



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L NO. 787 OF 2012

FORMERLY HCC 213 OF 2011

DAUDI KIPTUGEN.....PLAINTIFF

VS

COMMISSIONER OF LANDS NAIROBI LANDS.....1ST DEFENDANT

CHIEF LANDS REGISTRAR NAIROBI2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

HELDO FOOD STUFF LIMITED.....4TH DEFENDANT

DISTRICT LAND REGISTRAR ELDORET5TH DEFENDANT

JUDGMENT

(Suit by plaintiff contending that action by Commissioner of Lands in issuing a lease in favour of 4th defendant was improper; plaintiff holding a registered lease over suit land; defence that the lease to plaintiff was issued improperly; evidence showing that plaintiff was not allotted the suit land but another parcel of land; improper therefore for him to have been issued with a lease over land that was not allotted to him; order that plaintiff's lease be cancelled; Commissioner of Lands free to issue lease to 4th defendant)

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 9 December 2011. The plaintiff has sought the following orders :-

(i) An order of mandatory injunction to restrain the 1st, 2nd and 5th defendants from issuing another Lease and Certificate of Lease to the 4th defendant over the property Eldoret Municipality Block 7/154.

(ii) An order do issue to the 1st and 2nd defendants to reinstate the expunged original records on the title Eldoret Municipality Block 7/154 indicating the plaintiff as the original owner.

(iii) A declaration that the allotment of Lease dated 24th June 1999 to the 4th defendant is fraudulent, illegal, null and void ab initio and an Order to the Commissioner of Lands to cancel it.

(iv) A declaration that the plaintiff is the bona fide owner of Plot number Eldoret Municipality Block 7/154.

(v) Costs of the suit.

In his pleadings, the plaintiff pleaded that he is the registered owner of the land parcel Eldoret Municipality Block 7/154 (the suit land), having been allocated the same land in the year 1999. It is pleaded that in November 2011, the plaintiff discovered that the Commissioner of Lands in cahoots with the plaintiff, had removed the original documents which showed the plaintiff as the owner, and replaced the same with forged documents, and had issued a new Lease to the 4th defendant irregularly, with intent to disposes the plaintiff. Particulars of fraud are pleaded against the 1st, 2nd and 4th defendants being :-

(a) Expunging the original documents at Ardhi House Nairobi indicating the plaintiff to be the registered owner.

(b) Replacing the plaintiff's original documents with forged 4th defendant's documents at Lands Registry Nairobi misrepresenting that the 4th defendant is the legal owner.

(c) Purporting to issue a new Lease to the 4th defendant's company backdated to 1999 when the company was not in existence having been incorporated later in the year 2010.

(d) Purporting to issue a new Lease on the suit land in the name of the 3rd defendant.

It is averred that due to the aforesaid particulars of fraud, the plaintiff is on the verge of being disentitled to the suit land.

Together with the plaint, the plaintiff filed an application for injunction, to stop the 1st, 2nd and 5th defendants from issuing a new Lease and Certificate of Lease to the 4th defendant. Interim orders were granted and later by consent, it was agreed that the status quo be maintained.

The 4th defendant filed a Defence and Counterclaim. He denied removing or interfering with any documents relating to the suit property and denied the particulars of fraud. He pleaded that he is the legal owner of the suit land. In the counterclaim, the 4th defendant pleaded that if the plaintiff was the registered owner of the suit land, the same was procured by fraud and the following particulars of fraud are pleaded :-

(i) Secretly and fraudulently causing land officials to expunge the original documents of the lease granted to the 4th defendant and replacing them with forged documents.

(ii) Fraudulently and purportedly obtaining conveyance and transfer of lease of land parcel Eldoret Municipality Block 7/154 without knowledge and consent of the 1st, 2nd, and 4th defendants.

(iii) Fraudulently purporting to have himself registered as the owner of the suit land and obtaining improper certificate of lease thereof.

(iv) Falsely claiming to be the owner of the suit land while knowing that the same was on 24/06/1999 allocated to the 4th defendant.

The 4th defendant has sought an order to have the plaintiff's title cancelled and for a declaration that it is the 4th defendant which is the legal and rightful owner of the suit land. The 4th defendant also sought an eviction order and a permanent injunction to restrain the plaintiff from interfering with the suit land. There was a Reply to Defence and Defence to Counterclaim filed, through which the plaintiff refuted all the allegations of the 4th defendant and put the 4th defendant to strict proof.

The State Law Office entered appearance and filed Defence for the 1st, 2nd, 3rd, and 5th defendants. It was denied that the plaintiff is the registered owner of the suit land and it was further denied that the 4th defendants removed the original documents which indicated the plaintiff as the real owner of the suit land. It was also denied that the Commissioner of Lands was in the process of issuing a new title to the 4th defendant and all particulars of fraud were denied. It was further pleaded that :-

- (i) *The suit land was allocated to Heldo Foodstuff of P.O Box 219 Eldoret on 24/6/1999.*
- (ii) *That the allottee accepted the offer.*
- (iii) *That prior to accepting payment to this allocation a letter was written to District Land Officer on 11/8/2006 to confirm the status on the ground.*
- (iv) *That upon establishing that there were no permanent developments on the ground, an authority was sought to effect payment.*
- (v) *That vide letter dated 8/6/2010 the allottee requested to be allowed to make full payment of allocation.*
- (vi) *That vide receipt No. 2563127 of 16/12/2011 the payment was received.*
- (vii) *That upon payment, the Director of Surveys was requested to forward the Registry Index Map.*
- (viii) *That vide letter ref c774/vol.99/178 of 4th November 2011, the Director of Survey forwarded the Registry Index Map.*
- (ix) *That prior to this allocation, the suit land was uncommitted Government land.*
- (x) *That before the aforementioned lease was released to the District Land Registrar for registration, is when a court order was received stopping the process until the matter is determined.*

They asked that the suit be dismissed with costs.

B. EVIDENCE OF THE PARTIES

(i) The plaintiff's evidence.

The plaintiff testified that he is an employee of the Ministry of Lands, Physical Planning Department. He is employed as a Senior Draftsman. He stated that he is the rightful owner of the suit land. He stated that in the year 2011, he received information from a colleague that his records at the Lands Office were being tampered with and that a new lease was in the process of being prepared to a third party. He travelled to Nairobi to the Ministry of Lands office and found that the registration card had been removed from the Senior Records Office (SPRO). He also went to the Land Rents office and found that the records had been tampered with. The name of the proprietor now read Heldo Foodstuff as proprietor rather than himself. It is then that he opted to come to court.

He stated that he was allotted the plot on 1st June 1999. He however did not produce the Letter of Allotment as an exhibit, his explanation being that it got lost. He then paid the amount in the allotment letter, that is the sum of Kshs. 21,748/= on 29th September 2000. He also paid an amount of Kshs. 675/= for registration, attestation and for the Certificate of Title on 22nd January 2001. He was then issued with the Lease said to commence from 1st June 1999. The Lease was forwarded by the Chief Land Registrar to the District Land Registrar, Uasin Gishu through a forwarding letter of 19 January 2001. The Lease was registered and he was issued with a Certificate of Lease on 22nd January 2001 and this was entered in the Presentation Book. He also had a Memorandum of Registration of transfer which he produced as an exhibit. He produced an Official Search Certificate conducted on 3rd August 2011 which showed him as the registered proprietor. He stated that he has been paying Land Rent. He testified that he went through all procedures before obtaining title. He questioned the allotment letter issued to Heldo Foodstuff dated 24th June 1999. To him the same was a forgery, and in any event, the said allotment letter came after his own allotment letter, which was the earlier to be issued on 1st June 1999. He also testified that Heldo Foodstuff Ltd was incorporated as a company on 1st December 2010. He also testified that the letter of allotment in favour of Heldo Foodstuff required the offerree to pay the premiums within 30 days, yet the 4th defendant purported to accept the terms thereof on 8 June 2010, 13 years later. He testified that his

title had a history of being interfered with, and he produced a letter dated 13 March 2009 from one Onyino Mukobe, the Chief Land Administration Officer, where there was a purported lease to one Leah Jelagat, which the writer declared to be a forgery. He testified that the records showing him as owner were interfered with by Land officers so as to facilitate a lease to the 4th defendant.

Cross examined by Mr. Wabwire of the State Law Office, the plaintiff stated that he applied for the plot although he did not have the application letter. Once the land was allotted to him, he drew a letter of acceptance, although he did not have the same with him. He stated that the sum of Kshs. 21,748/= was what was noted in the Allotment letter as requiring payment. He agreed that the payment was made outside 30 days as required in the said allotment letter. He stated that the land is within the Eldoret Central Business District (CBD) and is a commercial property but he has not developed it since the year 1999. It only has temporary structures. He testified that when he went to peruse the Land office file, he found all documents that showed how he acquired the land as missing, save for the Certificate of Lease.

Mr. Komen for the 4th defendant first cross-examined the plaintiff on his status. The plaintiff testified that he was employed in the Physical Planning office in the year 1992 when he was 20 years old. He was earning a net salary of about Kshs. 2,800/= and as at 1999 his earnings were about Kshs. 13,800/= net. He agreed that the value of the property was about Kshs. 50 million at present and that the value was not commensurate with his earnings. He stated that when he applied for the plot, it was vacant. He was shown the special conditions in his lease certificate which required the plaintiff to submit building plans within 6 months and develop the property within 24 months. He agreed that he has not obliged with these conditions.

In re-examination, the plaintiff testified that his application letter, acceptance letter and allotment letter are among the documents removed from the Lands office file.

PW-2 was called to produce the Presentation Book, but I declared him an incompetent witness as the book was not under his custody, the witness being a customer care agent. The plaintiff then called PW-3, the District Land Registrar, at Eldoret who produced the Presentation Book as an exhibit. He testified that when documents are presented for registration, they are recorded in the Presentation Book. He testified that the Lease held by the plaintiff was registered on 22 January 2001 after payment of the requisite fees.

With the above evidence, the plaintiff closed his case.

(ii) Evidence of the Defendants

The 1st, 2nd, 3rd and 5th defendants did not call any witness.

DW-1 was Shadrack Kemboi Kimitei. He is a director of Heldo Foodstuff Ltd, the 4th defendant. He testified that the company was initially registered as Heldo Foodstuff on 7th January 1997 as a business name. The business was later incorporated into a limited liability company on 1st December 2010. He stated that Heldo Foodstuff applied for the land and on 1st July 1999, was issued with an allotment letter dated 24th June 1999. The allotment letter required payment of premiums of Kshs. 69,980/= which was eventually paid on 24th March 2011, and land rent of Kshs. 105,700/= was paid on 16 December 2011. A rent clearance certificate was issued to them upon payment. The company was then issued with a Registered Index Map and a Lease instrument, to forward to the Eldoret Lands Office for registration. What stopped its registration was the injunction issued in this case. He was not aware of the allegations of the plaintiff that his documents were plucked out of the Lands office file.

Cross-examined by Mr. Wabwire for the State, DW-1 conceded that acceptance and payment was required to be made within 30 days of the allotment letter.

Cross-examined by Mr. J.K Korir for the plaintiff, DW-1 stated that they applied for the property in the year 1997. The property was allotted to Heldo Foodstuff as a business name. They paid for the lease on 14 March 2013. The Lease itself was forwarded to Eldoret Lands office for registration on 1st March 2013.

DW-2 was Cyrus Kiogora Mburugu. He works with the Ministry of Lands in the office of the National Land Commission. He is a Principal Land Administration Officer. His work entails the processing of applications for land allocations, processing of grants and leases and appearing in court to give evidence when required. He is based in Ardhi House Nairobi. His office also keeps the files for leaseholds which he described as "Correspondence Files." He stated that the Correspondence File contains the history of the land in issue. He had a Correspondence File No. 203326 for Eldoret Municipality/ Block 7/154, opened in favour of Heldo Foodstuff. He stated that in the file was a letter of allotment Ref. No. 31710/XXVI dated 24 June 1999 allotting land of 0.0697 to Heldo Foodstuff for a term of 99 years from 1st July 1999, at a stand premium of Kshs. 60,000/= and annual rent of Kshs. 12,000/=. At the time of allotment, the plot had been surveyed, the survey having been conducted on 6th April 1984 as per the Registry Index Map (R.I.M).

He testified that once the premium is paid, they call for the RIM after which they prepare a lease. He testified that at some point, the file No. 203326 had disappeared and was re-constructed. A Temporary Cover (TC) was opened. The Lease to Heldo Foodstuff was prepared in the Temporary Cover and was forwarded for registration on 1st March 2013. He stated that when the Lease was forwarded for registration, the Temporary Cover also got lost. However, the original file was recovered after the Minister for Lands, ordered a clean-up at the Lands Office. He stated that the user of the land was business cum commercial. When shown the receipt through which the plaintiff paid his premiums, DW-2 stated that the receipt quotes another file No. 172852. He also stated that the Lease of the plaintiff refers to the file No. 172852.

The witness at that time did not have the file No. 172852 and he was stood down so as to avail it. The matter was adjourned to another date when the witness availed the file No. 172852. That file No. 172852, is the file that contains the lease issued to the plaintiff. He testified that survey for the suit land was done in the year 1984 when survey for several plots in the block, being parcel numbers 147 to 154 was conducted. The survey was done for purposes of preparing leases to the said parcels. He stated that the RIM was released on 11th November 2011 to facilitate preparation of a Lease.

Cross-examined by Mr. Wabwire for the State, DW-2 stated that one first applies for a plot after which the Government assesses the stand premium. There was no application for the land in the plaintiff's file No. 172852. If the land is not yet planned they call for planning, but if the land is already planned and surveyed, the land is allotted as a surveyed plot. If it is not yet surveyed, it is allotted as an unsurveyed plot. Upon determination of the stand premium, the allotment letter is prepared. He was not sure of the payment by the plaintiff for he could not find a carbon copy of the receipt in the file No. 172852, though a photocopy was in the file.

DW-2 was extensively cross-examined by Mr. Korir for the plaintiff and I also asked him a few questions of my own. Inter alia, he stated that according to his knowledge, there has been no lease registered over the suit land and he doubted the authenticity of the plaintiff's lease in the file No. 172852. He stated that the said lease is not backed by any history of how it came into being and that there was no background documentation on how the lease was prepared. He stated that the lease to Heldo Foodstuff Ltd was prepared after ascertaining that the land had not been allotted to anybody else and was still Government Land. He stated that a lease is prepared at their head office in Nairobi after several processes. He was aware that before issuing a second lease, the first had to be cancelled, but according to him, there was no first lease to cancel. He refuted the allegations of the plaintiff that his documents got lost from the file and stated that if this were so, the plaintiff ought to have applied to reconstruct the file using certified copies but what was in their file were only uncertified photocopies. He agreed that the letter of offer was made to Heldo Foodstuff as a business name and the lease was to issue to Heldo Foodstuff as a limited liability company. He stated that this was normal as business names can later get incorporated.

On the allotment letter in the plaintiff's file No.172852, he stated that the same is dated 26th June 1995. He stated that the allotment letter is in respect of an "unsurveyed residential plot No. B26" situated in Eldoret Municipality for a term of 99 years starting 1st July 1995, for an area of approximately 0.1033 hectares. It was his opinion, that the allotment letter in favour of the plaintiff, is not related to the land parcel Eldoret Municipality Block 7/154. He stated that this is because , the allotment letter states that the

land is unsurveyed, yet for the suit land, survey was done in the year 1984, when amendment to the RIM was made to reflect the plot numbers 147 to 164, of which the parcel No. 154 falls in. A proper allotment of the suit land could not therefore be for an "unsurveyed land". He stated that according to the allotment letter of the plaintiff, rent was to be Kshs. 3,000/= but the Lease issued to the plaintiff shows annual rent of Kshs. 2,320/= . The user was also residential, not commercial. Neither does its location correspond to the map. The area of the plot in the allotment letter is 0.1033 hectares yet that in the lease is 0.0697 hectares.

He was referred to the file No. 203326, which held the lease in favour of Heldo Foodstuff. He testified that the letter of allotment was issued in favour of Heldo Foodstuff on 24th June 1999. He agreed that acceptance and payment had to be made within 30 days. He stated that there was a letter of acceptance in the file, but the same is undated, but payment was done on 24th March 2011, about 12 years after the allotment. He agreed that the letter of offer had expired. He testified that the two files are not for the same plot. He stated that file No. 172852 is for an unsurveyed plot and that the correct file for the suit land is the file No. 203326. He testified that he could not tell when the files were opened but usually, they are opened in sequence, meaning that the file No. 203326 was opened after the file No. 172852. He stated that he has no record that the file No. 172852 ever got lost; what had disappeared at some point was the file No. 203326. He agreed that most of the documents in the file No. 172852 were copies but he could not tell where the original documents went. He agreed that it is possible that some documents are missing in the file.

He testified that the parcel Eldoret Municipality/Block 7/154 came into existence on 6th April 1984 when amendment was done to the RIM to reflect the plots numbers 147 to 164, of which the parcel No. 154 was among them. He stated that before they drew a lease in favour of Heldo Foodstuff, they sent an officer to the ground who prepared a ground report. This was for purposes of due diligence. He stated that the Commissioner of Lands approved for payment to be made. He testified that before preparing the lease in favour of Heldo Foodstuff, they did not call the plaintiff to hear his side of the story. He testified that the search certificate showed the plaintiff as registered owner, but he faulted it for stating that the title is an absolute title.

He produced both land files as exhibits. It was his opinion that the Lease of the plaintiff is not a good lease whereas the 4th defendant is entitled to the land.

C. SUBMISSIONS OF COUNSEL

In his submissions, Mr. Korir for the plaintiff inter alia submitted that the plaintiff has proved his case on a balance of probabilities. He submitted that the plaintiff has established that all due procedures were complied with before he became registered as the leaseholder. He submitted that there was proof that his records had been interfered with and that this was admitted by DW-2. He relied on the protection offered by Section 26 of the Land Registration Act, Act No. 3 of 2012, and Article 40 of the Constitution, which protect title. He further submitted that the letter of allotment in favour of Heldo Foodstuff was issued to an entity that had no legal personality, and could not therefore hold property. He submitted that Heldo Foodstuff as a business name is not a party to this suit, and that the 4th defendant cannot assert rights over the letter of allotment. He submitted that a company cannot transact before it is incorporated. He also submitted that the said letter of allotment had expired a long time ago and the action by the Commissioner of Lands in purporting to issue a lease to the 4th defendant was fraudulent, irrational, erratic and smacks of gross unreasonableness. He further submitted that a letter of allotment cannot defeat the title of a person. He submitted that the 4th defendant never led any evidence of fraud to warrant a cancellation of the plaintiff's title. He submitted that the pleadings of the defendants do not contain any allegation of illegality, unprocedurality or corruption, and that parties are bound by their pleadings. He relied on various authorities to support his arguments, all of which I have considered.

Mr. Wabwire for the State Law Office, submitted that the plaintiff does not hold a valid title and that the land belongs to the Government and the Government has the right to lease the same to the 4th defendant. He submitted that the plaintiff never applied for the suit land. He submitted that the plaintiff's land file shows a different allotment letter to what he described as having been issued to him on 1st June 1999. He

submitted that what was allotted to the plaintiff was an unsurveyed plot B26 and that the file No. 172852 was opened for this plot. He submitted that the file No. 172852 was opened in 1995 and submitted that the plaintiff misled the court that he was allocated the land in the year 1999. He also raised doubt that a stand premium of Kshs. 21,748/= would apply for a surveyed plot in the CBD yet the same plot, as allotted to the 4th defendant in the same year, had a stand premium of Kshs. 60,000/=. He also pointed at the discrepancies in the figures of annual rent in the allotment letter and lease held by the plaintiff. He also submitted that title is a document pegged on the process and is not a stand alone document. He relied on Section 65 and 66 of the Land Titles Act, CAP 282. He submitted that the plaintiff must have used his position as an official of the Ministry of Lands to unjustly acquire the suit land. He also raised doubts on the official search produced as it had no receipt and no indication of who had applied for the search. He submitted that Article 40 of the Constitution, only protects a title that was legally acquired. He also relied on Section 80 and 26 of the Land Registration Act, which empower the court to cancel title if irregularly acquired. It was his view that the plaintiff's title was acquired illegally, unprocedurally, and or through a corrupt scheme, as there were no documents to support how the title was acquired. He submitted that the 4th defendant had showed that he applied for the land, was issued with an allotment letter, which was accepted, and he paid the requisite fees. He relied on some authorities to support his submissions.

Mr. Komen for the 4th defendant inter alia submitted that the description of the land in the plaintiff's letter of allotment was completely different from the title that he holds. He submitted that the 4th defendant applied for the land and through various internal processing, its application was approved. He referred to the various correspondences in the file No. 203326, authorizing the issuance of title to the 4th defendant. He submitted that the plaintiff has failed to account on the history of how he applied for and obtained the Lease. He submitted that the correct file for the suit land was the file No. 203326 and not the file No. 172852. He submitted that the plaintiff has failed to prove his case on a balance of probabilities. He asked that the title of the plaintiff be cancelled.

D. DECISION

It is with the above pleadings, evidence and submissions that I need to make a decision on this matter.

In my view, answers to the following issues will determine the matter herein.

- (i) Whether the plaintiff has a valid title.
- (ii) Whether the title of the plaintiff is liable to be cancelled.
- (ii) Whether the proposed lease to the 4th defendant is proper.

I will straight away address the issues.

(i) Whether the plaintiff has a valid title.

On the face of it, the plaintiff does hold what appears to be a Lease from the Government. The Lease was executed by the Commissioner of Lands on 13th December 2000 and it was registered at the Eldoret Lands Registry on 22nd January 2001. The registration of it is discernible from the Presentation Book that was tendered as evidence. It is on this basis that the plaintiff asserts that he holds a good title to the suit land. His evidence is that he was allotted this land on 1st June 1999, and he paid the stand premiums, after which the lease was drawn and registered.

The defendants have countered this, by saying that the suit land has never been allotted to the plaintiff, and therefore, the plaintiff is not entitled to hold a lease over the suit land. They have contended that the Lease that the plaintiff holds was irregularly issued to him and irregularly registered.

In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is

contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.

The plaintiff stated that he was issued with an allotment letter on 1st June 1999. He however did not produce this allotment letter as an exhibit. He stated that the allotment letter got lost. He stated that he wrote an acceptance letter which he also did not have. He stated that he paid what was noted in the allotment letter, but we of course cannot tell if this is so, for he had no documents to support this. He has of course complained of tampering of the file of the lands office. It was admitted by DW-2 that some documents in the file are missing. We cannot however tell what these documents are. I think the plaintiff needed to state what exactly these documents that got lost are, and where possible, produce what he ought to have for his own records, such as the allotment letter and the acceptance letter.

The lands office file, under which the plaintiff obtained his lease, is the file No. 172852. I have seen the allotment letter in that file and it does not tally with the plaintiff's allegation, that he received an allotment letter on 1st June 1999. The allotment letter therein is dated 26th June 1995 in favour of Daudi Kiptugen, the plaintiff. What was allotted to the plaintiff is an "Unsurveyed Residential Plot B26- Eldoret Municipality." The land allotted to the plaintiff measured 0.1033 hectares for a term of 99 years from 1st July 1995. The annual rent is Kshs. 3,000/=. This is certainly different from what was leased to him. The Lease is for the property Eldoret Municipality/ Block 7/154 which measures 0.0697 hectares and the term is 99 years from 1st June 1999. The annual rent is Kshs. 2,320/=. If the plaintiff had an allotment letter showing that he was actually been allotted the suit land, and not the unsurveyed residential plot B26, then, he would have had some weight in his favour. But he has nothing to show that he was allotted the property Eldoret Municipality/ Block 7/154 and he has not demonstrated that the unsurveyed plot B26 is the same as Eldoret Municipality/ Block 7/154. Indeed all evidence goes to show that these two, are completely different plots. The plaintiff sought relief in stating that the allotment letter got lost. I am afraid that without it, I cannot assume that the allotment letter that he is purporting to have held, actually allotted to him the suit land, and I am afraid that I cannot allow that excuse to supercede the documentary evidence that has been tabled before me, that what the plaintiff was allotted was not the suit land. I am aware that the plaintiff's case is partly premised on the argument that some documents were plucked out of the Lands Office file. However, the allotment letter is certainly not one of the documents plucked out of the file. Neither has the plaintiff stated that the allotment letter in the file is not the one issued to him.

In my view, on a balance of probabilities, the plot that the plaintiff was allotted is not the land parcel Eldoret Municipality/ Block 7/154. If it was, then I am afraid that the plaintiff has failed to tender sufficient proof, that he was actually allotted this plot. What appears to me to have been allotted to the plaintiff, is an unsurveyed plot B26, which cannot be the suit land.

If the plaintiff was never allotted the suit land, it was therefore improper and unprocedural for the Commissioner of Lands to issue to the plaintiff a Lease over the suit land. What ended up being registered as a Lease in favour of the plaintiff was not what the Government intended to Lease to him. Somehow, for reasons which are not clear to me, the plaintiff ended up obtaining a Lease over land that the Government did not allocate to him. The title of the plaintiff was therefore either obtained by fraud or misrepresentation, and at the very least, it was acquired unprocedurally.

(ii) Is the title of the plaintiff liable to be cancelled ?

The position of the plaintiff was that since he holds title, the same must be protected. But this cannot be the case. The Constitution of Kenya, 2010, at Article 40 (6), provides that a title that has been unlawfully acquired cannot be protected. This is echoed at 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It will be seen from above that title can be challenged by virtue of the provisions of Section 26 (1) (a) and (b). Under Section 26 (1) (a) title can be challenged if obtained by fraud or misrepresentation to which the person is proved to be a party. Under Section 26 (1) (b), it needs to be demonstrated that the title has been acquired illegally, unprocedurally, or through a corrupt scheme. On the latter, it is not necessary that the title holder be guilty of any misfeasance; he may be an innocent party, but so long as the title is not procured legally, or procedurally, or through a corrupt scheme, the title is still impeachable.

I will address the matters covered in Section 26 (1) (a) and (b).

(a) Was the title of the plaintiff acquired by way of fraud or misrepresentation to which the plaintiff is proved to be a party ?

I have already stated that the evidence before me shows that the plaintiff was allocated an "unsurveyed plot B26." The plaintiff has not demonstrated that he was allocated the suit land. How then, did he accept a lease over property that was not allocated to him ? I have no evidence that the plaintiff made any misrepresentation, that the suit land had been allocated to him. But the plaintiff certainly, knew or ought to have known, that he was receiving a lease over property that had never been allocated to him. Receiving property that one is not entitled to receive, is to me, a fraudulent action. The plaintiff was therefore a party to a fraud that led him to being granted a lease over property that was never allocated to him.

(b) Was the title of the plaintiff acquired illegally, unprocedurally, or through a corrupt scheme ?

On this point, it does not have to be proved that the plaintiff was a party to the illegality, lack of proper procedure or corruption. The plaintiff certainly did not get title procedurally, for what he was supposed to obtain a lease over, was the property described as "unsurveyed plot B26". It was not procedural for the Commissioner of Lands to issue the present lease to the plaintiff. Such action cannot be defended as being legal. I have no evidence that there was any corrupt dealings, but at the very least, there was a procedural impropriety that led to the Lease being issued to the plaintiff.

It is therefore my opinion, that the title of the plaintiff is impeachable by dint of both Section 26 (1) (a) and Section 26 (1) (b).

Under Section 80 of the Land Registration Act, the court has power to order the cancellation of a registration and order a rectification. I have found that the title of the plaintiff was not procedurally acquired, and I therefore proceed to cancel the registration of the plaintiff as proprietor of the land parcel Eldoret Municipality/ Block 7/154.

I do not agree with Mr. Korir that this is a contest as to who holds good title between one holding a lease and another an allotment letter. The matter would be different if the Lease of the plaintiff was properly acquired. In such instance there would be no question that the Lease, since it is a properly obtained lease,

would override a letter of allotment. The issue in this matter goes to the root of the Lease of the 4th defendant, and since it was improperly acquired, it cannot be said to be a good Lease that may be protected.

(iii) Whether the proposed lease to the 4th defendant is proper.

As far as the State is concerned, no lease has ever been issued over the property Eldoret Municipality/Block 7/154. That is why the State intends to issue a lease to the 4th defendant. The lease had already been drawn and was in the process of being registered. The State drew an allotment letter in favour of the 4th defendant on 24th June 1999 upon the premise that the suit land was unalienated Government land. The allotment letter is drawn in favour of Heldo Foodstuff as a business name. It seems that the allottees went quiet until around the year 2006, when they surfaced, and requested that they be allowed to pay for the plot. Their request was granted and they paid for the plot on 24 March 2011. A lease was being prepared for registration in their favour when this suit came up.

I see no problem with the State favouring the 4th defendant with a lease and the State is free to register the said land in favour of the 4th defendant if it minded to do so. Evidence was led that the business name that was allotted the land was converted into a limited liability company, and I see no impropriety in issuing the Lease to the company.

I think I have dealt with all issues in this matter save for costs. Costs ordinarily follow the event and I see no reason to depart from this. The plaintiff shall therefore bear the costs of this suit.

I now make the following final orders :-

- 1. That the Lease and Certificate of Lease held by the plaintiff, over the land parcel Eldoret Municipality/Block 7/154 was irregularly acquired.***
- 2. That the register of the land parcel Eldoret Municipality/ Block 7/154 be rectified by the cancellation of the name of the plaintiff as proprietor.***
- 3. That the State is free to register a lease in favour of the 4th defendant subject to following all required procedures.***
- 4. That the plaintiff shall bear the costs of the suit.***

Judgment accordingly.

DATED and DELIVERED at ELDORET this 30th day of JANUARY 2015.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of: