality/Block 9/2810 or any other title number that will affect the interest of the Petitioner.
17. The petitioners further seek an order of **Mandamus** against the 1st and 2nd Respondents to restore the Petitioners as the registered proprietors of a leasehold interest over land parcel Eldoret Municipality/Block 9/3115 and to reconstruct of land registry documents to reflect the Petitioner as the registered proprietor of the land.
18. The petitioners seek an order that the 6th Respondent, his servants and/or agents **surrenders to the Court** for destruction all documents including leases and certificates of lease in respect of Eldoret Municipality/Block 9/2810 issued in his favour.
19. Lastly the petitioner seeks a **Permanent Injunction** to restrain the 6th Respondent by himself or his servants and/or agents from alienating, transferring, charging, leasing, subdividing, taking possession, continuing to occupy or in any other way dealing or interfering with land parcel number Eldoret Municipality/Block 9/2810 and the subdivisions effected thereunder being Eldoret Municipality/Block 9/3115 — 3126 and the Petitioners interest in any of the said land parcels with Costs of the Petition.

THE 1ST TO 5TH RESPONDENTS CASE

20. The 1st – 5th respondents filed a replying affidavit through **Priscilla Njeri Wango** who states that she is a land surveyor working with the Director of Surveys. She states that the office received instruction from the Principal Land Administration Officer in Land Registrar's office to amend the Registry Index Map to reflect some changes contained in the internal memo dated 14.8.2015. On receiving instruction, a search was carried out on parcel No. 2810 but it revealed that the records of parcel No. 2810 do not exist. The purported subdivisions were cancelled. Moreover, that investigation revealed that L. R. No. Eldoret Municipality Block 9/2810 was acquired irregularly hence proper for cancellation. She amended the existing Registry Index Map to create L. R. No. Eldoret Municipality Block 9/3338 and 3339 in favour of 6th respondent without knowledge of the existing court order.

21. Dorothy Leting, the County Land Registrar confirmed that the 6th respondents newly created numbers were super imposed on Eldoret Municipality Block 9/3115 – 3126. The existing Registry Index Map showed that Block 9/3115-3126 existed.

22. Ben Muneria Wesonga, 6th respondent states that he was allocated the unsurveyed commercial plots 1 and 2 Block 9/Eldoret Municipality on 14.12.1992 by retired President Daniel Toroitich Arap Moi. He paid for stand premium and the department of Lands opened file number 180821 for Plot No. 1 and issued receipt No. D446602. He was issued with receipt No. D446603 for Plot No. 2. He paid for both plots and was issued with one receipt. He paid for land rent owing between 1992 – 2014 on 2.10.2014 amounting to Kshs. 225,000.

23. The leases in respect of parcel No. 2810 could not be prepared due to the fact that there was an overlapping of plots No. 3118 and 3122 and 3126 from an earlier subdivision of Plot No. Block 9/2810. A grant could just be prepared due to the overlapping plots.

24. According to the 6th respondent, the documents held by the petitioner are fake and that there are no letters of allotment. In a nutshell, it is the 6th respondent's case that the titles to the property in dispute was fraudulently obtained.

25. In the supplementary affidavit filed on 6.11.2017, Moses Kiptoo Rono states that the letters of allotment were issued on 14.12.1992 and had specific conditions to meet with specific time by the allottee and in default, the allotment lapsed. It is stated that the 6th respondent failed to meet the conditions on time as he was to pay within 30 days of the date of the allotment letter. At the time, he was making the payment, the allotment had lapsed and the payment was of no consequence. The petitioner alleges that the leases annexed by the 6th respondent are signed by unnamed and unknown Chief Land Registrar in 2016 when the subject lands had existing titles. Moreover, that the leases do not have the seal to authenticate the purported signatures of 27.1.2016.

SUBMISSIONS BY PETITIONER

26. The petitioner submits that it is evident that he purchased a leasehold interest measuring 0.4047 hectares of land parcel number Eldoret Municipality 9/2810 from Rehema Koriomat Investments Ltd, the registered proprietors Ibrahim Odhiambo Adero, Luke Kipkemboi Chemweno and Charles Kipkemboi Malakwen. Before he bought the land, he did a search and found the land was registered in the name of Rehema Koriomat Investment Limited and Rehema Koriomat Investment Limited made an application to subdivide land parcel No. Eldoret Municipality Block 9/2810. Subdivision was done and the resultant parcels of land were 9/3115 to 3126. The petitioner claims to be an innocent purchaser for value without notice of any fraud.

27. The petitioner submits that the cancellation or revocation of the lease and certificate of leases for land parcel No. Eldoret Municipality Block 9/3116 without issuing a notice to the petitioner and having the petition contravened the petitioner's right to fair administrative action enshrined under Article 47 of the Constitution of Kenya and flaunted the rules of natural justice. In purporting to the change, the records at the Land Registry in respect of parcel of land No. Eldoret Municipality Block 9/2810 and the resultant subdivision in favour of the 6th respondent was unfair, illegal, unconstitutional and deprivation of the property contrary to Article 40 of the Constitution of Kenya, 2010 and Article 47 of the Constitution of Kenya, 2010.

SUBMISSIONS BY THE 6TH RESPONDENT

28. The 6th respondent submits that he has a superior claim to the land, however, he goes further to heap a lot of complaints on the state counsel and the County Land Registrar. The submissions filed by the 6th respondent are not submissions properly so called as he appears to be applying that the case be heard afresh.

SUBMISSIONS BY THE 1ST TO 5TH RESPONDENTS

29. Mr. Odongo for 1st to 5th respondents submits that the issue before court is not whether the petitioner's title contained in Block 9/3116 or the whole of Block 19/2810 was acquired regularly or properly. He argues that the 1st to 5th respondents have not sanctioned the legality of Block 9/2810 and have not questioned the legality of the 6th respondent's leases in respect of Block 9/3338 and 3339. They argue that this is an issue that should be argued on full trial.

30. The Attorney General admits that the respondents did not follow due process of the law and he is of the opinion that the courts should not condone impunity. He however admits that the petitioner is the registered proprietor of the suit property Block 9/3116 which is a subdivision of Block 9/2810. He holds a valid certificate of lease issued by the 2nd respondent which he has committed to a permanent institution. The 6th respondent is registered as proprietor of Block 9/3338 and 3339 which if registered hold superimpose the petitioner's title. Mr. Odongo further argues that due process should be followed in dispossessing an individual of his property. He appears to support the petitioner that due process and fair administrative action was not applied.

DETERMINATION

31. I have considered the evidence on record and submission by all parties herein and do find that the petitioner was registered as the proprietor of land No. Eldoret Municipality/Block 9/3116 on the 30.7.2014 and charged the said property to I and M Bank Limited. The property was a resultant of the subdivision of Eldoret Municipality Block 9/2810, which was registered in the name of Rehema Kariomat Investment Limited and a certificate of lease issued. Rehema Kariomat Investment Limited made an application on 19.10.2006 for permission for subdivision of plot No. Block 9/2810 and the approval was made on 13.11.2006. On the 14.9.2007, the Commissioner of Lands approved the subdivision of L.R. No. Eldoret Municipality/Block 9/2810. It is in apparent that the 6th respondent has an allotment letter for plots numbers 1 and 2. It is not clear whether their two plots refer to parcel No. Block 9/2810. The issue before court as rightfully submitted by Mr. Odongo, learned state counsel is whether the petitioner was given the right to be heard before parcel of land number 3338 and 3337 were created. This court finds that the two parcels were irregularly superimposed on parcel numbers 3118 and 3126 without affording the petition a hearing. Article 40 of the Constitution protects the right to property in the following words:

“40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(c) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(d) 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).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(e) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(f) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

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

32. Article 40 (6) presupposes that before any action is taken deposing a person of his land, there must be a hearing. Otherwise who is supposed to find that the property was unlawfully acquired. The act of unilaterally causing the land to be subdivided and creating parcel numbers 3338 and 3339 without affording the petitioner a hearing was unfair and contrary to article 40 (6) that requires a hearing.

33. The next issue to be considered is whether the 1st Respondent violated the Petitioner’s rights under Article 47 of the Constitution of any other Article of the Constitution. The Petitioner contended that the 1st Respondent, violated its (the Petitioner’s) rights to fair administrative action as stipulated under **Article 47** of the **Constitution**. In that context, the right to a hearing in a quasi-judicial context is contained in **Article 50** of the **Constitution** which provides that;

“every person has the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a Court or if appropriate another independent and impartial tribunal or body”.

34. On the other hand, **Article 47** of the **Constitution** provides for the right to a procedurally fair administrative process as follows;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

35. **Article 47** above is clear that when an administrative action is being undertaken, the person affected by the decision, ought to be given a hearing or written reason for the decision. The 1st respondent did not do so as required by the law. It was the Petitioner's contention that the decision to revoke its title to the suit property has violated its right to property as it is a *bona fide* purchaser for value without notice.

36. **Article 40** of the **Constitution** protects property rights. In order to enforce this right, a party must demonstrate that it is entitled to the property in issue and clearly show the proprietary interest sought to be protected.

37. In **Joseph Ihugo Mwaura and 82 others vs Attorney General Petition No.498 of 2009** the Court stated as follows;

“Section 74 of the Constitution (equivalent of Article 40 of Constitution 2010) contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically Section 75 does not create proprietary interest nor does it allow the Court to create such rights by constitutional fiat. It protects proprietary interest acquired through the exiting legal framework.”

38. For a party to enforce the rights in **Article 40** of the **Constitution**, it must also establish that it has an indefeasible title to property. The petitioners have title to property which has not been found to have been unlawfully acquired and yet the same have been nullified.

Conclusion

39. It must be remembered that the substratum of the Petitioners' case was that the 1st Respondent did not follow due process in the creation of the new parcels of land which in essence superimposed the new numbers on the old numbers both created by the respondents. The act of creating new titles of the suit land when the same was registered as Block 9/2810 and subdivided into Block 9/3116 to 3159 was an act of deprivation of an interest in property contrary to the law. The Fair Administrative Action Act, 2015 provides for fair hearing, reasons for any action, right to information. The process followed by the respondents in cancelling the petitioners' titles contravenes the principle of fair administrative action.

40. This court observes that a country that respects its people will always apply the rule of law, democracy and people's participation in its making and implementation of public policy decisions. In this case the respondents should adhere to the provision of Articles 10, 40, 47 and 50 of the Constitution of Kenya 2010 by applying the law in a fair and transparent manner. The upshot of the above, I do find that the whole process of creation of parcels of land numbers 3338 and 3339 was contrary to law and therefore, a nullity.

41. I do grant a declaration that the petitioners are the registered owners of a leasehold interest over land parcel ELDORET MUNICIPALITY/BLOCK 9/3116 and Eldoret Municipality/Block 9/3115 respectively as the records show that the property is registered in the petitioners' names.

42. I do grant an order of **Certiorari** to quash the decision of the 1st Respondent to cancel the Lease and Certificates of Lease for land parcel number ELDORET MUNICIPALITY/BLOCK 9/2810 which is the mother title of the titles issued in (b) above and the decision to issue leases for Eldoret Municipality/Block 9/2810 to the 6th Respondent contrary to the rights of the Petitioner and to alter, vary and/or change the records of land parcel ELDORET MUNICIPALITY/BLOCK 9/2810 at the Lands Registry in favor of the 6th Respondent.

43. I do further grant an order of **Certiorari** to quash amendment of the Registry index map for land parcel ELDORET MUNICIPALITY/BLOCK 9/2810, by the 3rd Respondent's in favor of the 6th Respondent.

44. Lastly, I do grant an order of **Certiorari** to quash any title issued to the 6th Respondent over Eldoret Municipality/Block 9/2810 or any other title number that will affect the interest of the Petitioner.

45. Costs of the petition to be borne by the 1st to 5th respondents. No orders as to costs against the 6th respondent as he was not the cause of the dispute. Orders accordingly.

Dated and delivered at Eldoret this 20th day of April, 2018.

OMBWAYO

JUDGE