



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

PETITION NO. 2 OF 2014

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 AND THE ALLEGED
CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE
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AND

**IN THE MATTER OF ALLEGED ILLEGAL ALLOCATION AND/OR ACQUISITION AND
REGISTRATION OF ELDORET MUNICIPALITY/BLOCK 14/1646 WHICH IS PUBLIC
PROPERTY DESIGNATED AS PUBLIC PARKING SPACE TO SERVE THE COMMERCIAL
PLOTS NEXT TO IT AND AS EASEMENT TO PLOT NUMBERS ELDORET
MUNICIPALITY/BLOCK 14/654 AND ELDORET MUNICIPALITY/BLOCK 14/657**

AND

**IN THE MATTER OF PARCELS OF LAND NUMBERS ELDORET MUNICIPALITY/BLOCK
14/654 AND ELDORET MUNICIPALITY/BLOCK 14/657 AND THE RIGHT OF EASEMENT
AND/OR ACCESS TO THE PARCELS HEREIN ABOVE THROUGH THE PUBLIC OPEN
SPACE DESIGNATED FOR PUBLIC PARKING**

BETWEEN

NARESH KIMAR AGGARWAL.....PETITIONER

VERSUS

SILAS KIPTUI KIPCHILAT ALIAS SILAS YEGO.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Mr Naresh Kumar Aggarwal (**hereinafter referred to as petitioner**) has by petition dated 21.1.2014 against **Silas Kiptui Kipchillat alias Silas Yego, National Land Commission and Attorney General (hereinafter referred to the respondents,)** claimed that he is the proprietor and/or owner of all those parcels of land namely, Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657 situated within the Municipality of Uasin Gishu County whose access and/or easement has been blocked and/or prevented and/or obstructed by the 1st respondent who has commenced construction and/or erection of a perimeter wall around the said easement space thereby blocking the Petitioner's easement on account of allocation by the 2nd respondent contrary to the Petitioner's interest.

The Petitioner further claims to bring this petition in the public interest to protect the public and the users of the public space designated as parking space which serves as an easement to the commercial plots Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657 and parking space for the members of the public and prospective customers to the plots mentioned herein above since they are commercial plots which require easement for their effective use. The Petitioner's presupposes that the acts of the 1st respondent of claiming proprietorship and/or ownership interest of the easement area and/or space contrary to the original intent and/or interest of the public at large is an act of selfishness aimed at grabbing the subject piece of land for his own use and benefit thereby depriving the petitioner the right to easement and the public the right to parking space and has learnt that the 2nd respondent in collusion with the 1st respondent has without any colour of right fraudulently created a lease instrument and/or Certificate of Lease in favour of the 1st respondent and delineated it as Eldoret Municipality/Block 14/1646 and yet according to the Municipal Council of Eldoret original map and the Physical Planning Department of the Uasin Gishu County, the area is a designated parking space which should be open to allow easement to the property next thereto and not to be fenced.

According to the petitioner, the Certificate of Lease issued on the 20.6.2003 by the 2nd respondent showing the 1st respondent as the registered owner of the said parcel of land was issued unconstitutionally illegally, fraudulently and without due regard to the interests of the public at large and/or the petitioner's right of easement and ought to be canceled.

The *petitioner contends that* the 2nd respondent is the National Land Commission charged with the responsibility of managing and dealing with land issues in the country whereas the 3rd respondent is the legal adviser of the government of Kenya. The 2nd respondent's servants and/or agents have taken part in perpetuating an illegality whilst the 3rd respondent ought to protect the public who are the citizens of Kenya from such acts of unconstitutionally illegality hence this petition for the cancellation of the lease instrument and/or Certificate of Lease on Eldoret Municipality/Block 14/1646 issued in favour of the 1st respondent. In or about 2008, the Petitioner instituted a civil suit in Eldoret vide Chief Magistrate's Civil Suit No. 245 of 2008 between himself and Silas K. Yego over the subject matter seeking injunctive orders to restrain the 1st respondent from interfering with the Petitioner's right of easement and/or access to his parcels of land namely, Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657. The matter was heard and a decree passed in favour of the Petitioner herein on the 14.12.2011 granting injunctive orders barring the 1st respondent from interfering with the petitioner's right of easement area and/or the access space of the petitioner to his plots. The court further ordered that the temporary fence erected by the 1st respondent be removed forthwith.

That the 1st respondent on learning of the court's decree, moved to court to set aside the decree of the court which application was heard and allowed in his favour, thus the decree was set aside and suit ordered to proceed for hearing. The Petitioner was dissatisfied with the court's decision setting aside the decree and/or judgment and appealed to the High Court vide Eldoret Civil Appeal No. 80 of 2012 which appeal is still pending for determination.

That the Petitioner has complained to the 2nd and 3rd respondent seeking help but his efforts have been fruitless for want of action by the 2nd and 3rd respondents and the 1st respondent has in the last few days commenced the construction of a boundary wall around the perimeter of Plot Eldoret Municipality/Block 14/1646 necessitating the instant petition for orders that;

- 1. The 1st respondent be restrained from putting up a perimeter wall around the illegally acquired parcel of land denoted as Eldoret Municipality/Block 14/1646.**
- 2. The cancellation of the Lease which gave rise to the Certificate of Lease issued on 20.6.2003 in favour of the 1st respondent.**
- 3. The removal and/or distraction of the perimeter wall purportedly erected on the and/or around the aforesaid plot number Eldoret Municipality/Block 14/1646 to allow access and/or easement to the plots numbers Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657 and create parking space for the members of the public.**
- 4. The giving full effect of the original map as initially intended.**

The Petitioner further contends that orders sought herein are not exactly the same as the orders that were sought in the civil case number Eldoret CMCC No. 245 of 2008 between the Petitioner and the 1st respondent save for the orders of injunction which in fact the said suit was limited to as opposed to the current petition. That as a result of the foregoing, it is the Petitioner's position that the respondents have contravened the Constitution of Kenya, 2010 by wrongfully alienating public property and taking away the petitioner's easement and/or access space thereof thereby depriving the petitioner and the members of the public their right to access and parking space. The 2nd and 3rd respondents in furtherance of the illegality issued a Lease and Certificate of Lease in favour of the 1st respondent conferring ownership rights against the interests of the Petitioner and the public at large. The petitioner strongly believes that the actions of the 1st respondent of purporting to acquire the property purportedly denoted as Eldoret Municipality/Block 14/1646 which is a public parking reserve and the access and/or easement area for Plot Number Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657 are unconstitutional, fraudulent, illegal and amounts to land grabbing and that the acts of the 2nd respondent of purporting to create records at the land registry in respect of parcel number Eldoret Municipality/Block 14/1646 and issuing a Lease and Certificate of Lease in favour of the 1st respondent amounts to illegal allocation, deprivation and dispossession of the Petitioner's right to easement and/or access and the public parking space which acts are inconsistent with the Constitution of Kenya.

The Petitioner prays for orders that **a permanent injunction** restraining the 1st respondent, his agents, servants and/or any other person acting on his instructions from erecting or continuing to erect a perimeter wall, constructing, fencing off, occupying and/or in any other manner or whatsoever interfering or dealing with parcel number Eldoret Municipality/Block 14/1646 which is public parking space or interfering with the petitioner's right to easement and/or access to his parcels of land namely, Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657. Further, an order for the **surrender and cancellation of the Lease and Certificate of Lease** issued in favour of the 1st respondent by the 2nd respondent in respect of land parcel number Eldoret Municipality/Block 14/1646 and the rectification of the land records at the Lands Office to reflect and/or show that the parcel of land Eldoret Municipality/Block 14/1646 is a public parking space and the Petitioner's easement and/or access area in conformity with the original map of the area. An order for **removal and/or demolition of the perimeter wall** erected thereto and/or any other structure constructed on the land parcel number Eldoret Municipality/Block 14/1646. A **declaration that the purported allocation** to the 1st respondent and the Lease and the Certificate of Lease issued on 20.6.2003 in favour of 1st respondent over parcel Number Eldoret Municipality/Block 14/1646 was and **is illegal and null and void**. An order of **Certiorari** to quash the decision of the 2nd respondent to allocate and issue a lease and/or Certificate of Lease in favour of the 1st respondent and/or any other person and the Lease Certificate held by the 1st respondent over Eldoret Municipality/Block 14/1646. An order for **Mandamus** against the 2nd and 3rd respondent to restore and/or rectify the records at the Lands Office in respect of Eldoret Municipality/Block 14/1646 to reflect the same as public utility, parking space and/or open easement to parcels numbers Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657.

Accompanying the petition is a Notice of Motion dated 21.1.2014 praying for conservatory orders that pending the hearing and final determination of this suit, the 1st respondent, his agents and/or servants be restrained by a temporary injunction from interfering with the Petitioner/Applicants easement and/or access to his land parcel Nos. Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657 and preventing and/or barring the public from parking in and/or land parcel No. Eldoret Municipality Block 14/1646 purportedly acquired by the 1st respondent through illegal means from selling, transferring, fencing of charging, vesting, mortgaging, leasing, giving as security, taking possession, constructing and/or in any other manner interfering with the said parcel of land purportedly denoted Eldoret Municipality/Block 14/1646 and that pending the hearing and determination of this application/petition, the 1st respondent be ordered to surrender and/or deposit with the court the lease and Certificate of Lease and all documents relating to the parcel of land in issue and/or in respect of the suit land in his possession within such time as may be ordered by the court.

That in the alternative, the court be pleased to order the 2nd respondent to halt, stop and/or hold in abeyance any transactions of whatever nature at the Lands Office in respect to Eldoret Municipality/Block 14/1646 pending the hearing and determination of the petition now before this court.

The application is made on grounds that can be discerned from the petition.

- (a) That the petitioner/applicant is the registered owner of the land parcel Nos. Eldoret Municipality Block 14/654 and 14/657.**
- (b) That the land parcel purportedly denoted as Eldoret Municipality/Block 14/1646 and purportedly registered in the name of the 1st respondent is public property.**
- (c) That the plot/land aforesaid Eldoret Municipality/Block 14/1646 is a public parking space.**
- (d) that the land is designated as parking space on the original map of the area and serves as the petitioner/applicants access and/or easement to his land parcel Nos. Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657.**
- (e) That the allocation and subsequent acquisition and/or alienation of the said property is illegal and fraudulent and unconstitutional.**
- (f) That the second respondent giving up ownership to the first respondent has violated and infringed the Petitioner/Applicant's easement and the public right to parking space contrary to the constitution of Kenya, 2010.**
- (g) That the court has power to grant the orders sought in the spirit of upholding and protecting the Constitution of Kenya, 2010.**
- (h) That unless the orders sought issue the Petitioner/Applicant and the public stand to be deprived of their rights aforesaid resulting to loss that cannot be monetarily compensated.**

The application is supported by the affidavit of **Naresh Kumar Aggarwal** who in a nutshell states that the parcel of land in dispute is public reserved for parking but was illegally allocated to the 1st respondent and reiterates the grounds in the notice of motion and the affidavit supporting the petition.

The 1st respondent **Silas Kiptui Kipchillat** has filed a replying affidavit stating that he is the sole registered proprietor of the leasehold interest in the land parcel known as Eldoret Municipality/Block 14/1646 measuring 0.3580 hectares and that his registration commenced on 29th June, 2003. That the petitioner is his neighbour as the land parcels known as Eldoret Municipality/Block 14/654 and 14/657 share a boundary and that if any dispute exists between himself and the petitioner being neighbours, the same is at best a boundary dispute and the petitioner is obligated to comply with the procedure of instituting a boundary dispute either under section 21 of the repealed Registered Land Act, Cap. 300 pursuant to which the leases of the parties were issued or the Land Registration Act, 2012 under section 18 hence the failure by the petitioner to comply with the said requirements of instituting a boundary dispute does render the petition herein as a nullity and the court has no jurisdiction to entertain it. That the matters alleged by the petitioner in the petition do not fall within the ambit of the Constitution of Kenya, 2010 but would be ordinary land disputes to be commenced by plaint as opposed to a petition.

The 1st respondent claims that the petitioner has no proprietary interests in the land parcel known as Eldoret Municipality/Block 14/1646 hence he cannot assert and enforce any constitutional rights that he does not have by dint of Article 40 of the Constitution of Kenya, 2010. That Article 40 of the Constitution of Kenya, 2010 cannot confer jurisdiction on the court to address any grievances by the petitioner as it only seeks to guard proprietary interests and proscribe the compulsory acquisition of property by the state and of which matters have not been disclosed to exist in this petition and that for the petitioner to institute a petition where a statutory framework exists for resolving a dispute is a flagrant abuse of court process, more so where the legislation bars the institution of legal proceedings without exhausting the said procedure. His Lease Certificate has been duly in existence for about 11 years and long before the Constitution of Kenya, 2010 was promulgated and any questions over its acquisition cannot be the subject of constitutional litigation premised on a constitution that did not exist when the lease came into being and indeed to entertain the petition would amount to allowing the constitution to

apply retrospectively while no such intention was contemplated of Article 40 of the Constitution of Kenya, 2010 which has been invoked by the petitioner.

The 1st respondent believes that the petitioner has no right to institute the petition on behalf of the public when he has not demonstrated who the public are and whether he has any authority to represent them as the said mandate is vested in the 3rd respondent by dint of section 61 of the Civil Procedure Act, Cap. 21. The petitioner's dispute as pleaded in the petition borders on rights of easement and access roads which matters have prescribed procedure of resolution under the Land Act, 2012, the Land Registration Act, 2012 and the Public roads of Access Act, Cap. 399 and which the petitioner has opted to ignore and being the proprietor of the land, he has never created an easement in terms of section 94 of the repealed Registered Land Act, Cap. 300 which the petitioner can seek to enforce.

Moreover, that to entertain the petition would be an abuse of court process and it would be *res-judicata* as the petitioner presented the same dispute vide **Eldoret CMCC No. 245 of 2008 – Naresh K. Aggarwal Vs Silas K. Yego** and the Petitioner and himself resolved the matters; settled the same perpetually and a consent was duly entered into and adopted by the court leading to the issuance of a decree. That by the final agreement of the parties, the status quo prevailing on the respective land portions was to be maintained. That to entertain this petition, it would be a violation of section 8 of the Civil Procedure Act, Cap. 21 as the Petitioner is barred from instituting any further court proceedings.

The petitioner/applicant submits that he is the registered owner of Eldoret Municipality/Block 14/654 and Eldoret Municipality/Block 14/657 situated within the Municipality of Uasin Gishu. He submits that the land Eldoret Municipality/Block 14/1646 is a public property and therefore, not available for allocation. He argues that the parcel of land was reserved for a public parking. The petitioner argues that he has established a *prima facie* case with a likelihood of success as he has demonstrated that the suit land is public property and that unless orders sought are granted, he will suffer irreparable loss as he will be denied the right of access.

The 1st respondent submits that he is the registered proprietor of the leasehold interests in the land parcel known as Eldoret Municipality/Block 14/654 and 14/657 hence he is protected by the laws of the land..

I have considered the application, reply thereto, rival submissions and do find that the principle for granting interlocutory injunction was clearly set out in ***Giella Vs Cassman Brown & Co Ltd [1973] EA 358***. The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.

In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* at the Court of Appeal, at Mombasa March 7, 2003 Kwach, Bosire & O’Kubasu JJ A in Civil Appeal No 39 of 2002 held that the principles for granting an interlocutory injunction are that:-

a) The applicant must show a prima facie case with a probability of success;

b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

c) If the court is in doubt, it will decide an application on the balance of convenience.

4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

This court finds that the applicant has failed to demonstrate that the suit parcel of land is public

land as he did not annex any Part development plan prepared by the Department Of Physical Planning and registered with the ministry of lands Registry Index Map certified by the Director of Survey as a true copy or at all. The documents produced by the applicant as NKA3 and NKA 4 do not clearly show that the disputed land is public land and their source is not disclosed. The petitioner has failed to demonstrate that he has a *prima facie* case with the probability of success.

On the issue as to whether the applicant will suffer irreparable harm if injunction is not granted, I do find that the applicant has not demonstrated how he and or the public is likely to suffer loss as in the first place there appears to be no evidence that the property belongs to the public and that apart from the petitioner no other member of public is enjoined in the matter. The application for injunction is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE