



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO 1002 OF 2012

ALFRED KAPLAMAI BOR.....PLAINTIFF

VS

BONFACE MUTUA KISILU & 2 OTHERS DEFENDANTS

JUDGMENT

The plaintiff instituted this suit against the defendants in respect of the land parcel Eldoret Municipality/Block 1/209. In his plaint, the plaintiff has pleaded that he is the registered owner of the suit land. He has averred in his pleadings that in the month of April 2011, the defendants unlawfully entered the suit land and constructed a structure thus staging an illegal claim over the land. He has pleaded that he has suffered general damages for the illegal trespass and loss of income from April 2011 and continues to do so. He has thus sought the following orders :-

- (a) A declaratory order against the defendants that the suit land belongs to the plaintiff and that the defendants have no right over it.*
- (b) An order of permanent injunction directed against the defendants from claiming any interest over the suit land.*
- (c) An order of eviction.*
- (d) General damages for trespass and loss of income.*
- (e) Costs of this suit.*
- (f) Interests on (d) at court rates.*
- (g) Any other relief that this Honorable court may deem fit and just to grant.*

The defendants upon service of summons entered appearance and filed a joint defence. The 2nd and 3rd defendants averred that they have been wrongly enjoined to the case as they have no claim over the suit land. The 1st defendant on his part pleaded that he is the registered owner of the suit land having purchased the same vide a sale agreement dated 16 November 2009. He has averred that after he purchased the land he occupied and developed it. He has pleaded that he has in his possession all documents to prove that he is the rightful owner of the suit land and has asked that the plaintiff's claim be dismissed with costs.

Pleadings having closed, the matter proceeded for hearing. The plaintiff testified and called two witnesses . The plaintiff testified that he is the owner of the land parcel Eldoret Municipality/Block 1/209. The same

is a leasehold. The plaintiff produced both the lease and the Certificate of Lease as exhibits 1 and 2 respectively. He testified that before he was granted the lease, he was first issued with a letter of allotment. The first was dated 22/10/1992 and the second 8/6/1994. He also testified that he has been paying rates to the Municipal Council of Eldoret where the land is situated. He produced six receipts for rates. He also produced a receipt of kshs. 42,525/= (exhibit 6) which he stated was what he paid to get the title (probably the stand premium). He also produced an Official Search of the suit land dated 25/10/2012. He further testified that the Municipal Council had through a letter dated 17/10/2012 written a letter affirming his ownership of the suit land. In the year 2011 he found the defendants on the land and he instructed his advocate to write a demand letter. He stated that the defendants are still on the plot and have developed the same.

Cross-examined by Mr. Mwinamo for the defendants, the plaintiff asserted that the 1st defendant had no title over the suit land. He was shown a Certificate of title of the 1st defendant and agreed that the same appears to be a Certificate of title to the same land.

PW-2 was Samson Maru. He is a nephew to the plaintiff. He testified that in the year 2011 he accompanied the plaintiff to the suit land and when they got to the plot, they found the land developed with "mabati" structures. They inquired who had developed the structures and they were eventually led to the 1st plaintiff. They met and the 1st defendant informed the plaintiff that he has an allotment letter to the same land. They were to meet again but the 1st defendant did not show up. It is then that the plaintiff opted to file suit.

PW-2 was cross-examined on the contents of the allotment letters. He confirmed that the allotment letters of the plaintiff (exhibits 3 and 4) are for a commercial plot No. 8 Shauri Yako estate and they do not specifically mention a parcel No. Eldoret Municipality Block 1/209.

PW-3 is also another nephew of the plaintiff. His evidence echoed that of PW-2. He had accompanied the plaintiff to the suit land when they saw the "mabati" structures and later met the defendants.

With that evidence, the plaintiff closed his case.

The 1st defendant is a businessman who sells spare parts in Kisumu town. He testified that he has a Certificate of title to the suit land in his name which he produced as an exhibit (Defence exhibit No.1). He stated that he purchased the said land from one Lasen Mayodi Ombisa and they had a written agreement dated 16 November 2011. He produced the agreement as Defence Exhibit No.2. When they drew the agreement, Mr. Ombisa had a letter of allotment and a sketch map of the plot. He also had a property rates demand in his name. The allotment, sketch map and property rates payment request were produced as defence exhibits 3,4 and 5 respectively. Upon purchase, he took possession and constructed six semi-permanent structures which he rented out as residential premises.

Cross-examined by Mr. Birech for the plaintiff, the 1st defendant conceded that when he purchased the property, he did not conduct an official search from the Ministry of Lands. He only went to the Municipal Council of Eldoret. He read out the letter of allotment which states that the size is 0.04 Ha. His title deed shows the size of the plot as 0.0560 Ha. He conceded that there was a discrepancy between the size of the plot in the allotment letter and that in the Certificate of Lease. He also noted that the allotment letter shows a lease of 99 years from 1st October 1995 yet his Certificate of Lease shows that the lease is for 99 years from 1st January 1999. He conceded that there was a discrepancy on the term. He also read out part of the allotment letter which states that there should be no sale without the prior consent of the Municipal Council. He conceded that he was never issued with any consent from the Municipal Council by the vendor Mr. Ombisa. According to the allotment letter the lessor was the Municipal Council of Eldoret, the same lessor in the Certificate of Title in the name of the defendant. The 1st defendant conceded that he was never issued with a lease by the Municipal Council of Eldoret. He agreed that the Certificate of Lease of the plaintiff (exhibit 1) was issued on 14/7/1997 whereas his Certificate of Lease (Defence exhibit No.1) was issued on 12/01/2012. Mr. Ombisa never handed over to the 1st defendant the Lease itself.

He testified that Mr. Ombisa never issued him with a formal transfer instrument but that they only drew the agreement. He never went to pay stamp duty at the Lands Offices but he gave Mr. Ombisa Kshs. 5,000/= to follow up on the title deed. The same was duly delivered to his (the 1st defendant's) advocates by Mr. Ombisa. Prior to the sale, the 1st defendant did not know Mr. Ombisa.

The 2nd defendant on his part testified that he is only a friend to the 1st defendant and does not live on the suit land. He stated that he has never lived there.

The 3rd defendant on his part testified that he is merely a tenant of the 1st defendant on the suit property. He testified that he has been on the suit land since 2009 as a tenant.

With that evidence the parties closed their evidence.

I invited counsels to make submissions and they filed written submissions.

Mr. Birech for the plaintiff summarized the facts and submitted that not only was the plaintiff given a letter of allotment, but a lease was created in favour of the plaintiff and the plaintiff registered as the lessee of the plot in question. In his view further proof of ownership was provided by the Certificate of Official Search. He further submitted that the 1st defendant only produced a certificate of lease without demonstrating any formal lease between himself and the Municipal Council of Eldoret. He submitted that it is probable that the 1st defendant was a victim of what he termed "super conmanship" from the person who allegedly sold to him the plot and who went ahead to manufacture a Certificate of Lease. He submitted that this is not a case of double registration of the suit land, but only a case of two certificates of lease being in existence for the same land. In his view, the only genuine certificate is that of the plaintiff. He pointed me to the provisions of Section 28 of the Registered Land Act and to the case of ***Cheruiyot vs Bartiony (1988) KLR 422*** as asserting the right of exclusive ownership to every proprietor of land.

Mr. Mwinamo for the defendant on his part, submitted that the plaintiff's case should fail. He submitted that the 1st defendant had produced a title deed showing that he was the registered proprietor of the suit land. He contended that the 1st defendant is a bona fide purchaser for value. On the part of the 2nd and 3rd defendants, Mr. Mwinamo submitted that they were wrongly enjoined to this suit as they had nothing to do with the suit land. No authorities were relied upon by Mr. Mwinamo.

I have considered the pleadings, the evidence and the submissions of counsel. The contest in my view is squarely between the plaintiff and 1st defendant. On one hand, the plaintiff has contended that the suit land belongs to him whereas the 1st defendant has asserted that he has good title to the said land having purchased the same and having been handed over a Certificate of Lease by the vendor. The 2nd and 3rd defendants are strangers to this suit, but I do not fault the plaintiff for enjoining them to this suit. He may have thought that they also have a claim over the suit land. I therefore dismiss the suit against the 2nd and 3rd defendants but with no orders as to costs.

Let me now turn to the contest between the plaintiff and the 1st defendant.

The evidence of the plaintiff was very elaborate on how he came to be registered as owner of the suit land. He first obtained a letter of allotment which was followed up by a formal lease. The allotment letter is dated 22 October 1992 and is from the Municipal Council of Eldoret. It offered the plaintiff land described as commercial plot No. 8 at Shauri Yako Estate. This letter offers the plaintiff the said land at a stand premium of Kshs. 42, 525/= The allotment letter was followed up by a second letter dated 8 June 1994 again from the Municipal Council of Eldoret which set out some additional terms and conditions. The second letter again refers to Plot Provisional No. 8 (commercial) at Shauri Yako estate measuring 0.0525 Hectares. The offer in the allotment letters is for a term of 99 years from 1st January 1992. The plaintiff produced the receipt in payment of the stand premium which was paid on 23rd November 1992. A formal lease was drawn on 5th February 1997 between the Municipal Council of Eldoret and the plaintiff. It is signed and attested. The said lease was registered on 14th July 1997. A Certificate of Lease was then issued on the same day that the lease was registered. The Certificate of Lease shows that the

plaintiff holds a lease to the land Eldoret Municipality/ Block 1/209 for a term of 99 years from 1st January 1992. There is also the official search dated 12th October 2012 which shows that the suit land is registered in the name of the plaintiff. The documents of the plaintiff, from the letter of allotment to the Certificate of Lease and the Certificate of Official search all tally.

The 1st defendant's evidence on the other hand is that he purchased the suit land after being shown an allotment letter. I have seen the allotment letter which is dated 8th December 1995 allegedly from the Municipal Council of Eldoret. It is a letter addressed to L.M. Ombisa and is offering Mr. Ombisa a plot No. 8 being land measuring 0.04 hectares for a term of 99 years from 1st October 1995 at a stand premium of Kshs. 30,000/=. The Certificate of Lease exhibited by the 1st defendant is very different from the letter of allotment. The Certificate of Lease shows that 1st defendant is the first registered lessee for a term of 99 years from 1st January 1999, and not 1st October 1995 as shown in the letter of allotment. One would also have expected the 1st defendant as the first lessee of the suit land to have a formal registered lease in his favour. The 1st defendant admitted that he has none. There is also discrepancy in the acreage of the land. The allotment letter shows 0.04 hectares whereas the Certificate of Lease shows 0.0560 hectares which is a huge difference. No official search was produced by the 1st defendant. Neither did the 1st defendant produce any document to show that he has paid rates in his name. The only document on rates was a demand in the name of Mr. Ombisa without any proof of payment of rates. On the other hand the plaintiff produced several receipts showing that he has been paying land rates for the suit land.

If the 1st defendant had produced a lease and a certificate of official search showing that he is also registered as lessee, I would have treated the suit as one of double allocation of land between the plaintiff and 1st defendant. But none was produced by the 1st defendant and I am inclined to agree with the submissions of Mr. Birech, that the issue here is not one of double allocation but one of two Certificates of Lease of which only one can be genuine.

There is no evidence that supports the Certificate of Lease of the 1st defendant. There is no formal lease and there is no Certificate of Official Search. Neither was it shown that save for the letter of allotment, the vendor Mr. Ombisa, had title to the suit land. The Certificate of Lease of the 1st defendant is therefore a bare document and the only conclusion I can reach is that it is a fake Certificate of Lease that does not carry with it any proprietary interest. It therefore follows that the 1st defendant has no proprietary interest over the suit land. The land is genuinely that of the plaintiff who holds a leasehold title over the same from the Municipal Council of Eldoret.

In the premises, I do issue a declaration that the plaintiff is the genuine holder of the leasehold title comprised in the suit land. I also declare the Certificate of Lease held by the 1st defendant to be document that is not genuine. So that no more confusion can be caused, I order that the said Certificate of Lease be held by the court and not to be released to any person. It should be destroyed once the time for keeping records lapses.

As registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in Sections 24 and 25 of the Land Registration Act which provide as follows :-

24. Subject to this Act—

(a) 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; and

(b) 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 or expressed agreements, liabilities or incidents of the lease.

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.

It follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 1st defendant has no right to the suit land and he must therefore vacate the suit land and hand over possession to the plaintiff. I order the 1st defendant to ensure that he has vacated the suit land and to hand over vacant possession of the suit land to the plaintiff within a period of 30 days from the date hereof. Since there are tenants on the premises, the 1st defendant ought to ensure that they leave within 30 days from today. I also issue an order of permanent injunction restraining the 1st defendant from the suit land or in any other way utilizing the same.

Let me now turn to the claim for general damages and loss of income. The 1st defendant moved into possession of the suit land in good faith in the belief that he had received good title to the same. He had a genuine though mistaken belief that he was the registered owner of the suit land. However as from the time this suit was filed, he was put on notice that he does not own the suit land and if he had conducted due diligence, say by seeking to have a certificate of official search of the suit land, he would have discovered that he had no good title to the suit land. It was not necessary for the 1st defendant to await the conclusion of this matter. I think in the circumstances, it is fair that I condemn the 1st defendant to pay the plaintiff general damages for trespass and mesne profits from the time of institution of this suit which was 5 December 2012. No evidence was however led as to how much the 1st defendant has been receiving as rent. The plaintiff had stated that he intended to develop the land but he also did not say how much he would have expected as rent from what he intended to develop. I am unable to therefore calculate the precise amount that the plaintiff would be entitled to as mesne profits. In lieu of mesne profits, I will however award the plaintiff general damages for trespass as against the 1st defendant. General damages are in the discretion of the court, and in my own discretion, taking into consideration the nature of the suit land and the developments therein, I assess general damages at Kshs. 15,000/= per month from 5th December 2012 which is a duration of 8 months. The total award in general damages is therefore Kshs.120,000/=. The same shall attract interest at court rates from the date of this judgment till settlement in full.

As to costs, the plaintiff is entitled to the same against the 1st defendant.

For the reasons herebefore, I make the following final orders :-

- (1) The suit against the 2nd and 3rd defendants is dismissed with no orders as to costs.
- (2) I issue an order of declaration that the plaintiff is the genuine leasehold owner of the land parcel Eldoret Municipality/Block 1 /209 and further issue an order of declaration that the Certificate of Lease of the 1st defendant is not a genuine Certificate of Lease as the 1st defendant has no proprietary interest over the suit land.
- (3) I order the 1st defendant to vacate the suit land and to ensure that all tenants therein vacate within a period of 30 days from the date hereof. In default the plaintiff be at liberty to apply for an order of eviction and such eviction shall be at the cost of the 1st defendant.
- (4) I make no award on mesne profits but award the plaintiff general damages of Kshs. 120,000/= which shall attract interest from the date of this judgment till settlement in full.

(5) I award the plaintiff costs of this suit as against the 1st defendant.

It is so decreed.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF JULY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. P.K. Birech

Mr. Y.M. Barasa