



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 160 OF 2014**

**PAS COMMUNICATION LTD.....PLAINTIFF**

**VERSUS**

**TERESIA WANGARE KINUTHIA.....DEFENDANT**

**J U D G M E N T**

**INTRODUCTION AND PLEADINGS**

PAS Communication Limited (*hereinafter referred to as the plaintiff*) has sued Teresia Wangare Kinuthia, (*hereinafter referred to as the defendant*) claiming that the plaintiff is the registered proprietor of all that parcel of land comprised in L.R Certificate of Lease Eldoret Municipality Block 14/824 having purchased the same for valuable consideration on 29.06.2012 and having been duly registered on 03.07.2012.

The Plaintiff claims that on or about 30.11.2013, the defendant hereinabove named moved into one of the vacant units within the compound of L. R. No. Eldoret Municipality Block 14/824 without the knowledge or consent of the plaintiff or its caretaker and refused to pay rent or vacate the same when asked to. She has persisted in such illegal stay and refused to pay rents due. She has been a nuisance to legitimate tenants in the same premises who have elected to vacate or relocate to other premises. The plaintiff has suffered loss and damage.

The plaintiff contends that the defendant's actions are illegal, unlawful null and void and are a violation of the plaintiffs right to acquire and enjoy property.

The plaintiff claims that the defendant has been acting illegally by, forcefully collecting rent from the tenants of the plaintiff and appropriating the same to her own use, trespassing upon private property of the plaintiff and refusing/neglecting and persisting in such refusal/neglect to pay rent for the premises she occupies, being a nuisance to the legitimate tenants of the plaintiff by harassing them and being quarrelsome to them for no apparent reason at all, refusal to yield vacant possession when called upon to do so by the plaintiff as the owner, forcefully remaining in the said premises to the detriment of the plaintiff, denying the plaintiff the fair returns of its investment estimated at kshs.129,200/= per month and lastly, denying the plaintiff, the use and access of its premises.

The plaintiff claims to have suffered loss and damage as a result of the foregoing and demands accordingly to be compensated at the prevailing market rates. The plaintiff claim Kshs. 129,200/= being rents so far collected and appropriated by the defendant.

The plaintiff prays against the defendant for mesne profits to be assessed by the court at the prevailing market rates of Kshs.79,200/= per month from November 2013 to date and thereafter until this suit is heard and determined.

The plaintiff further prays for order of permanent injunction against the defendant restraining her from interfering with the plaintiff's ownership of the suit property known as L.R. No. Eldoret Municipality Block 14/824. The plaintiff avers that there is no other suit pending and that there have been no previous proceedings between the parties over the same subject matter.

The plaintiff prays for a declaration that the defendants action to enter and remain in L.R. No. ELDORET MUNICIPALITY BLOCK 14/824 is trespass, false detainer and is illegal and unlawful and an Order of eviction to be issued against the defendant.

Permanent injunction restraining the defendant from interfering with the plaintiff's ownership of L.R. ELDORET MUNICIPALITY BLOCK 14/824. Costs of the suit and any other relief the court may deem necessary to grant in the circumstances.

The defendant filed a statement of defence denying that the plaintiff was the lawful registered owner of the whole of that land L.R. certificate of lease ELDORET MUNICIPALITY/BLOCK 14/824 having purchased the same for valuable consideration on 29.06.2012 and having been

duly registered on 3.07.2012, and the plaintiff is invited to strict proof thereon.

The defendant denies that on or about 30.11.2013 she moved into one of the vacant units within the compound of L. R. No. ELDORET MUNICIPALITY/BLOCK 14/824 without the knowledge or consent of the plaintiffs' care taker and put the plaintiff to strict proof thereon.

The defendant states that she is a stranger to the particulars of illegality/unfaithfulness and nullity and further denies that the plaintiff has suffered loss and damages of Kshs.129,200/= and put the plaintiff to strict proof.

In answer to paragraphs 6 of the plaint, the defendant denies the plaintiff is entitled mesne profits to be assessed by court Kshs.79,200/= and put the plaintiff to strict proof thereon.

The defendant stated that the plaintiff fraudulently entered into a sale agreement of the land known as ELDORET MUNICIPALITY BLOCK 14/824 by coercing and inducing the late JANNAH NYAMBURA KINUTHIA into signing the sale agreement. Registering the land known as ELDORET MUNICIPALITY/BLOCK 14/824 fraudulently in their name. The defendant states that at no point did the family consult over the sale of any of the properties held in trust for the beneficiaries.

That before her demise the administrator was sickly and the alleged agreement of sale between her and Pass Communication on 29<sup>th</sup> June, 2012 for the land known as L. R. No. ELDORET MUNICIPALITY/BLOCK 14/824 is illegal, fraudulent and/or was due to coercion and or misrepresentation.

The defendant stated further that efforts to have the family resolve the issue pertaining the estate has been futile since the plaintiff is insisting that their brother Francis Kinuthia Kiarie is in agreement.

The defendant prays for an order holding that the property known as ELDORET MUNICIPALITY /BLOCK824 belongs to the beneficiaries of the late Kinuthia Kiarie and an order of permanent injunction against the plaintiff from interfering with the property ELDORET MUNICIPALITY/BLOCK824. The title document held and Registered in the name of the Plaintiff be cancelled as it was irregularly obtained.

The defendant prays that the plaintiff's suit be dismissed with costs and judgment entered for defendant in the following terms of a declaration that the land belongs to the beneficiaries of Kinuthia Kiarie.

A permanent injunction restraining the plaintiff or their agents from trespassing, entering and or any dealing over land parcel ELDORET MUNICIPALITY/BLOCK 14/824. Cancellation of title deed held by the plaintiff in respect of land parcel ELDORET MUNICIPALITY /BLOCK 14/824 and costs of this suit.

## **EVIDENCE**

When the matter came for hearing, ***PW1, Francis Major Watunu Kibithe***, the Director of P.A.S. Communication stated that the plaintiff buys and sells property. The company is the registered owner of Eldoret Municipality Block 14/824. The company is situated in Elgon View near Testimony Primary School. The plaintiff Company purchased L.E. No. ELDORET MUNICIPALITY BLOCK 14/824 for valuable consideration on 29.06.2012 for Kshs.14,000,000/-. That upon acquisition of the suit property the plaintiff paid the requisite taxes land levies to the government and was duly registered as owner on 03.07.2012 and was issued with a certificate of lease on the same date.

That the plaintiff took over the property and applied for change of user on 16.11.1012 to the local government and in the print media to alter the premises from a single dwelling to a multi dwelling. The Company commissioned a caretaker to collect rent from tenants and maintain the property immediately upon acquisition.

In the course of his duty to run the property the caretaker discovered in November 2013 that the defendant had moved into one of the dwelling units and taken up residence.

The defendant did not pay rent, was quarrelsome and a nuisance to other tenants.

The defendant also demanded from my tenants that they pay her rents for the premises, claiming that it belonged to her late mother, who was the vendor.

He made a report to Langas Police Station being O. B. No.37 of 3<sup>rd</sup> December 2013 but no concrete action was taken.

Again in 2014 while showing a prospective buyer, the defendant became vulgar and violent and chased him and his customer.

Although he had an opportunity to dispose the property for Kshs.27,000,000/=, he lost the deal due to the misconduct of the defendant.

The defendant has barred him and the Company agent from setting foot on the suit premises, which negates all rights and privileges of ownership.

It is the desire of the plaintiff company that the defendant be barred, restrained and or evicted from the suit premises as she does not have any rights over it.

It is also the desire of the company that the defendant be made to compensate the company for all rents received and appropriate from November 2013 to date.

The plaintiff also seeks several other reliefs against the defendant as set out in the plaint including but not limited to vacant possession, eviction, mesne profits and costs of the suit.

The plaintiff further stated that the defendant's mother was in good health when they signed the agreement. Moreover, that she gave possession of the suit property.

On cross examination by Mr. Ngetich learned counsel for the defendant, he stated that he bought the property from Hannah Kinuthia. The Advocate was Mburu Maina. He paid Kshs.14,000,000. The money was paid through the lawyer and the whole transaction was carried out through the lawyer Mburu Maina. The defendant used violence to enter the land. He reported to Langas Police Station. The defendant was charged but the Magistrate released them to pursue a civil case.

**DW 1, Teresia Wangare Kinuthia, testified** that her late mother Hannah Nyambura Kinuthia was the registered owner of the entire parcel L.R. No. Eldoret Municipality Block 14/824. It was not true that the plaintiff bought the said parcel L. R. No. ELDORET MUNICIPALITY BLOCK 14/824 for Kshs.14,000,000/= as per agreement dated 29<sup>th</sup> June, 2012 as the sum of Kshs.3,000,000/= was not deposited to Family Bank Account of his mother or neither the sum of Kshs.11,000,000/= was deposited on the same account after completion of the said agreement.

There is a similar agreement dated 11<sup>th</sup> May, 2012 purported sale of ELDORET MUNICIPALITY BLOCK 14/824 for Kshs. 13,300,000/= which never materialized. The said parcel ELDORET MUNICIPALITY BLOCK 14/824 is the family homestead and not for sale. The plaintiffs' intention to sell their homestead for Kshs.27,000,000/= to Sepal Sephire Ltd was illegal. Langas Police Station could not take action against her due to the fact that the parcel was family homestead and no consent to sell from other beneficiaries. As a beneficiary, she was not entitled to pay rent for their homestead. The plaintiff's company was not entitled to be compensated but to transfer back the family parcel to the family as they never deposited any money in their late mother's Account of Kshs.3, 000,000/= and Kshs. 11,000,000/= as per their agreement stated. The plaintiff's company is not entitled the relief sort in any way.

#### **SUBMISSIONS BY PARTIES**

The plaintiff submits that he obtained the title for valuable consideration and that **Sections 24, 25 and 26 of the of the Land Registration Act No. 3 of 2012** are applicable. The plaintiff submits further that Hannah Nyambura Kinuthia was the registered owner of the suit land and therefore had the legal capacity to transfer the property to the plaintiff. She signed the sale agreement on 29.06.2012 and had capacity to transfer the property. According to the plaintiff, the defendant did not prove any fraud against the plaintiff.

The defendant on her part submits that the transaction was fraudulent and therefore **Article 40(6) of the Constitution of Kenya 2010 and Section 26(1) of the Land Registration Act No. 3 of 2012** apply.

#### **ANALYSIS AND DETERMINATION**

The facts of this matter are that the 2<sup>nd</sup> June 2012 the late Hanna Nyambura Kinuthia of id no 8726866 known as the vendor of the property in dispute which expression included her successors and assigns and PAS Communications Ltd known as the purchaser agreed that the vendor was to sell whilst the purchaser was to purchase the suit property. The purchase price was kshs.14,000,000. The purchaser was to pay a deposit of Kshs.3,000,000 on the vendors account and whilst the balance of Kshs.11, 000, 000 was to be paid in full on or before the completion date which was 90 days after the execution of the agreement. The agreement was executed by the deceased and Francis Watunu Kibithe and Judy Waithira Watunu and attested to by J. M. Mburu advocate. The plaintiff produced a certificate of lease and a certificate of official search that indicated that property was registered in the names of the deceased on 4<sup>th</sup> November 2009 and a certificate of lease issued. The certificate of official search dated 3<sup>rd</sup> July, 2012 shows that the property was registered in the names of PAS Communication and a certificate of lease issued on 3<sup>rd</sup> July 2012. According to the available records the plaintiff is the registered absolute proprietor of the property.

Article 40(6) of the Constitution provides as follows;-

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

The provision of section 24(a) and 25 and 26(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows; Section 24 of the Land Registration Act provides as follows :-

***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***

Section 25 of the Land Registration Act provides as follows;-

***“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.”**

Section 26(1) of the Land Registration Act provides as follows:

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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.”***

The import of Article 40(1) of the Constitution and Section 26(1) of the Land Registration Act is that any title that is found to have been fraudulently, corruptly, unprocedurally obtained ought to be cancelled.

The particulars of fraud according to the defendant are fraudulently entering into a sale agreement with the deceased. There is no evidence that the agreement was fraudulently entered into. It is signed by the vendor and the purchaser. The deceased vendor marked the agreement with her thumb print. The same is attested to by Mburu Maina Advocate. There is no evidence that the deceased Hannah Nyambura Kinuthia was coerced into signing the sale agreement and that she was sickly at the time of signing the agreement. The fact that the agreement was signed on 29.6.2012 a Friday and certificate issued on 3.7.2012 on Tuesday is not per se evidence of fraud. The defendant failed to file a counter claim against the plaintiff and to enjoin the Land Registrar in the matter as a party and further failed to call evidence from the land registrar to prove fraud. It is trite law that the person who alleges fraud proves the same and as regards the standard of proof of fraud, the law is quite clear.

In ***R. G. Patel v. Lalji Makanji [1957] EA 314***, the East African Court of Appeal stated thus:

***“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”***

Moreover, this court finds that the defendant is not the administratrix of the estate of the deceased Hannah Nyambura Kinuthia and therefore, cannot claim on behalf of the estate. The defendant having failed to secure a grant of letters of administration cannot claim on behalf of the estate of the deceased Hannah Nyambura Kinuthia. This court finds that the defendant does not have the capacity to counterclaim and has not done so and that the plaintiff has a valid title to the property and that the defendant is a stranger to the estate of the deceased.

The upshot of the above is that the suit succeeds in terms of order of permanent injunction against the defendant restraining her from interfering with the plaintiff's ownership of the suit property known as L.R. No. Eldoret Municipality Block 14/824. The court issues a declaration that the defendant's action to enter and remain in L.R. No. ELDORET MUNICIPALITY BLOCK 14/824 is trespass, false detainer and is illegal and unlawful.

I do further issue an Order of eviction against the defendant. The defendant to be given 60 days' notice. The court further issues an order of Permanent injunction restraining the defendant from interfering with the plaintiff's ownership of L.R. ELDORET MUNICIPALITY BLOCK 14/824. The plaintiff has failed to prove the loss and damage suffered and the claim for mesne profits has also not been established. The suit partially succeeds and therefore I do award half costs. Orders accordingly.

**Dated and delivered at Eldoret this 23<sup>rd</sup> day of November, 2018.**

**A. OMBWAYO**

**JUDGE**