



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**LAND SUIT E & L NO. 216 OF 2012**

***(FORMERLY HCCC NO. 71 OF 2005)***

**SAMUEL WAGORO.....PLAINTIFF**

**VERSUS**

**NICODEMUS HONGO OMOGO.....DEFENDANT**

**JUDGMENT**

Samuel Wagoro Ngugi (hereinafter referred to as the Plaintiff) filed this suit on 8/8/2005 vide plaint dated 22/7/2005 against Nicodemus Hongo Omogo (hereinafter referred to as the Defendant) claiming that he was the registered proprietor and owner of all that land known as Eldoret Municipality Block 5/60/1 measuring approximately 0-1044 Hectares, having purchased the same in public auction on 19<sup>th</sup> January 2005.

That the Defendant had charged the parcel of land known as Title No. Eldoret Municipality Block 5/60/1 to M/S Kenya National Assurance Co. Ltd., which through its successor in title M/S Kenya National Assurance Company (2001) Ltd. Acquired statutory power of sale in the event of default on the charge terms as against the defendant. Following invitation for a public action scheduled for 19.1.2005 of all that property comprised in Title No. Eldoret Municipality Block 5/60/1 through the press and posters the plaintiff attended a public auction conducted at Eldoret Town Main Post Office precincts, which public auction was conducted by Garam Investments Auctioneers and court bailiffs and following his competitive highest bid, he was declared the successful highest bidder of the suit property. Attendant to the plaintiff's successful public auction purchase of the suit land he was granted transfer by charge and the memorandum of discharge of charge by deposit of title, which he lodged, registered at the Uasin Gishu Land registry and obtained a new title in his name, thereby extinguishing the defendants' rights over the suit land on the 13.4.2005.

The defendant is aware that the property in the suit land has passed to the plaintiff and that he is supposed to give vacant possession, and in any event has been asked expressly to give the plaintiff vacant possession of the suit land and in default the defendant has become a trespasser liable for mesne profits from 19<sup>th</sup> January 2005 upto the date the defendant shall give vacant possession. The mesne profits shall be at the rate of Kshs. 30,000/per month.

The plaintiff prays for orders restraining the defendant from purporting to remain in the suit land. He prays for vacant possession as against the defendant over the suit land known as Title No. Eldoret Municipality Block 5/60/1. Demand and notice to sue in default have been issued to no avail.

There has not been any other suit between the plaintiff and the defendant over the same subject matter nor is there one pending in any other court.

The Plaintiff specifically prays for a permanent injunction to restrain the defendant, his agents, servant's, assigns and or heirs or anybody whosoever from occupying, or using the plaintiffs property comprised in Title No. Eldoret Municipality Block 5/60/1.

The defendant do forthwith and in any event within 14 days do give the plaintiff vacant possession of the suit land herein and in default the defendant be evicted. Mesne profits of Kshs. 30,000/per month from 19.1.2005 until determination of this action. Costs of the suit and interest.

The defendant denied plaintiffs allegations and further stated that the plaintiffs title was withdrawn and cancelled once the District Lands Registry realized that a lawful caveat in the nature of a court injunction restrained the Kenya National Assurance Company Ltd (2001) from transferring the property or at all. The Defendant contents that the Plaintiff has wrongfully sued him as no transaction of sale or purchase have ever been negotiated or concluded between them and hence lack of privity of contract. The title in favour of the plaintiff was lawfully withdrawn by the Lands Registrar which act terminated ex-parte eviction proceedings the Plaintiff had procured hence this suit. Further the

Defendant contends that he owes the Plaintiff no duty of care and the Plaintiff can seek redress from the Lands Registrar pursuant section of the Registered Lands Act and Kenya National Assurance Company 2001 Limited who are not a party to this suit. The Defendant contends that injunctive relief or eviction an issue prior to the determination of the issues in Kisumu, HCC 6/2005 Kenya National Assurance (2001 Limited pending before court now at Eldoret as HCC 43/2005.

The Defendant further avers that the plaintiff in collusion with the Kenya National Assurance Company through Garam Investment Auctioneers privately and without regard to due process privately sold off the Defendant's house to the Plaintiff well below the market value. By an indecent valuation done at the time of the sale the Defendant obtained the valuation at a market value of Kshs. 3.54 million.

The Defendant contends that the sale to the Plaintiff at Kenya Shilling 2.2 million was well under the market and forced sell value price and constituted a fraud on his condominium of lease.

The counter claim is based on fraud. The defendant prays that the suit be dismissed and counter claim allowed.

In the reply to defence and defence to the counter claim the plaintiff denies fraud and states that the counter-claim discloses no cause of action.

When the matter came up for hearing the plaintiff testified that he saw in the newspaper an advertisement by Garam investment for the sale by auction of a plot in West Indies in Eldoret. The auction was to take place on 19/1/2005 at the front office of Eldoret. He attended the auction and made a bid of Kshs. 2.2 million and was declared the highest bidder in respect of the property thus Eldoret Municipality Block 5/60/1. He produced the advertisement. He paid 25% of the purchase price which was Kshs. 550,000. He produced the receipt. He followed due process and was issued with a certificate of lease on 13/5/2005. The defendant has refused to move out of the parcel of land hence he prayed for eviction. He also prayed for rent. He denied any fraud or unlawful dealing with the property.

PW2, Dorothy C. Letting testified that the suit property was registered in the names of the plaintiff vide entry number 16 but a cancellation was effected by the Registrar under section 142 of the Registration Land Act Cap 300 (repealed). She did not know why the cancellation was done.

PW3, Sara Chelimo, Land Registrar Uasin Gishu testified that the register of the parcel of land was opened on 30/4/1979. It was a leasehold title for Jabira Onyango Odondi for a term of 72 years. On 14/10/1992, there was a transfer to Nicodemus Hongo Omogo and a certificate of lease was issued. Nicodemus charged the property on 27/10/1992 to K.W.A.C for Kshs. There was a transfer by charge in exercise of statutory power of sale to Samuel Wagoro Ngugi. He was registered as owner and a certificate of lease was issued. Transfer by charge on 15/4/2005. The transfer was cancelled by the Land Registrar under entry number 8. The Defence did not call any evidence and in fact did not attend the hearing.

I have considered the evidence in record and submissions by the Plaintiff and do find that the plaintiff was an innocent purchaser for value without notice having purchased the property and paid the purchase price vide an auction.

Section 27 and 28 of the repealed Registration Land Act Cap 300 Laws of Kenya provided as follows: -

**"(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;**

**(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 and expressed agreements, liabilities and incidents of the lease.**

28. 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 —

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

**(b) 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."**

I do find that the Plaintiff was lawfully registered as the proprietor of the suit property. This court further finds that the Land Registrar has limited power in cancellation of entries in the register.

Section 142 of the repealed Registered Land Act Cap 300 Laws of

Kenya provided as follows:

**"(1) The Registrar may rectify the register or any instrument presented for registration in the following cases —**

**(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;**

(b) in any case and at any time with the consent of all persons interested;

(c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.

(2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change."

It follows that the Registrar had no powers to cancel or Rectify the register in this case as the rectification did not involve formal matters and or errors or omissions not materially affecting the interests of any proprietor.

The defence did not controvert the evidence of the Plaintiff. The Plaintiff has proved his case on a balance of probabilities and therefore I do grant orders that the cancellation by the Land Registrar in Entry number 8 was a nullity. I do grant orders that the defendant do forthwith and in any event within 60 days do give the plaintiff vacant possession of the suit land herein and in default the defendant be evicted.

**SIGNED, DATED AND AT KISUMU THIS 26TH DAY OF JANUARY, 2022.**

**S.M.KIBUNJA**

**JUDGE**

**DELIVERED AND SIGNED AT ELDORET THIS.9TH DAY OF FEB, 2022**

**ENVIRONMENT & LAND**

**JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honorable Chief Justice on 15<sup>TH</sup> March 2020 and with the consent of the parties.

**ENVIRONMENT & LAND**

**JUDGE**