



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 200 OF 2015

RAGHBIR SINGH SIDHU.....PLAINTIFF

VERSUS

KIPKEMBOI ARAP KOSKEI.....1ST DEFENDANT

GEOFFREY TENAI.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE COUNTY LAND REGISTRAR, UASIN GISHU COUNTY.....4TH DEFENDANT

THE NATIONAL LAND COMMISSION.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

Raghibir Singh Sidhu (*hereinafter referred to as the plaintiff*) has come to court against the defendants claiming that he is the proprietor of the Land Parcel Number Eldoret Municipality/Block 13/265 and when he became the registered owner thereof, he was issued with a Certificate of Lease to that effect. The plaintiff had purchased the aforesaid property from the original allottees, Rannesh Lall Aggarwal and Sadrudin Shainshudin Nurani.

The lease thereof was due to expire on 1st October, 2009 and therefore he commenced the process of extension of lease and obtained all the requisite approvals. The 3rd defendant acknowledged having received the plaintiff's application for extension of the lease and the plaintiff never received any communication that his application had been rejected. That while the plaintiff was waiting for a response from the 3rd Defendant, it transpired that the 3rd Defendant ignored the plaintiff's application for extension of the lease and proceeded to issue a lease for 99 years effective from 1st June, 2012 in favour of the 1st Defendant. That on 28th February 2013, the 4th Defendant issued a Certificate of lease in respect of the land in favour of the 1st Defendant.

That the 1st Defendant then transferred the land to the 2nd Defendant. That the plaintiff avers that the defendants' acts and omissions herein are fraudulent.

The particulars of fraud by the 1st and 2nd defendants are grabbing the plaintiff's land, Stealing the plaintiff's land, secretly acquiring documents of title over the plaintiff's land despite knowing that the same was owned by the plaintiff, colluding with government officers to illegally acquire the plaintiff's parcel of land, acquiring documents of title on the plaintiff's parcel of land in disregard of the plaintiff's rights and failing to comply with the relevant laws and procedures for acquisition of land.

The particulars of fraud of the 3rd, 4th and 5th defendants are allocating and transferring the plaintiff's land to the 1st and 2nd defendants despite knowing that the plaintiff had preemptive rights thereof, failing to act on the plaintiff's application for extension of the lease, allocating and transferring the plaintiff's land to the 1st and 2nd defendants in total disregard of the laws, procedures and regulations governing the allocation and transfer of land and deliberately violating the plaintiff's statutory and constitutional rights on the land.

The plaintiffs aver that the defendants' actions are oppressive, illegal and in violation of the plaintiff's fundamental right to protection of property as set out in article 40 of the Constitution of Kenya.

The 1st and 2nd defendants have now commenced development of the aforesaid parcel of land by erecting a perimeter wall and that the plaintiff stands to suffer irreparable loss and damage unless the court grants the reliefs sought to secure their fundamental right to protection of property.

There is no other suit pending and neither have there ever been previous proceedings between the parties herein over the subject matter of this suit. That this Honourable Court has jurisdiction.

The plaintiff prays for a declaration that the plaintiff is the proprietors of the leasehold interest comprised in land title number ELDORET MUNICIPALITY/BLOCK 13/265 and an order compelling the 3rd, 5th and 6th defendants to issue the plaintiff with a lease over the land title number ELDORET MUNICIPALITY/BLOCK 13/265 subject to payment of the necessary statutory fees. The plaintiff further prays for an order for rectification of the register in respect of land title number ELDORET MUNICIPALITY/BLOCK 13/265 to delete the name of the 2nd defendant and in lieu thereof the name of the plaintiff be entered as the registered proprietor thereof.

Lastly, a permanent injunction restraining the 1st and 2nd defendants by themselves, their servants, employees, agents or any other persons acting on their behalf, or under their direction from trespassing into, entering into undertaking any development whatsoever, transferring, charging, encumbering, selling, leasing or completing any conveyance or disposition whatsoever on land title number ELDORET MUNICIPALITY/BLOCK 13/265. Plus, costs and interest thereof.

The 2nd defendant filed defence and counterclaim denying averments in the plaint to the extent that the plaintiff is the proprietor of land parcel ELDORET MUNICIPALITY BLOCK 13/265 and further denies to the extent that when he became the registered owner thereof he was issued with a certificate of lease to that effect.

The 2nd defendants denies the contents of paragraph 6 of the plaint to the extent that the lease was to expire on 1.10.2009.

The 2nd defendant avers that if at all the plaintiff purchased a leasehold interest from the original allottees Ramesh Lall Aggarwal and Sadrudin Shamshudin Nurani, such lease had and or expired by effluxion of time on or about the 1.10.2008 as opposed to plaintiff's allegation that the same expired on 1.10.2009.

The 2nd defendant denies the contents of paragraph 7 of the plaint to the extent that the plaintiff commenced the process of extension of lease and further denies that the plaintiff obtained all requisite approvals and invites the plaintiff to strict proof thereof.

The 2nd defendant avers that if at all the plaintiff ever applied for extension and or obtained the requisite approvals such application was done on or after July 2010, 2 years after expiry by effluxion of time and as such the same was of no legal effect/consequence in view of the fact that there was nothing capable of being extended. The 2nd defendant deny allegations and particulars of fraud levelled him and avers that he is a stranger to averments of violation of his right as stated in paragraphs 13 of the plaint and the plaintiff is invited to strict proof thereof. That no admission is made as to the alleged or any loss or damage and the plaintiff is put to strict proof thereof. That in the premises, the plaintiff is not entitled to the relief claimed or any relief sought.

The 2nd defendants aver that the plaintiff's suit is bad in law, does not disclose any reasonable cause of action, fatally defective, an abuse of the court process, untenable in law and hereby puts the plaintiff to notice that a preliminary objection shall be raised at the hearing to have this suit struck out.

In the counterclaim, the 2nd defendant avers that he is the legal and legitimate registered as leasehold proprietor of the suit property having purchased the same from the 1st defendant for value and without notice and after conducting due diligence as to the veracity of the 1st defendants' title. The 2nd defendant aver that he has since assumed possession of the suit property where he has put a perimeter wall on the same and as such the order of injunction sought by the plaintiff is not tenable.

The 2nd defendant's claim against the plaintiff is for wrongful claim of the property known as ELDORET MUNICIPALITY BLOCK 13/265 and as such claims damages and or mesne profits.

That the 2nd defendant further avers that the plaintiff does not hold any proprietary rights over the suit property known in law and or capable or worthy of being protected by the court. The 2nd defendant avers that the 1st defendant died on 10th /8/2015 and as such the suit is incompetent.

The 2nd defendant prays that the plaintiff's suit be dismissed with costs and that a permanent injunction do issue against the plaintiff restraining the plaintiff, his servants, workmen and agents, from entering on the 2nd defendants' property being ELDORET MUNICIPALITY BLOCK 13 /265 or interfering with 2nd defendant's proprietary rights, use and enjoyment of the said property.

The defendant prays for damages from the plaintiff for the wrongful entry on to the defendant's leasehold property known as ELDORET MUNICIPALITY BLOCK 13/265. Costs and interest of the suit and those of the counterclaim.

The 3rd, 4th, 5th and 6th defendants filed defence denying contents of the plaint and stating that the parcel of land herein, L. R. No. Eldoret Municipality Block 13/265 measuring 0.2162 Ha, was first allocated to Ramesh Lall Aggarwal and Sadrudin Shamshudin Nurani for a leasehold interest of 99 years with effect from 1.10.1909 at an annual rent of KShs.500/=. That on 24.11.1982, the register of the suit land was opened in the names of Ramesh Lall Aggarwal and Sadrudin Shamshudin Nurani.

That on 22.2.1983, the said parcel of land was transferred to Raghbir Singh Sidhu at a consideration of Kshs. 20,000/= and a certificate of lease issued forthwith. That on 28.2.2013, the register for the suit land was closed as the lease had expired.

The 3rd, 4th, 5th and 6th defendants aver that after expiry of the lease on 1.10.2008, the suit land reverted back to the Government of Kenya. The 3rd, 4th, 5th and 6th defendants further contend that on 23.2.2013 a new register was opened and the said parcel of land was registered in the name of Kipkemboi Arap Koskei, the 1st defendant herein, for a leasehold period of 99 years with effect from 1.6.2012 at an annual rent of Kshs. 21,300/= and on 7.8.2014, the suit land was transferred to Geoffrey Tenai and certificate of lease issued.

The 3rd and 4th defendants aver that they acted bonafide and within their statutory and constitutional mandates and were not aware of or party to the alleged fraud or particulars thereof and invite strict proof to the contrary from the plaintiff.

In his reply to defence and defence to counterclaim, the plaintiff states that the 3rd Defendant acknowledged having received the Plaintiff's application for extension of the lease and never communicated to him that his application had been rejected. The Defendant ignored and/or refused the Plaintiff's application for extension of lease and proceeded to issue a lease for 99 years effective from June, 2012 in favour of the Defendant and certificate of lease issued on 28th February, 2013.

That in reply to paragraphs 9, 10 and 11 of the defence, the plaintiff reiterates the contents of paragraphs 11 and 12 of the plaint and avers that the Defendants' actions are oppressive illegal and in violation of his fundamental right to protection of property as set out in article 40 of the constitution of Kenya.

In his defence to counterclaim the Plaintiff avers that the defendants are attempting to distort the true facts of the suit by making such baseless and false allegations. That demand and notice of intention to sue was never issued to the Plaintiff. The Plaintiff avers that the Defendant's Defence is incompetent, bad in law and shall at the opportune time apply to have it dismissed.

When the matter came for hearing, **PW1, Mr. Raghbir Singh Sidhu** testified that he is a farmer by profession. Parcel No. Eldoret Municipality/Block 13/265 belongs to the plaintiff. He bought the land from Ramesh Lall Aggarwal and Sadrudin Shamshudin Nurani. He produced the lease document dated 6.10.1982. He was issued with the certificate of lease issued on 1.1.1983. It was a lease for 99 years commencing on 1.10.1909. He applied for extension of lease on 20.9.2010. He applied for extension of lease and it was approved by the Town Planning Officer and the Physical Planning Officer. He applied for relevant applications. The extension was approved by the District Surveyor on 8.10.2010 and the Municipal Council of Eldoret. The approvals were forwarded to the Commissioner of Lands who wrote to the plaintiff. He enquired about the extension but got no response. Later, he learnt that the land had been allocated to someone else. He learnt that a new register was opened on 28.2.2013 and the land was registered in the name of Kipkemboi Arap Koskei. He states that the allocation was fraudulent.

On cross examination by Mr. Korir, he states that he planned to build but never did so. He has never fenced on the land. He has never developed the land. The 2nd defendant was registered on 2.8.2014.

On cross examination by Mr. Odongo, he states that the term was 99 years. The lease expired in 2009. He tried to extend the lease in 2010. He applied for renewal but did not receive any communication.

DW1, Geoffrey Tenai states that he has had an occasion of reading the plaintiff's claim and opposes the same as the said suit is frivolous vexatious, incompetent, an abuse of the court process and does not disclose any cause of action against him.

He states that he purchased the suit property from the deceased 1st defendant sometimes on 7th August 2013 at a consideration of Kshs. 4 million. That before he purchased the suit property, he conducted all due diligence by applying for a search at the land registry, whereof he confirmed that the 2nd defendant now deceased was the legal and registered owner of the suit property.

That upon being issued with the search, he confirmed that the registered owner was one Kipkemboi Arap Koskei, the 1st defendant herein. That he is not aware of any fraud neither perpetrated by himself nor the 1st defendant in view of the fact that documents held by the 1st defendant were genuine and regular on the face of it. That there was no registration of any interest by the plaintiff over the land.

That he is therefore a bonafide purchaser of the property for value and without any notice of the 2nd defendant's defect of title if any. That upon purchase and transfer of the property the 2nd defendant handed him possession of the property where he has had an exclusive possession of the same whereof he has proceeded to put up a perimeter wall and gate.

That he has had an occasion of perusing the plaintiff's annexures and has noted that the plaintiff has a hopeless case because the said lease expired on or about 1st October, 2008 and that the plaintiff's application for extension was done in the year 2010, 2 years after the lease had expired. That since the lease had expired, there was nothing to be extended.

That he is advised by his Advocate which advise he verily believes to be true that the law envisages an application for extension to be done before a lease has expired.

That he is further advised by his advocate that a lease being a contract in nature and therefore once it had expired without an extension the applicant/plaintiff was bound to apply a fresh in order to be allocated the land.

That since the plaintiff had failed to apply to be allocated the land, then the government through the commissioner was at liberty to issue the lease to the deceased which was properly done. That he is further advised by his advocate which advise he verily believes to be true that the

orders being sought in the suit are not tenable and the court has no jurisdiction to re-write contracts for the parties. That he prays that the suit be dismissed with costs of the suit and those of the counterclaim.

On cross examination, he states that he bought the land from the 1st defendant who is deceased. He paid Kshs. 4,000,000 for the land. He did not have a letter of allotment. He produced the agreement and title. He has put up a perimeter wall.

On cross examination by Mr. Odongo, he states that he did a search before purchasing the land. He did not peruse the parcel file. He obtained the consent to transfer. He did not collude with the County Land Registrar.

The 4th DW1, Dorothy Chepkogei Leting testified that she is the County Land Registrar. She is familiar with this case. It revolves on Eldoret Municipality Block 13/265. The land is a leasehold for 99 years from 1.6.2012. The plaintiff was registered on 22.2.1983. The term of the lease ran from 1st of October, 1909 for a term of 99 years. She has a copy of the lease. She produced the register as 4DEX1. The register was closed on 28.2.2013. The closure was due to the expiry of lease. Entry No. 4 shows the lease expired. She produced the lease for Ramesh Lall Aggarwal as 4DEX2. They transferred the parcel of land to the plaintiff. The first entry was on 24.11.1982. The land was transferred to Raghbir Singh Sidhu on the 22.2.1983 as per entry No. 2. Certificate of Lease was issued. Upon closure of the register, the land was subsequently re-allocated to one Kipkemboi Arap Koskei, the 1st defendant, on 28.2.2013. She had the certified copy of the white card. She had the allotment letter and produced the letter of allotment as 4DEX3. She does have the lease for Geoffrey Tenai. The land was reallocated to Kipkemboi Arap Koskei on 28.2.2013. The certificate of lease was issued on the same date. On 7.8.2014, the land was transferred to Geoffrey Tenai and certificate of lease issued on the same date. According to the Land Registrar, the plaintiff had not applied for extension of lease and therefore the allocation to the 1st defendant was regular. The land was for development and the condition for re-allocation is failing to develop the land. She did not collude with the defendants. They did not do a ground report. The registration of the 1st and 2nd defendants was lawful. She produces the registration for 1st and 2nd defendant as 4DEX9.

The gravamen of the plaintiff's submissions is that the lease lapsed on 1.10.2008 when the regime for disposition and renewal of government land was regulated by section 4 of the Government Land Act, Cap. 280 of the Laws of Kenya. The President under section 3 of the Government Land Act, the Commissioner of Lands under section 5 of the Government Land Act had the powers to issue leases. He argues that when the lease expired, the Government Land Act lacked express legislative provision for renewal of town plots.

The plaintiff submits that the County Land Registrar stated that the lease was allocated to the 1st defendant on 1.7.2012. According to the plaintiff, the law applicable is the Constitution of Kenya, 2010 and the Land Act No. 6 of 2012. The plaintiff submits that the 3rd and 5th defendants failed in their administrative duties in failing to consider the plaintiff in renewing the lease.

The plaintiff submits further that a plain reading of section 13 of the Land Act mandates the National Land Commission to offer the immediate past holder of a leasehold interest pre-emptive rights to allocation as long as the lessee is a citizen of Kenya and that the land is not required by the national or county government for public purposes. The plaintiff further argues that he had a legitimate expectation to a renewal of a lease.

The 2nd defendant submits that the plaintiff was a transferee of the lease over the suit property, the same having been transferred to him by Ramesh Lall Aggarwal, however the lease was subject to the rights, terms and conditions held by the transfers. The lease was issued for 99 years from 1.10.1909. The same expired on 1.10.2008 and therefore, any purported extension in 2010 was a nullity as the lease had expired and could not be extended. The extension came 2 years after expiry. The plaintiff ought to have applied for the re-allocation.

The 1st defendant further submits that the applicant has not demonstrated that land was developed in accordance with the terms and conditions of the lease. It is argued that the plaintiff did not adduce any evidence of fraud.

On the counterclaim, the 2nd defendant argues that he is an innocent purchaser for value without notice. He is the registered owner and therefore, section 24, 25 and 26 of the Land Registration Act apply. The 2nd defendant prays for damages for the wrongful and unlawful lodging of the restriction.

The Attorney General, for the 3rd, 4th, 5th and 6th defendants, submits that the allocation to the 1st defendant was after expiry of the lease. Subsequently, the transfer to 2nd defendant was in good faith and based on the documents on record hence no fraud could be imprinted against them. The Attorney General argues that fraud was not proved and that the court ought to determine whether the title was obtained lawfully.

I have considered the pleadings, evidence on record and rival submissions and do find that the plaintiff purchased the suit land from Ramesh Lall Aggarwal and Sadrudin Shamshudin Nurani. He produced a lease document form 13 – Registered Land Act that shows to have been received in the presentation book on 24.11.1982. the lease was for a period of 99 years from the 1.10.1909. He was issued with a certificate of lease. The lease expired in 2009. He applied for extension of lease and prepared all reports. It was approved by the town planner, by the Physical Planning Officer, the Physical Planning Officer, Principal Planning Officer and the District Surveyor. It was approved by the Municipal Council of Eldoret. The approvals were forwarded to the Commissioner of Lands. Instead of the Commissioner for Land considering the application for extension of the lease as requested, he allocated the land to Kipkemboi Arap Koskei who was issued with a lease for 99 years from 1.6.2012. The register was closed on the 28.2.2013 due to expiry of lease. The land was re-allocated to one Kipkemboi Arap Koskei on 28.2.2013. On 7.8.2014, the land was transferred to Geoffrey Tenai and a certificate of lease was issued.

This court observes that there is evidence that the land was not developed. However, the allegation by the Land Registrar that the land was re-allocated because it was not developed flies in the face of the rules of natural justice because the plaintiff should have been informed by the Commissioner of Lands that his application did not succeed because of failure to develop the land. The defendants did not write to the plaintiff on the reasons they declined to extend the lease.

This court observed that the doctrine of legitimate expectation is alive and kicking more so, after the promulgation of the Constitution of Kenya, 2010. The essence of the doctrine was well captured by this court ***in Eldoret E & L Petition No. 4 of 2016, Sirikwa Squatters Group Vs Commissioner of Lands***. This court observed that the doctrine of legitimate expectation has two aspects that is procedural as well as substantive. Procedural legitimate expectation refers to a scenario where an individual has a right to a certain procedure, such as the right to hearing as a result to the behavior of the public body.

Substantive legitimate expectation refers to a scenario where an individual is seeking a substantive benefit which arose out of the legitimate expectation he had in ***R (Bibi) Vs Newham London Borough Council [2001] EWCA Civ. 607 [2002] 1 WLR 237 at 19***, it was observed as follows:

“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself to; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”

In ***R Vs Jockey Club exparte TAM Racecourses [1993] 2 All ER 225, 236h-237b***, it was held that the basic hallmarks of an unqualified representation are:

“(1) A clear and unambiguous representation. (2) That since the [claimant] was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the [claimant] to rely upon it without more.... (3) That it did so rely upon it. (4) That it did so to its detriment... (5) That there is no overriding interest arising from [the defendant’s] duties and responsibilities.”

This court holds that the fact that the plaintiff had applied for extension of lease whether after expiry of the lease or not, the 2nd and 3rd defendants had a duty to consider his application and make a decision and communicate the said decision to the plaintiff and therefore, failure to consider the application for extension was breach of rules of natural justice and contravention of the plaintiff’s legitimate expectation.

The 3rd to 5th defendants breached the provisions of Article 47(1) of the Constitution of Kenya 2010 that provides for a fair administrative action and Section 13(1) of the land Act no 6 of 2012 that provides for **pre-emptive rights to allocation thus where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.**

I do find that the 1st defendant obtained the allotment letter and title to the property on the 25th May 2012 and 28th February 2013 un-procedurally as there was a pending application for extension of lease. There was no notice issued to the plaintiff of the intention to allocate the property to another person by the 3rd – 6th defendants.

In conclusion, this court finds that though the 2nd defendant is the registered proprietor of the suit property, his registration as proprietor flows from an irregularity and the plaintiff is entitled to be considered for the application for extension of lease by virtue of the principle of legitimate expectation.

The upshot of the above is an order that the registration in respect of the suit property be rectified and the 2nd defendant’s name to be deleted and the name of the plaintiff to be re-entered as the registered proprietor as at the expiry of the lease and the 5th defendant to consider the application of the extension of the lease by the plaintiff that is pending determination. Costs to the plaintiff. Orders accordingly.

Dated and delivered at Eldoret this 21st day of December, 2018.

A. OMBWAYO

JUDGE