



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 67 of 2007

JANE WAMBUI KAGWIMA

(suing as the administratrix of the estate of the late) **JAMES KAGWIMA NG'ANG'A**:.....**PLAINTIFF**

VERSUS

ALBERT NJOROGE KAGWIMA

(Suing as the administrator of the estate of the late) **JAMES KAGWIMA NG'ANG'A**:.....**DEFENDANT**

JUDGMENT

The Plaintiffs are the administratrix and administrator respectively of the estate of the late **JAMES KAGWIMA NG'ANG'A**, they being widow and son respectively of the deceased. It is their case that the parcel of Land known as UASIN GICHSU/BURNT FOREST TOWNSHIP/3 measuring 0.0418 acres, hereinafter referred to as the suit land, is registered in the name of the late James Kagwima Ng'ang'a and hence belongs to his estate. That they had a Grant of Administration of his estate confirmed so that the said parcel of land could be transmitted to them but that the Defendant herein had lodged a caution on the suit land on 12th January 2000 claiming to be an equal partner with the deceased proprietor. The Plaintiffs aver that such caution is wrongful and ought to be removed from the register. Their further case is that the Defendant has placed tenants on the suit land continues to collect rent from them while she holds no proprietary interest in the Suitland and this the Plaintiffs claim to have occasioned loss and damage to the estate of the deceased proprietor of suit land. The Plaintiffs therefore pray against the Defendant for orders that the caution be removed and the the Defendant, tenants, and caretaker or anyone else in occupation of the Suitland be evicted from the Suitland. There are also claims for mesne profits at the rate of Kenya shillings 6,000/= per month from 1st August, 2005 until the date of judgment, accounts be taken of all sums of money collected from the Suitland for the period of the Defendant's occupation of the Suitland and for a permanent injunction against the Defendant from entering the Suitland and collecting rent, and a declaration that the Suitland belongs to the deceased.

The Defendant's defence denied that the deceased James Kagwima Nganga is the registered proprietor of the Suitland and further that the Suitland does not form part of his estate. The Defendant's further case is that her step son John Waringu Gichingi fraudulently obtained Grant of Letters of Administration of the estate of her late husband Anthony Gichigi Wawire who died on 25/10/1983 and thereafter fraudulently sold the suit land to the late James Kagwima Ng'ang'a whose estate is represented by the Plaintiffs herein. That the issue of rent was resolved in the succession cause by the Defendant in respect of the estate of her late husband. She then made a general denial of the plaint and prayed that the suit be struck out or be dismissed with costs.

The Defendant though served, did not attend court at the hearing of the suit. The Plaintiff gave evidence that she is an administratrix of her late husband's estate together with her son the co plaintiff. She produced a copy of the confirmed Grant. Her further case was that her

late husband James Kagwima Nganga owned the parcel of land known as Uasin Gishu/Burnt Forest/3 and she produced a copy of the certificate of lease. She further produced a copy of Green Card – particulars of lease. She produced a sale agreement between her late husband and one John Warigu Gichigi over the suit land. Her evidence was that her late husband and John Waringu Gichingu were tenants in common in equal shares in 1985 but that changed in 1999 when her late husband bought John Waringu's Gichigi's ½ share thereby becoming the sole proprietor of the consolidated suit land. That the family of the late James Kagwima Nganga has never used the Suitland since it was purchased with a stone building wherein tenants abide paying rent to the Defendant. She made a demand to the Defendant to move out of the suit land but the Defendant refused to do so. She prayed that her suit succeeds. Her counsel submitted that the suit was proved and the same must succeed.

In this case the Plaintiff produced a certificate of lease in which it is clearly shown that the registered proprietor of Uasin Gishu/Burnt Forest township/3 is one James Kagwima Nganga whom the Plaintiff states is her late husband. The Certificate of Confirmation of Grant to the estate of James Kagwima Nganga produced in evidence shows the 1st Plaintiff as one of the administrators of the said estate. In the said certificate of Confirmed Grant the suit land is listed in the schedule as item no.(d) and it devolves to the 1st Plaintiff wholly. The suit land is registered in the name of James Kagwima Nganga under the Registered Land Act cap.300 Laws of Kenya and by virtue of the provisions of section 27 of the said Act, that registration vests in him the absolute ownership of the suit land together with all rights and privileges belonging or appurtenant thereto. It follows therefore that James Kagwima Nganga as registered proprietor of the lease of the Suitland he is vested with the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto only subject to all implied and expressed agreements, liabilities and incidents of the lease. It is my finding from the above provisions of the law that James Kagwima Nganga as the registered proprietor of the Suitland he is entitled to all rights and privileges thereto.

I find that the interest of the Defendant in the suit land is not defined either in the pleadings or in any other way. She chose not to attend court and so the court lacks the benefit of what she could have said in evidence had she attended. In her defence she alleged fraud by the seller of the Suitland to James Kagwima Nganga but I find that that is a matter between the Defendant and the said seller one John Waringu Gichigi who was in any event not made a party to the instant suit. Having found that the Suitland is registered in the name of James Kagwima Nganga and having held that the same then as per chapter 300 S.27 of the Registered Land Act of the Laws of Kenya, the same vests absolutely in him and having found that the 1st Plaintiff is the administratrix of the estate of the late registered proprietor of the suit land and that in the Certificate of Confirmed Grant the Suitland devolves to the 1st Plaintiff I hereby declare that the 1st Plaintiff is the owner of the Suitland. Having so found and held I order that the Defendant her tenants, caretaker or any other persons in occupation of the suit be removed there from by eviction and there is hereby issued an order of perpetual injunction against the Defendant, her servants and agents from entering the Suitland collecting rent or in any other way interfering with the Plaintiffs' use of the Suitland.

No basis whatsoever was shown as to the continued persistence of the caution entered against the suit land by the Defendant. The same is hereby ordered removed.

As concerns the claim for mesne profits it is my finding that nothing was produced in evidence to prove the basis upon which the claimed sum of monthly amount of Kshs.6000/= was arrived at. There was nothing produced to show what shops or residential premises there were and what rents were being collected there from. In the 1st Plaintiff's evidence that part of the suit premises as is in use by the Defendant is not exactly similar to the 1st Plaintiff's portion. And even if they were similar, which I find that they are not, nothing was

tendered in evidence to show that the 1st Plaintiff was indeed collecting a monthly rent of Kshs.6,000/= as stated in her evidence. In the circumstances I find that the claim for mense profits in the monthly sum of Kshs.6, 000/= is not proved and the same fails. In the circumstances of this case I make the finding that the taking of accounts as prayed in the plaint is the exercise that is appropriate. I hence order that accounts will be taken within one hundred and twenty (120) days of the date of this judgment of the rents the Defendant has collected from the Suitland from 26th June 2006, when the Grant was confirmed, until the date of eviction as ordered above. The Plaintiffs will have the costs of the suit.

There will be orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF MAY 2010.

**P.M.MWILU
JUDGE**

IN THE PRESENCE OF

Alwanga H/B for Karira - Advocate for the Plaintiff's

Andrew Omwenga - Court clerk

**P.M.MWILU
JUDGE**