



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 246 OF 2013**

**KELMAS INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

***Kelmas Investments Limited*** has come to court against the Attorney general claiming that on or about 8<sup>th</sup> January 1996, the department of physical planning wrote to the Commissioner of Lands in reference to his letter of 8<sup>th</sup> November, 1995 for his approval of the Town Clerk's recommendation for allotment and that before, during and after the application for allotment of a residential plot by Contrasup Enterprises Limited, the plaintiff sought to know the procedure followed in acquisition of the said plot which was availed and was duly convinced that the right procedures were followed right from the Ministry of Lands Headquarters up to the Municipal Council of Eldoret and immediately obtained title No. Eldoret Municipality Block 5/706.

On or about the year 2006, the plaintiff was desirous of disposing of the said property situated within Eldoret Municipality while one Wilfred Mwangi Watunu was willing to acquire the same and relevant transactions undertaken by both parties willingly as there was no encumbrance whatsoever. On or about 20<sup>th</sup> December 2007, the said Wilfred Mwangi Watunu obtained a certificate of lease which was again unencumbered. On or about June 2008, the said Wilfred Mwangi Watunu sought to subdivide the same and did obtain relevant consents from relevant authorities to do so and proceeded accordingly. On or about the year 2012, the current proprietor realized that the said parcel of land thus Eldoret Municipality Block 5/706 was named in the report of the Commission of Enquiry into the illegal/irregular allocation of public land popularly known as The Ndung'u Report.

That pursuant to the above, the plaintiff instructed the firm of M/s Obura Obwatinya & Company Advocates to seek clarification from the relevant arm of the government more specifically the Ministry of Housing through the County Director of Housing, Uasin Gishu County. That it was thereafter established that the said plot is not listed in their records as part of a government housing compound thereby confirming that the property was erroneously cited in the Ndung'u report as a government housing.

That it is therefore paramount that the same be expunged from the Ndung'u report for the sake of the record. That there is no other suit pending before any other court of competent jurisdiction between the same parties over the same subject matter neither have there been previous proceedings over the same. He prays that Eldoret/Municipality Block 5/706 be expunged from the report of the Commission of Inquiry into the illegal/irregular allocation of public land.

The Honourable Attorney General filed a statement of defence stating that the acquisition of the suit land by the plaintiff and Contrasup Enterprises Limited was irregular for the land was public land reserved for public purposes namely a government house for Uasin Gishu Primary School and hence was not available for alienation. He adds that Contrasup did not pass a good title to the plaintiff nor did the plaintiff pass a good title to Wilfred Mwangi Watunu. The suit land being public land was irregularly acquired and therefore it was fair that it be included in the Ndung'u report with a recommendation that its acquisition by third parties be revoked. The recommendation of a Commission has no force of law and therefore cannot form a basis of a suit and therefore the present suit is not sustainable.

The plaintiff states that the suit is public land with a school hence public interest outweighs private interest. I have considered the pleadings and written submissions and do find that the plaintiff has no legal cause of action as the Ndung'u report was a recommendation as opposed to a final verdict. The government of Kenya has the duty to consider the recommendation and take action under part viii of the land registration act that makes provision for rectification and indemnity. It is trite law that title can only be cancelled by the Registrar under the provisions of section 79 of the Land Registration Act Cap 300 and by the court under Section 80 of the said Act. Section 79 that deals with rectification by the registrar provides that: -

***(1) The Registrar may rectify the register or any instrument presented for registration in the following cases—***

**(a) in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;**

**(b) in any case and at any time with the consent of all affected parties; or**

**(c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;**

**(d) for purposes of updating the register;**

**(e) for purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.**

**(2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless—**

**(a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or**

**(b) it would for any other reason be unjust for the alteration not to be made,**

*Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.*

**(3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.**

**(3A) A person aggrieved by the decision of the Registrar under this section may apply to the Court for any necessary orders.**

**(4) The Cabinet Secretary may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under this section and without prejudice to the generality of the foregoing, the regulations may provide for—**

**(a) the process of investigation including notification of affected parties;**

**(b) hearing of the matters raised; and**

**(c) the criteria to be followed in coming up with the decision.**

Section 80 that provides for rectification by order of Court states that: -

**(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

If the plaintiff obtained the property lawfully, he will be protected by Article 40 of the Constitution of Kenya that provides: -

**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—*

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

*(b) 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—*

*(a) 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*

*(b) 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.*

The Ndungu report has not cancelled or revoked the title and therefore, the plaintiff's rights have not been threatened or affected and that if the report was to be implemented, due process of law shall be applied by the registrar or the court depending on the circumstances and if the court is satisfied that the proprietors of the land mentioned in the report did not contribute to the mistake or illegality they will be entitled to indemnity. The upshot of the above is that I do find the suit premature and the same is dismissed with costs.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of June, 2018.**

**A. OMBWAYO**

**JUDGE**