



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CSE NO. 186 OF 2017

GABRIEL S. CHEPKWONY.....PLAINTIFF

VERSUS

GIDION NZIOKI MBILI.....1ST DEFENDANT

AGNES MWEENDE MUTUNE.....2ND DEFENDANT

JUDGMENT

By a plaint dated 27th April 2017 the Plaintiff sued the Defendants herein seeking the following reliefs:-

- a) An order for permanent injunction restraining the Defendants by themselves, their servants and/or agents from interfering, trespassing, intermeddling, continuing to develop, selling and/or in any other manner dealing with plot NO. ELDORET MUNICIPALITY BLOCK 9/23 1 formerly PDP NO. 17/93/58 SUB-PLOT NO.2.
- b) An order of declaration that the Plaintiff is the bonafide legal owner of the suit parcel of land.
- c) An eviction order against the defendants.
- d) Compensation for loss of user.
- e) Costs of this suit.
- f) Any other relief the Honourable court may deem fit to grant in the circumstances.

The plaintiff filed an application for injunction contemporaneously with the plaint under certificate of urgency which was heard and determined. The court found that the plaintiff did not meet the threshold for grant of temporary injunctions and therefore dismissed the application with costs in the cause. The parties were ordered to comply with order 11 within 30 days and set down the main suit for hearing.

Plaintiff's Case

The plaintiff gave evidence and stated that he is the owner of the suit parcel of land known as ELDORET MUNICIPALITY BLOCK 9/2316 formerly PDP NO.17/93/58 SUB-PLOT NO.2 which was allocated to him on 14th June, 1994 by the defunct Municipal Council of Eldoret and he holds an original letter of allotment which he produced as an exhibit before the court. He stated that he duly paid the requisite purchase fee to the said Municipal Council of Eldoret being Kshs.32, 000/= and Kshs. 12, 000/= respectively.

It was the plaintiff's evidence that in the year 2015 he discovered that someone had encroached on his suit parcel of land and had begun developing the same. It was his evidence that he expected his children to build the suit plot but they did not. He stated that he made a complaint to the Ministry of Lands, Housing & Physical Planning Uasin Gishu County whereby the defendants were summoned to appear before the County Physical Planning offices to bring their original documents in relation to the suit parcel of land for purposes of verification but the defendants never turned up.

The plaintiff further stated that his son went to the Lands office but he did not know whether he took the documents with him or not. He further stated that he has been paying rates to the County Government of Uasin Gishu ever since he was allocated the suit parcel of land and he produced a bundle of rates payment receipts in court. The plaintiff also gave evidence that he was issued with a duly approved development plan and an inspection card by the then Municipal Council of Eldoret on 13th May, 2011 and that the defendants through their allies and/or accomplices with impunity duplicated the records at the Municipal Council of Eldoret and faked the allotment letter they purport to hold and later used the same to fraudulently cause the transfer of the suit parcel of land to their names and acquired title.

The plaintiff gave evidence that the Defendants used illegal and fraudulent means to acquire the suit parcel of land, making it difficult for them to change the records at the county offices. He stated that they should not be allowed to benefit from their illegal actions. The plaintiff therefore prayed for the cancellation of the defendant's title and the same be registered in his name as the legal allottee.

On cross examination by the defendant's Counsel the plaintiff stated that he was allotted the plot in 1994 but was not able to build within 2 years as was stipulated in the letter of allotment because he did not have the means. He also confirmed that he did not know the defendants and that he got their names from the Municipal Council. He was also not aware that the suit plot was allocated to one Douglas Kimani in 1994.

The plaintiff also stated in cross examination that he did not know that the plot had been sold to the defendant but confirmed that it is now 21 years and he has never developed the plot as was a condition for allotment to develop within 2 years.

PW2 Jacton Kiprop an Acting Chief officer Physical planning and Urban Development Uasin Gishu County gave evidence and stated that the plaintiff's allotment letter was similar to the ones in their files at the office. He stated that the plaintiff's documents and the defendant's did not originate from the same file as the reference numbers were different. The witness confirmed that he received a letter of complaint from the plaintiff and he summoned both the plaintiff and the defendant to appear in his office with original documents in respect of the suit land. He stated that he had asked them to come with original allotment letters, PDP plans, approved building plans and lease certificates of which he stated that the plaintiff's son came but the defendant did not appear.

He further testified that a notice was issued to the defendant to stop construction by a Chief officer known as Mutai. He said that they sent their officers to mark the structure with x which was done. He confirmed that the defendant's inspection card was issued and signed by their office.

On cross examination by Mr. Mutei, PW2 stated that from a casual glance, the defendant's allotment letter did not originate from their office because Eldoret Municipality as appearing in the allotment letter and Municipal Council of Eldoret are different. The witness was shown the certificate of lease which indicated that the lessor was Eldoret Municipality but PW2 indicated that he cannot comment on a document issued by the Registrar of lands.

PW2 confirmed that nobody can undertake any construction without their knowledge and that the names of the defendants were supplied to the plaintiff by their office. The witness also stated that the plaintiff had not satisfied the conditions on the allotment letter. He finally stated that their office had made site visit and the last one was done on 24/8/17.

The plaintiff therefore closed his case.

DEFENCE CASE

DW1 gave evidence and stated that he is a businessman and the 2nd defendant is his wife who are joint owners of the suit land. It was his evidence that he bought the suit land from one David Mwangi in 2011 vide a land sale agreement dated 2/4/2011 who had initially acquired the suit land from an original allottee one, DOUGLAS KIMANI MUHUGU who had an allotment letter dated 14/6/94. The defendant produced a copy of the agreement, the allotment letter, transfer of lease, certificate of lease, a bundle of rates payments receipts in the name of Douglas Kimani as the record had not been changed at the Municipal Council, building plans and inspection card.

The defendant stated that he took possession of the suit land immediately after purchase and constructed a temporary structure and materials in 2011. It was further his evidence that he did building plans which were approved by the Municipal Council who allocated an engineer to inspect the construction. DW1 stated that he started construction in 2013 and completed on 24/8/17 when the sewer was inspected and tenants allowed to take occupation. He further produced photographs of the development on the suit land.

It was the defendant's testimony that he has never received any communication that anyone is claiming the suit land and that he has trespassed on it. He stated that the official search indicates that he is the registered owner. He therefore prayed that the plaintiff's suit be dismissed with costs.

On cross examination by the plaintiff's Counsel the defendant stated that he purchased the land from David Mwangi who gave him the allotment letter which was in Douglas Kimani's name. He further stated that he conducted due diligence by carrying out a search. He confirmed that he went to the county offices but did not meet the plaintiff and that the plaintiff's son has never been to the site. He confirmed that he has paid rates upto 2018.

Plaintiff's submission

Counsel for the plaintiff submitted that the plaintiff has proved his case against the defendant and that the allotment letter produced by the defendant is not authentic. He urged the court to find that the defendant acquired the title fraudulently. He therefore prayed that judgment be entered for the plaintiff as per the plaint.

Defendant's Submission

Defendant's Counsel also filed submissions and reiterated the defendant's case. He submitted that the plaintiff admitted that ever since he was allocated the suit land more than 21 years ago he never followed up what was happening to the suit land. That the plaintiff also admitted that he did not fulfil the terms and conditions of the allotment letter which required an allottee to build or develop the suit land within 2 years.

Counsel further submitted that the plaintiff was aware that the suit land is registered in the defendants' names and had been developed with permanent buildings. Counsel stated that PW2 did not qualify as an expert as he did not exhibit any expertise and special knowledge on matters in issue before the court as per the definition of an expert witness in Black Law Dictionary 8th edition. He urged the court to disregard his evidence.

Counsel listed the issues for determination by the court as:

Whether the plaintiff would be entitled to the injunctive orders sought against the defendants in the circumstances

Whether the plaintiff's claim over the suit land would override the defendants' interest who are the registered owners.

Counsel submitted that the plaintiff is not entitled to the equitable remedy as he is guilty of laches and that since the defendants have acquired rights to the suit land, rights cannot be defeated by equity as equity follows the law. That the plaintiff did not prove fraud as alleged in his pleadings. He therefore urged the court to find that the plaintiff has not proved his case against the defendants and should be dismissed with costs.

Analysis and determination

This is a case where the plaintiff wants the court to grant an order of a permanent injunction against the defendants, a declaration that the plaintiff is the bona fide owner of the suit land, compensation for loss of user and eviction of the defendant.

The plaintiff filed this case together with an application for injunction but the court found that the balance of convenience tilted in favour of the defendant who was the registered owner and had extensively developed the suit land and was in occupation.

The issues for determination in this matter are whether the plaintiff is the bona fide owner of the suit land, whether the defendant fraudulently acquired the suit land, whether the plaintiff is entitled to the orders sought and finally whether the defendant is a bona fide purchaser.

On the 1st issue as to whether the plaintiff is the bona fide owner of the suit land, it is not in dispute that the plaintiff produced a letter of allotment which was issued on the same year as the one that the defendant produced. From the onset and from the evidence on record together with the documentation produced, it seems that the plaintiff slept on his rights after allocation of the suit land. The allotment letter indicated that the allocation of the plot was subject to written acceptance of the terms and conditions stipulated and payment of the prescribed charges.

It was a term of the allotment letter that the plaintiff was to pay rates and that he was to develop the plot within 2 years from the date of the acceptance of the offer. The other condition was that a person was not to sell, transfer, charge, sub let or otherwise part with the possession of the plot or any part thereof except with the prior written consent of the Council.

The plaintiff admitted that he did not develop the suit land as required as he did not have the money to do so. He stated that he expected his children to develop but they did not do so. This was more than 21 years after the allocation and that he did not go to the suit land until 2015 when he realized that someone had encroached on his suit land.

On the 2nd issue as to whether the defendant fraudulently acquired the suit land, the plaintiff listed particulars of fraud on the part of the defendant as required by law but did not lead credible evidence to prove the allegation of fraud. When a person alleges fraud, this is a serious issue which is criminal in nature and it does not only require the particulars to be listed but must be specifically proved. How do you prove that a transaction was fraudulent? Do you just shout from the roof top that a transaction is fraudulent or you engage the relevant investigative agencies to help in unearthing the act?

The plaintiff did not take steps to prove the allegation of fraud against the defendants. PW2 who was a witness from the County government did not help the case both because he admitted that the approvals that were done for the construction of the defendants' buildings emanated from their offices and that no construction can take place without their knowledge. The witness did not strike me as a person who knew why he had come to court and what type of evidence he was to tender. He was not a document examiner expert so he could not authenticate which document was genuine and which one was fake.

I therefore find that the plaintiff has failed to prove that the defendant fraudulently obtained the title to the suit land. Having found the same it follows that the plaintiff is not entitled to the orders sought.

The defendant gave evidence on the process of how he acquired the suit land through purchase, produced documents including an allotment letter, sale agreement, consent from the Council for transfer which was a requirement, rates payment receipts, photographs of development of the plot, and building plan approvals, certificate of lease registered in his name. This was an elaborate process which was sanctioned by the then Municipal Council. I find that the plaintiff slept on his initial right and did not comply with the terms of the allotment. The plaintiff has also not met the threshold for grant of a permanent injunction against the defendant and therefore his suit must fail.

The court is alive of the provisions of section 26 of the Land Registration Act that states that if it is proven that a title was fraudulently acquired or by misrepresentation or mistake then the same can be nullified. The current case does not fall under the provisions of this section as misrepresentation or fraud has not been established.

I have considered the evidence of both the plaintiff and the defendant, the documents produced, judicial authorities together with the rival submissions by Counsel and I come to the conclusion that the plaintiff has failed to prove his case on a balance of probabilities and the same

is therefore dismissed with costs to the defendants.

Dated and delivered at Eldoret this 11th day of October, 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Juma holding brief for Mutei for defendant and Miss Kuyaki holding brief for Okara for Plaintiff.

Mr. Koech: Court Assistant