



**REPUBLIC OF KENYA**

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

**E&L CASE NO. 438 OF 2013**

**ABDI ADAN HUSSEIN.....1<sup>ST</sup> PLAINTIFF**

**SHIRE MAALIM OSMAN.....2<sup>ND</sup> PLAINTIFF**

**IBRAHIM ABDULLAH KALIF.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE COMMANDANT NATIONAL YOUTH SERVICE.....2<sup>ND</sup> DEFENDANT**

**THE KENYA COMMERCIAL BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

Abdi Adan Hussein, Shire Maalim Osman, Ibrahim Abdullah Kalif herein after referred to as Plaintiffs, have sued the Attorney General, the Commandant National Youth Service and the Kenya Commercial Bank herein after referred to as defendants respectfully claiming that the Plaintiffs are the registered owners of the whole of that parcel of land known as Eldoret, Municipality/Block 15/2089 measuring 2.00 Hectares which is situated in Eldoret Municipality. The Plaintiffs acquired the said parcel of land for valuable consideration by Public Auction on 19<sup>th</sup> December, 2007. The public auction was slated at the instance of the Kenya Commercial Bank Limited 3<sup>rd</sup> Defendant who were holding a charge over the suit land. The Plaintiffs paid the entire Purchase Price of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000.00) to the 3<sup>rd</sup> Defendants and eventually caused the land to be registered in their names. The Plaintiffs were issued ultimately with a certificate of lease over land parcel number ELDORET MUNICIPALITY BLOCK 15/2089 on 28<sup>th</sup> July, 2008.

Prior to the acquisition of the land by the Plaintiffs, the land was registered in the name of **Leberio Farm Limited** and a certificate of lease issued to the said company on 3<sup>rd</sup> December, 1997. The company charged the land to the Kenya Commercial Bank Limited to secure the repayment of a credit facility of Kshs.2,600,000.00 and it is upon default by the said company in repaying the facility that the land was sold by public auction as advertised. The subject parcel of land has thus been registered land under the provisions of the repealed Registered Land Act (Cap 300) of the Laws of Kenya since 3<sup>rd</sup> December, 1997 and remains so registered to date under the new Land Registration Act, 2012.

The Plaintiffs visited their land with the intention of taking possession of the same but were prevented by officers from the National Youth Service from doing so. The Plaintiffs also discovered that officers from the National Youth Service had also trespassed into and had erected temporary structures on the land.

Upon learning of the above developments, the Plaintiffs carried out inquiries at the offices of the Commissioner of Lands where they discovered that the commissioner of Lands had erroneously issued an allotment letter over land that the National Youth Service had been previously occupying together with part of the Plaintiff's land.

The Commissioner of Lands discovered the anomaly cancelled the earlier letter of allotment and issued a fresh letter of allotment reference number 299588/13 wherefore he omitted the Plaintiffs parcel of land from that allotted to the National Youth Service which was now reduced from 6.3 hectares to 3.9 hectares. The Plaintiffs aver that the commissioner of lands could not at any rate allot the plaintiffs land since the same was already alienated and that explains why he canceled the allotment. In spite of all the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have refused, neglected, ignored and or otherwise failed to vacate from the plaintiff's land and remove all the structures they have erected thereupon. The Plaintiffs aver that they are innocent purchasers for good consideration without notice of any defect to title, if at all there was any and that the said purchase was a public auction, fully advertised by the 3<sup>rd</sup> Defendant for the foretold reasons.

The Plaintiffs claim against the Defendants jointly and severally is therefore for a declaration that the Plaintiffs are bonafide purchasers for value without notice of any defect of the suit-land. Further, a declaration that the plaintiffs are the registered owners of land parcel number ELDORET MUNICIPALITY BLOCK 15/2089 and that any allotment after registration was null and void ab initio. Moreover, the plaintiffs pray for a declaration that the 2<sup>nd</sup> Defendant and or officers from the National Youth Service are trespassers on the Plaintiff's land parcel number ELDORET MUNICIPALITY BLOCK 15/2089. The Plaintiffs further claim for an order directing the Defendants and or any officer sub-ordinate to them to immediately give the Plaintiffs unhindered access in and out of the Plaintiff's land and to vacate from the said land parcel number ELDORET MUNICIPALITY BLOCK 15/2089 or be evicted therefrom under the supervision and direction of the commissioner of police and or any other officer sub-ordinate to him. The Plaintiff additionally prays for general damages and mesne profits

The defendants filed a defence stating that the suit premise has at all material times been the property of the Government and put to utilization by the National Youth Service. Further, in the alternative and without prejudice to the foregoing the Defendant avers that the purported allocation of the suit premises to the **Leberio Farm Limited** and/or any other person or entity was illegal and obtained through fraud and misrepresentation. Particulars of fraud and or misrepresentation are namely; Obtaining through public auction an interest in the suit premises from a person/s who did not have title or any valid title to the suit premises and who for that reason lacked the interest to transfer to the Plaintiffs and/or any other person; Purporting to obtain through public auction an interest and/or transfer for premises which they knew or ought to have known was and still is a protected Government area; Purporting to obtain through public action proprietorship over premises which they knew or ought to have known to be the exclusive property of the National Youth Service; Purporting to obtain via the said auction a purported claim in the suit premises which they knew or ought to have known related to an area already committed, fully occupied, utilized and developed as a public utility by the Defendant; Purporting to obtain through the auction a supposed transfer of premises which they knew or ought to have known was obtained without adherence to the procedure prescribed under the law; Unlawfully representing to the Commissioner of lands that they had a valid transaction on the said suit premises; The alleged title to **Leberio Farm Limited**, if at all, was given irregularly and the process was fraudulent and thus void ab initio and conferred no interest in **Leberio Farm Limited**, and/or any other person or entity.

Consequently, the defendant avers that the said **Leberio Farm Limited**, had no title or proper title to the said land to pass to any person or entity, directly or indirectly and/or charge or transact or cause any transaction with regard to the title thereof as alleged in the Plaint. The Defendant contends that if any Certificate of Lease was issued to **Leberio Farm Limited**, which is denied, then the same was obtained from a person and/or Officer who at the material time lacked requisite authority to issue the same. Accordingly, and in the alternative, the Defendant avers that the issuance of the said Certificate of Lease, if at all, together with the subsequent charge placed over the purported title and/or any subsequent act or omission by Kenya Commercial Bank Limited or any person affecting the status and proprietorship of suit premises were of no consequence as the original transaction thereto was effected by a person without

authority to act as such. The Defendant denies the contents and purport of paragraphs 10,11&16 of the Plaintiff, specifically the allegations of trespass and reiterates at all material times the National Youth Service has had possession of the suit premises and that most of the buildings and structures erected thereon by the National Youth Services are more than 20 years old.

The Defendant avers that it's presently making use of the suit premises as a sports/athletics training facility for National Youth Service Recruits in accordance to, and in pursuance of its mandate as stipulated in the law. The defendants pray that the suit be dismissed with costs.

The plaintiffs' in their reply to defense reiterate that the suit property is registered in their names and that the suit land was and is not unalienated Government Land. The Government could not therefore put private land to utilization by the National Youth Service. The plaintiffs deny the allegation that **Leberio Farm Limited** acquired the land illegally and or fraudulently.

That Plaintiffs avers that **Leberio Farm Limited**, is not a party to this suit and that any allegations of fraud or misrepresentation made against the said company has no basis. The plaintiffs did not deal and or acquire the property from the said company. The question of whether there was fraud or misrepresentation by the said Company is one between the Defendants and the said Company. The plaintiffs reiterate that they acquired title over the suit land for valuable consideration without notice of any irregularity and that their proprietary interest is therefore indefeasible and is protected by the provisions of the Registered Land Act (CAP 300) of the laws of Kenya The plaintiffs deny that the National Youth Service has had possession of the suit premises for over 20 years and aver that the trespass is recent and that the said National Youth Service ought to be evicted form the Plaintiffs land forthwith. The plaintiffs further aver that if the National Youth Service is using the plaintiffs land for sports/athletics purposes then such use is unlawful and illegal since the suit land lawfully belongs to the plaintiffs and the National Youth Service is liable to pay damages for such unlawful use and occupation of land that it does not own.

In his testimony, PW1 Abdi Adan Hussein States that on 13.12.20087, they saw an advertisement by Wagly Auctioneers on the Daily Nation that a parcel of land known as L.R. Eldoret Municipality Block 15/2089 within Uasin Gishu District registered as a leasehold interest I.N.O. Leberio Farm Limited was going to be sold on a public auction. The auction was to take place on Wednesday 19<sup>th</sup> December, 2007 near the main post office at Eldoret town starting from 12.00 noon. That the condition of the sale was set out in the advertisement. A deposit of 25% was to be paid in cash or bankers cheque at the fall of the hammer. The balance was payable within a thirty (30) days period from the date of the auction. That PW1 together with his brothers got interest and they attended the auction on the 19<sup>th</sup> December, 2007 where they became the highest bidders at a consideration of Kshs.2,500,000 in which they paid Kshs.625,000 at the fall of the hammer. That they were issued with a certificate of Lease over land parcel No. Eldoret Municipality Block 15/2089 on 28<sup>th</sup> July, 2008 after following all the due procedure and completing the balance of the consideration. That prior to their acquisition of the land, the land was registered in the name of Leberio Farm Limited and a Certificate of Lease had been issued to this company on 3<sup>rd</sup> December, 1997. The company charged the land to the Kenya Commercial Bank Limited to secure a credit facility of Kshs. 2,600,000 and it is upon default by the said company in repaying the facility that the land was sold by public auction.

The last amount in respect of the auction was paid on 20.2.2005 and thereafter they were registered as proprietors. There was a temporary structure made of iron sheets. There was a previous letter of allotment for the land. The land belonged to Libero firm. They paid Kshs.2.5 million to K.C.B. The commissioner of lands cancelled the 1<sup>st</sup> letter of allotment.

They visited the land with intention of taking possession of the land but they were prevented by officers from the National Youth Service from doing so. These officers had also trespassed into and had erected temporary structures on their land. Upon realizing encroachment by the Kenya National Youth Service, they carried out inquiries at the offices of the Commissioner of Lands where they discovered that the Commissioner of Lands had erroneously issued an allotment letter over land that the National Youth

Service had been previously occupying together with their land. That the Commissioner of Lands upon discovering of the anomaly cancelled the earlier letter of allotment and issued a fresh letter of allotment, wherefore he omitted their parcel of land from the allotted to the National Youth Service which was now reduced from 6.3 hectares to 3.9 hectares.

That despite the cancellation of the allotment letter by the Commissioner of Lands, the defendants have refused and failed to vacate and remove all their structures erected on their land. They are innocent purchasers for good consideration without notice of any defect to title since they purchased their land through a public auction, fully advertised. That due to the defendant trespass and encroachment of their land hinders their access and use of the land and they were losing the utilization of land. That they are praying that the court does find that the National Youth Service are trespassers on their land being Eldoret Municipality Block 15/2089 that they are the bonafide purchasers for value without notice of any defect. Further, they are praying that court finds in their favour as prayed in the plaint.

**On Cross examined by Mr. Odongo, learned state counsel, he states that** The property was advertised by Wagly Auctioneers. The notice showed the portion of land but they did not inspect the land before buying it. He saw the notice on 13.12.2007. The auction was done on 19.12.2007. He had 6 days to search. The agreement was made on 19.12.2007 between the plaintiffs and K.C.B and was signed by Cheptum Advocates and the Auctioneer and that the same related to the Leberio farm. The title was BLOCK 15/2089. The land was being utilized by Leberio farm and in the name of Augustine Kipnyuk, Arap Cheruiyot the owner of Leberio firm.

**DW1 Albert Silbit Arap Too stated** on oath that he is a superintendent stationed at NYS Nairobi Headquarters. That vide PDP No. Eld/17/87/13A prepared on 7<sup>th</sup> October, 1987 and approved by the Minister of Lands and settlement on 5<sup>th</sup> June, 2000 as Development Plan No. 426 the land was alienated and reserved for the 2<sup>nd</sup> defendant. That the Director of Physical Planning through the letter Ref. No. PPD/9/5/VII/29 dated 21<sup>st</sup> June, 2000 requested the Commissioner for Lands to issue the 2<sup>nd</sup> defendant with the letter of allotment in respect of the land identified in the plans. The PDP refers to the existing NYS Camp situated along Kipkaren Road next to Rivatex Factory and adjacent to Wareng Secondary School along Eldoret-Kisumu Road and measuring 6.3 hectares. That vide letter Ref. No. NYS/CONF/ADM/1/19/19(28) dated 4<sup>th</sup> May, 2009 the 2<sup>nd</sup> defendant made inquiries to the Physical Planning Department on the status of land. The 2<sup>nd</sup> defendant received the responses in that the parcel of land had no encroachment and that Vide Letter Ref. No. PPD/ELD/17/5/VOL/IX/120 dated 11<sup>th</sup> May, 2009, the District Physical Planning confirmed that there is no other plan prepared in respect to the area covered by the above quoted plan. He also confirmed that there was no encroachment to the land zoned for the NYS. Vide letter Ref. No. PPD/ELD/17/5VII/66 dated 29<sup>th</sup> May, 2009, the Director of Physical Planning confirmed that there is no other plan prepared in respect to the area covered by the above quoted plan. He also confirmed that there was no encroachment to the land zoned for the NYS. That through the Legal Notice No. 306 of 15<sup>th</sup> July, 1988, another unit called the Nyayo Bus Service Unit was established. When the operations of the Nyayo Buses were wound up. The land it was occupying automatically reverted back to NYS and NYS camps were developed for vocational training courses for service men and service women. This was in respect of the letter Ref. No. NYS/CONF/ADM/1/12(37) dated 4<sup>th</sup> March, 1999. In that regard, the 2<sup>nd</sup> defendant took immediate uninterrupted possession and occupation of the land.

On 8<sup>th</sup> March, 2007 and vide a letter of allotment Ref. No. 215338/102 to the 2<sup>nd</sup> defendant, the Commissioner of Lands allocated the said parcel of land measuring 6.3. hectares to the 2<sup>nd</sup> defendant who then embarked on the process of survey and processing of title. On 4<sup>th</sup> May, 2007 through receipt No. 0583700, the 2<sup>nd</sup> defendant paid for the existing NYS Eldoret Camp vide file No. 259588. That the District Surveyor concluded the survey exercise on the site and then compiled his date book UG/01/07 and submitted to the Director of Surveys vide his letter Ref. No. CT/74/R/VOL.IX/145 dated 23<sup>rd</sup> July, 2007. That the Director of Surveys approved the survey vide the letter Ref. No. CT/74/VOL.96/127 dated 7<sup>th</sup> March, 2009 where he informed the Commissioner of Lands of this position and confirmed the

following information:

- i. The registration Block/R.I.M. SHEET NOS. Eldoret Municipality (BLK XV).
- ii. Plan F/R 470/101 representing the survey of parcels 2430.
- iii. New Grant has been approved and RIM amended by the Commissioner of Lands.

That the information contained in the letter dated 7<sup>th</sup> March, 2009 was to enable the Commissioner of Lands to process title document for the 2<sup>nd</sup> defendant. The plaintiffs started claiming that they held title documents in respect of a portion of land allocated to NYS. They claimed that they held title document to parcel number Eldoret Municipality Block 15/2089. They filed the instant suit seeking declaration that they were owners of the said land and that the 2<sup>nd</sup> defendant should give them access to their portion. That enquiries of the 2<sup>nd</sup> defendant to the Director of Surveys over the suit land revealed that Eldoret Municipality Block 15/2089 is supposedly situated along Sergoit Road opposite the existing Prisons Primary School vide a PDP No. ELD/17/94/78 which parcel was allegedly allocated to Naruna Enterprises Limited in or about 8<sup>th</sup> June, 1995. The letter of allotment was Ref. No. 31710/XXXV/. The survey in respect of the same land was carried out in 1997 which resulted in F/R No. 328/79 and Comps 39354. This was vide letter Ref. No. CT 74 Vol. 97/30 dated 22<sup>nd</sup> May, 2009.

To the best of his knowledge, the 2<sup>nd</sup> defendant is the owner of the parcel of land which it is in actual occupation. The plaintiff's title to a portion of the 2<sup>nd</sup> defendant's land is strange to him. The title the plaintiff holds is in respect of a different parcel of land situated along Sergoit-Iten Road measuring 0.30 hectares.

**On Cross examination by Mathai learned counsel for the defendants.** He states that the subject matter was an establishment of NYS unit of Nyayo Buses. The legal notice deals with Nyayo Bus Service. When Nyayo buses collapsed, the land reverted to NYS. The unit refers to land. The letter dated 4.3.1999 explains the portion of NYS. DEX4 shows that they paid money for the plan which included Eldoret. Shown letter dated 22.5.2009, he states that it shows that the plot was issued to Leberio Enterprises. The letter shows that there was encroachment on the original R.I.M. NYS has never challenged the certificate of lease because the plaintiffs went to court before it could be challenged. NYS has never acquired title. They were in the process of acquiring title but when the commissioner of lands was about to issue lease, they that found out that the Plaintiff was in possession of the title. On Re-examination by Mr Odongo learned state counsel he states that the unit referred to was Nyayo Bus services. In NYS they have vocational units. A unit is like a station.

**DW2 was one Timothy W. Mwangi** a director of Physical Planning who has served for more than 22 years. According to the Director, the procedure of acquisition of land depends on the Physical Planning Act. The Director of Physical Planner would receive a request for alienation of government land. The Director would prepare the file and forward it to the commissioner of lands. The commissioner would return an approval to the Director. The Director of planning would assign a physical planning number. He produced a Part Development Plan Referenced ELD/17/87/3 for proposal site for National Youth Service Camp prepared on 7.10.1987 and signed by Director of Physical planning and approved by the ministry on 5.6.2000 and assigned approval number 426 and further produced a copy of the register. The PDP number is ELD 17/87/13A for proposed site for Government Community services. The letter forwarding the plan is dated 21.6.2000. The Director found that there was no other file prepared in respect of the areas in dispute. The Directors of physical planning found that P.D.P No. NRB/17/97/1 was not in their records. An approved P.D.P can only be attained vide a letter from the Commissioner of Lands. A letter of Allotment cannot be received unless procedure is followed.

On Cross examination by Mathai and on being shown DEX2, the reference number being ELD/17/87/13, he states that this plan precedes the letter of allotment. The number on the Register is ELD/17/87/13A. The DEX 2 P.D.P Ref No. 17/87/13 was never registered. There is a difference between 17/87/13A and 17/87/13. The Register does not indicate NYS, but it refers to Government Community services.

## **SUBMISSIONS BY PLAINTIFFS**

The plaintiff submits that the issues for determination are:

- 1. Whether the plaintiffs are the registered owners of land parcel number Eldoret Municipality Block 15/2089.***
- 2. Whether the plaintiffs are bonafide purchasers for value without notice of any defect.***
- 3. Whether the 2<sup>nd</sup> defendant are trespassers on the plaintiffs' land, parcel No. Eldoret Municipality Block 15/2089.***

On the first issue, the plaintiff submits that he bought the land in a public auction after the same had been advertised in the Daily Notice on 13.12.2007 by Wagly Auctioneers which was produced as plaintiff exhibit 1. The land was previously registered in the name of Leberio Farm Limited and a certificate of lease issued to the company on 3.12.1997, the same was later charged to the 3<sup>rd</sup> defendant to secure a facility of Kshs. 2,600,000 and it is upon default by the company to pay that the land was sold in an auction. The auction was carried out on 19.12.2007 and the plaintiffs were the highest bidders of a consideration of Kshs. 2,500,000 in which they paid Kshs. 650,000 as deposit at the fall of THE hammer. They were later issued with the certificate of lease over the land parcel number Eldoret Municipality Block 15/2089 on the 28.7.2008. the certificate of lease was issued after the plaintiff obtained consent to transfer.

According to the plaintiff, Section 24(b) of the Land Registration Act provides that the registration of the plaintiffs as the leasehold proprietor of the suit property confers upon the plaintiff to leasehold interest together with all rights and privileges appointment thereto subject only to implied or express agreement liabilities or mandate of the lease. The plaintiff also relies on section 26(1) of the Land Registration Act which provides that the certificate of title issued by the Registrar shall be taken as prima facie evidence that the person named therein is the absolute and indefeasible owner of the land and such title should not be challenged on grounds of fraud or misrepresentation.

The plaintiff relies on the case of **Nairobi Permanent Markets Society & 11 Others Vs Salima Enterprises & 2 Others – Court of Appeal No. 185 of 1997**, where it was held that the title is conclusive evidence of absolute and indefeasible ownership. The plaintiff further refers to the case of **Joseph Arap Ng'ok Vs Maijo Ole Keiwa & Others 1997 eKLR**, where it was held that upon registration of properties, he becomes the absolute owner of the land and the title of such an owner can only be challenged on grounds of fraud and misrepresentation when the title owner is proved to be party to.

On the second issued, the plaintiff submits that the plaintiff is a *bonafide* purchaser without notice of any defect. They purchased the title from the 3<sup>rd</sup> defendant without notice of any defect. The purchase was through public auction.

According to the plaintiff, the Commissioner of Lands upon realizing the owner issued a fresh letter of allotment and omitted their parcel of land. The letter of allotment issued to the Kenya National Youth Service was later cancelled. The plaintiffs are clearly purchasers without notice of error.

Lastly, the plaintiff submits that the land belongs to the plaintiff and the defendants are trespassers. Legal notice No. 306 refers to Nyayo Bus Service. Moreover, that the part development plan referred to as the DEx.2 was never registered. The plan registered was Eldoret/17/8/13A The defendants submit that the plaintiff did not inspect the property before the auction but got interested in the property when they saw the notice. They inspected the property after obtaining the title and realized that the property was occupied by the 2<sup>nd</sup> defendant. The defendant submits that the plaintiffs failed to carry out due diligence and therefore, they are not *bonafide* purchasers for value without notice.

The defendant further argues that the suit land was alienated government land and therefore, not available

for allocation to Leberio farm Ltd. The defendant submits that since Leberio farm Ltd did not have a good title, no good title could pass to the 3<sup>rd</sup> defendant as a charge or to the plaintiffs as purchasers in a public auction. The 2<sup>nd</sup> defendant submits that he has a legitimate interest in the suit land. The 2<sup>nd</sup> defendant cannot be a trespasser and an order of eviction cannot be issued in such circumstances.

I have considered the pleadings, evidence and submissions by counsel and do find the following issues ripe for determination:

- 1. Was the allocation of the suit land the Leberio Farm legal?*
- 2. Was the plaintiff an innocent purchaser for value without notice?*
- 3. Whether the 2<sup>nd</sup> defendant has legitimate interest in the property.*

### **(1) WHETHER ALLOCATION OF THE SUIT LAND TO LEBERIO FARM WAS LEGAL?**

According to the green card, the register was opened on the 3.12.1997 for Eldoret Municipality Block 15/2089 measuring 2.0 Ha. The lessor is the government of Kenya whilst the lessee is Leberio Farm Limited for term of 99 years at rent of Kshs. 100,000. Leberio Farm Ltd was registered as the absolute proprietor on 3.12.1997 and a certificate of lease issued on the same date. On the 9.2.1999, the property was charged to the Kenya Commercial Bank Ltd for Kshs. 2,600,000. On the 28.7.2008, the property was registered in the names of the plaintiffs and a certificate of lease issued on the same date. The genesis of this parcel of land is the allotment letter ref. No. 3710/XXXV dated 8.6.1995 in respect of the unsurveyed plot No. "A" in Eldoret Municipality. The allotment letter was issued to Naruna Enterprises Limited of P. O. Box 1464, Eldoret. The Part Development Plan No. Eldoret/17/94/78 was forwarded to the Commissioner of Lands and approved by the Commissioner of Lands on 27.11.1994. That is so far as regards the letter of allotment. We are not told how Leberio Farm became registered as the proprietor of the plot which later came to be known as Eldoret/Municipality/Block 15/2089. The defendants allege fraud; however, it is not clear against whom as they have not enjoined Leberio enterprises as the alleged fraud cannot be visited upon the plaintiff who purchased the property at a public auction. The defendants have not demonstrated by evidence that the said Leberio Farm Ltd were illegally or fraudulently registered as the proprietors of the parcel of land. The certificate of lease having been issued to Leberio Farm Limited, the said farm became the registered proprietor of the parcel of land.

It is now settled law that where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, he must prove that the title holder was party to the fraud or misrepresentation. conversely, where a person intends to challenge a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, it is not mandatory for one to demonstrate that the title holder is guilty of any immoral conduct on his part so long as it is proved that there was illegality, fraud and corruption.

No evidence has been brought before court that there was no letter of allotment to Leberio ltd or Naruna enterprises or that the letter of allotment in respect of the parcel of land issued to Naruna Enterprises was issued fraudulently or illegally and that no evidence has been availed to suggest that the certificate of lease issued to Leberio was issued fraudulently or illegally. I do therefore, find that Leberio Farm Ltd held a valid title being a certificate of lease in respect of the suit property. There is no evidence that the suit land was land set apart by the government of Kenya as public land or that the suit land is unalienated government land.

Section 2 of the government lands act cap 280 laws of Kenya defines "**unalienated Government land**" as Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. This court finds that by the date the 2<sup>nd</sup> respondent was being issued by the allotment letter for the suit property on the 8<sup>th</sup> March 2007 the parcel of land herein had ceased being unalienated government land and was registered in the names of a private person and title in the form of a certificate of lease issued on 3/12/1997 under the registered land Act cap 300

laws of Kenya repealed. The Part Development Plan produced as Defence Exhibit 2 was approved on 5/6/2000 by the director physical planning ministry of works and housing and the ministry of lands and settlement however the same was not registered by the commissioner of lands as admitted by the PW2 and that the status of the land had already changed to alienated government land.

Section 3 provides that The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land; The import of the above provisions is that as long as government land was unalienated the president had the power to allocate the same for private use.

Section 27 of the Registered Land Act Cap 300 Laws of Kenya( repealed) provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease. Section 28 of the said Act provides that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

This sections are replicated by the Land Registration Act of 2012 see **Section 26** of the Land Registration Act, 2012 which provides as follows.

**“26. (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.”**

The plaintiffs as the registered proprietors of the suit property are entitled to the rights conferred on a proprietor of land by law, subject only to the limitations contemplated by law to those rights. In this regard see **Section 25** of the Land Registration Act which provides as follows:

**25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section**

**28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”**

In determining this question, I begin by taking note of the contention by the defendants that the title held by the applicants was obtained by fraud. With regard to that contention, no evidence whatsoever has been provided by the defendants capable of proving the said allegation. Contrary to the said allegation/contention, the evidence on record shows that the registration of the plaintiff as the proprietors of the suit property was effected pursuant to an auction conducted pursuant to the 3<sup>rd</sup> defendant exercising its statutory power of sale.

I do find that the Leberio Farm had a valid title hence passed the same to Kenya Commercial Bank which the said property was charged on the 9.2.1999. It is not disputed that the property was charged to Kenya Commercial bank by Leberio Farm and that there was a default in paying the loan hence the property was sold by the charge in exercise of the statutory power of sale. The plaintiffs being the highest bidder and having bought the property at the all of lower, obtained title to the property.

**(2) WHETHER THE PLAINTIFF WAS INNOCENT PURCHASER FOR VALUE WITHOUT NOTICE OF ANY FRAUD OR MISREPRESENTATION**

I have found earlier that the defendant has not demonstrated fraud or misrepresentation to the required standards. Moreover, there is no evidence of illegality and corruption in the acquisition of title. I do find that the plaintiffs saw an advertisement by Wagly Auctioneers on the Daily Nation that the suit land would be sold in a public auction. The conditions of sale were set out in the advertisement. A deposit of 25% was to be paid in cash or bank cheque at the fall of the hammer and the balance was payable within a period of 30 days from the date of auction. The plaintiffs attended the auction and became the highest bidders at a consideration of Kshs. 2,500,000 in which they paid Kshs. 625,000 at the fall of the hammer and the balance of ksh 1,825 000 was paid latter. I do find that they were innocent purchasers for value without notice of any fraud and that they were not guilty of any fraud.

The plaintiff argues that he was an innocent purchaser for value and was not party any fraud. This brings me to the question; what is the extent of due diligence to be exercised by a purchaser? In **Captain Patrick Kanyagia and Another v Damaris Wangeci and others, NBI civil appeal no 150 of 1993(unreported)** the Court of Appeal held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by the court of appeal in **David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR**. In **Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported)**, the Court of Appeal held that a purchaser at a public auction was protected by **section 69(B)** of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice.

In the present case, the defendants have not demonstrated that the plaintiffs had any notice of irregular exercise of the statutory power of sale by the 1<sup>st</sup> respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 1st plaintiff, the action to purchase was based on the advertisement for sale advertised in the newspaper. The plaintiffs duly participated in the auction and their bid was accepted.

**(4) WHETHER THE DEFENDANT HAS LEGITIMATE INTEREST IN THE PROPERTY**

The 2<sup>nd</sup> defendant was issued with a letter of allotment for 6.3. hectares vide ref. No. 215338/103 on the 8.3.2007. When the letter of allotment was being issued, part of the 16.3 acres had already been alienated and had become private land and therefore, not available for allocation. The 2<sup>nd</sup> allotment letter was issued on 9.9.2008 to the 2<sup>nd</sup> defendant vide reference No. 259588/13 and that the earlier allotment letter of 8.3.2007 Ref. No. 215338/102 was cancelled all point to the fact the defendants were attempting to

circumvent the law by alienating government land that had already been alienated. The import of the above is that the National Youth Service, the 2<sup>nd</sup> defendant herein was allocated 3.9 ha for a term of 99 years. I do find that the defendants have established that the 2<sup>nd</sup> defendant is a legitimate owner of 3.9 ha of land which is not the disputed parcel of land. The upshot of the above is that the plaintiffs have established on a balance of probabilities that they are the legal owners of the suit land. The defendants have failed to prove that the title obtained by the plaintiff was obtained fraudulently or illegally. Moreover, nothing turns on the part development plan no referred to as the DEx.2 as it was never registered.

Ultimately, the court grants judgment to the plaintiff in the following terms ***thus a declaration*** that the Plaintiffs are bonafide purchasers for value without notice of any defect of the suit-land. Further, ***a declaration*** that the plaintiffs are the registered owners of land parcel number ELDORET MUNICIPALITY BLOCK 15/20189 and that any allotment after registration was null and void ab initio. Moreover, that the 2<sup>nd</sup> Defendant and or officers from the National Youth Service ***are trespassers*** on the Plaintiff's land parcel number ELDORET MUNICIPALITY BLOCK 15/2089. The court further issues an order directing the Defendants and or any officer sub-ordinate to them to immediately give the Plaintiffs ***unhindered access*** in and out of the Plaintiff's land and ***to vacate*** from the said land parcel number ELDORET MUNICIPALITY BLOCK 15/2089 or ***be evicted*** therefrom under the supervision and direction of the commissioner of police and or any other officer sub-ordinate to him. General damages and mesne profits were not proved and therefore are not granted. Costs of the suit plus interest are awarded to the plaintiffs.

**DATED AND DELIVERED AT ELDORET THIS 1<sup>ST</sup> DAY OF MARCH, 2017.**

**A. OMBWAYO**

**JUDGE**