



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L 229 OF 2012

HASHAM LALJI PROPERTIES LTD.....PLAINTIFF

VERSUS

KIPCHOGE KEINO.....DEFENDANT

JUDGMENT

INTRODUCTION

By a plaint dated 25th January 2006 the plaintiff sued the defendant for:

- a. A declaration that the Plaintiff being the registered owner of the suit property namely Eldoret Municipality/Block 13/72 is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
- b. A permanent injunction restraining the defendant, his agents, servants or otherwise howsoever, from remaining on or continuing to occupy the suit property.
- c. A declaration that the defendant whether by himself, his agents and or servants or otherwise howsoever are not entitled to remain on the suit property.
- d. Vacant possession of the suit property.
- e General damages for trespass.
- f. Costs of this suit and interest thereon at such rate and for such period of time as this Honorable court may deem fit and just to grant.
- g. Any such other or further relief this Honorable court may deem appropriate.

The plaintiff contemporaneously filed a chamber summons seeking for leave to enter upon and take possession of the suit premises pending the hearing and determination of this suit. The plaintiff further sought for an injunction restraining the defendant from trespassing or dealing in any way with the suit premises. It also sought for the assistance of the Officer Commanding Eldoret Police station in enforcing the orders if granted.

The defendant was served and filed a defense and counterclaim dated 4th February 2006 where he denied

the contents of the plaintiff's plaint and sought for orders in his counterclaim as follows:

Counter claim:

- a. General damages for trespass
- b. A declaration that the Defendant is the lawful and rightful owner of Eldoret Municipality Block 13/72
- c. An order compelling the Plaintiff to execute the transfer of Lease documents over Eldoret Municipality Block 13/72 in favour of the Defendant and or do any such acts or obtain such consents that shall be required to transfer legal ownership of Eldoret Municipality Block 13/72 to the defendant and in default the Deputy Registrar of this Court to execute the transfer and all such documents as shall be required to effect the aforesaid Transfer;
- d. Costs of this suit;
- e. Any other or further relief this Honorable Court.

In the defendant's counterclaim, he particularized the loss and damage that has been occasioned by the plaintiff 's refusal to transfer the suit property.

The plaintiff's application dated 25th January 2006 was heard and a ruling delivered on 18th May 2006 whereby the said application was dismissed as it did not meet the threshold for granting mandatory injunctions. The matter was mentioned on several occasions to enable parties comply with the pre-trial procedures. On 23rd May 2013 when this matter came up for mention to confirm compliance with pre-trial procedures, the Judge noted that the defendant had complied while the plaintiff was yet to comply with order 11 of the Civil Procedure Rules 2010. The court gave an order that the plaintiff do file and serve its list of documents, list of witnesses and witness statements within 30 days failure of which the plaintiff would be required to show cause why its suit should not be dismissed.

The court also issued an order of inhibition on the suit land inhibiting the registration of any disposition in the register. The order directed that either party was to extract the order and serve upon the Land Registrar to preserve the subject matter as there was an imminent danger of the same being disposed of.

This matter came up for hearing 20th March 2017 when both counsels for the plaintiff and the defendant were present. The defendant was also present but the plaintiff was however not present. I notice from the court record that the defendant has always attended court and the plaintiff has never attended. Counsel for the defendant told the court that he was ready to proceed with his two witnesses who were in court. Counsel for the plaintiff applied for adjournment stating that they did not have sufficient instructions from the plaintiff. Counsel for the defendant vehemently opposed the application on the grounds that the matter has been in court for over 10 years and that the plaintiff has never been interested in prosecuting the case. It has been the defendant who has made the initiatives to fix the matter for hearing. He submitted that if the plaintiff's counsel really lacked sufficient instructions then he could have filed an application to cease acting a long time ago.

The court declined to grant the adjournment and ordered that the matter proceeds as earlier scheduled. Plaintiff's Counsel made a further application that the plaintiff's witness statements be adopted as evidence before the court but the same was objected to by counsel for the defendant on the grounds that the defendant would not have an opportunity to cross examine the witnesses. Counsel submitted that this would be prejudicial to the defendant if the plaintiff is not subjected to cross examination. The court rejected the application and observed that that was a backdoor way of renewing the application for adjournment which had already been denied.

Mr. Masika Counsel for the defendant urged the court to dismiss the plaintiff's claim under Order 12 Rule 3 of the Civil Procedure Rules which states that:

If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court

Counsel for the defendant further submitted that under order 12 Rule 3(3) if the defendant has a counterclaim then he may be allowed to proceed and prove his counterclaim.

Order 12 Rule 3(3) states:

If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.

The court considered the arguments and the import of Order 12 rule 3, dismissed the plaintiff's case and allowed the defendant to proceed with his counterclaim.

Counsel for the plaintiff Mr. Chemoyai informed the court that he would not be comfortable cross examining the defendant's witness as he is known to him. Counsel for the defendant stated that he would withdraw the statement of the witness Ian Kipkoskei Keino and proceed with only the defendant. The same was withdrawn.

Defendant's Case

It was the defendant's case that he was sued by the plaintiff herein. He testified that the plaintiff's representatives came to his home in 1973 and told him that they were selling the suit property. The defendant stated that he informed the plaintiff that they had to go to his lawyer's office. The defendant subsequently went to the office of Aggarwal Advocates where the plaintiff informed him of the purchase price. The defendant urged the court to adopt his statement dated 21st July 2015 as evidence of the court and the same was adopted.

The defendant further urged the court to adopt the bundle of documents filed in court as evidence before the court. The defendant confirmed that he was taken to view the suit property by the plaintiff 's two directors, their mother and the defendant's lawyer. He further testified that he was also introduced to the Assistant Managing Director as they wanted him to know that the property had been sold to the defendant.

The defendant testified that by a letter dated 13th August 1973 the plaintiff wrote to Raymond Woolen Mills informing them that they should forward the rent payment of the suit property to the defendant as the property had been sold to him.

On 3rd November 1973, the defendant's lawyer Mr Aggarwal wrote to the plaintiff seeking for the release of titles in respect of the suit property which letter is on page 5 of the list of documents. The defendant further stated that his lawyer wrote a reminder on 18th January 1974 in respect of the release of the title documents. See pg. 6 of the bundle of documents. On 5th February 1974, the defendant's lawyer wrote another reminder to the plaintiff to release the title documents within seven days failure of which he would take legal action against the plaintiff. See pg. 7.

It was the defendant's evidence that the plaintiff wrote a letter dated 12th February 1974 to the defendant's Advocate enclosing the original title documents. See pg. 8. The letter stated in part;

'We hereby enclose all the documents regarding the title deeds to enable you draw up a transfer in favour of Mr. Kipchoge arap Keino.

Please note that the land rent will also be paid by Mr. Keino as we have already sold the plot to him'.

The plaintiff forwarded the following documents to the defendant's lawyer:

1. Original Indenture dated 10th December 1946 between one Brendan O' Shea and Rosaline Woods. (See pgs. 9 – 12)
2. Original Indenture dated 21st February 1948 between one Rosaline Woods and Marjorie Crofts Rose Magentry. (see pgs. 13 – 16)
3. Original Indenture dated 15th February 1966 between Marjorie Crofts Rose Magentry and the plaintiff. (see pgs. 17 – 20)
4. An original land rent demand sent to the plaintiff on 22nd January 1974 (see pg. 21)
5. An original land rent demand sent to the plaintiff and the defendant on 6th April 1974. (see pg. 22)

The defendant further testified that his lawyer wrote a letter dated 15th February 1974 to the Commissioner of lands enclosing a cheque of Kshs. 72/ in respect of the land rent payment. He stated that the land rents demands were being addressed to both the plaintiff and the defendant for their attention. It was the defendant's testimony that his lawyer prepared a draft assignment and forwarded it to the plaintiff for execution vide a letter dated 16th February 1974. (see pg. 24). The plaintiff vide a letter dated 19th February 1974 wrote a letter to the defendant enclosing a duly signed and sealed Transfer/Assignment by the plaintiff in favour of the defendant. (see pg. 25)

The defendant further produced an undated but signed and sealed Assignment/Transfer from the plaintiff to the defendant. (see pg. 26 -28) He stated that the Assignment was not dated but the same defined the suit property and the amount of the purchase price which was Kshs. 75,000/. The said amount was acknowledged by the plaintiff. The defendant also gave evidence that the plaintiff Directors signed and sealed with the company's common seal and the same was witnessed by Mr. Aggarwal the defendant's Advocate. He further stated that his lawyer died before the registration of the Assignment was done.

The defendant produced bank statements from his account No. 11041122 with Barclays Bank of Kenya Ltd to show that Raymond Woolen Mills was depositing monthly rent in respect of the suit property. The said Raymond Mills had a standing order for payment of rent to the defendant's account. (see pgs. 31-33). Nyairo & Co Advocates were later appointed as Administrators of Aggarwal's law firm. The defendant stated that he wrote a letter dated 5th March 2003 instructing Nyairo & Co Advocated to take over his files from Aggarwal's firm. Alfred Nyairo wrote a letter to the defendant acknowledging receipt of his letter and of the files.

It was the defendant's testimony that Nyairo & Co Advocates were following up with the registration of the suit property. The defendant stated that he took possession of the suit property in 1973 and that Raymond Woollen Mills moved out in 2002. The defendant's son Ian Kipkoskei Keino moved into the property in 2003. It was also the defendant's evidence that that the plaintiff never came to the property between 1973 and 2002.

In 2005, the defendant stated that some people from the plaintiff's firm came and locked the building which prompted the defendant to report the matter to the police. He produced a letter dated 12th November 2005 addressed to the OCS Eldoret Police station. The Defendant also stated that the plaintiff herein filed this suit in 2006 together with an application for a mandatory injunction which was heard and dismissed by the court. He referred the court to the proceedings. The parties later recorded a consent that both do apply for the extension of the lease which was expiring and that the certificate of lease be kept in the defendant's custody.

The defendant gave evidence that he applied for the extension of lease and the same was approved for a

further 50 years with effect from 1st October 2008 as per the letter dated 11th October 2010 from the Ministry of Lands. (see pg. 54) The said letter was copied to the plaintiff. The defendant also paid Kshs. 28,200/ as renewal fees for the suit land as demanded vide a letter dated 1st September 2012. He stated that he is the one who paid the said amount and not the plaintiff. Upon payment, he was issued with a new lease certificate which was still in the plaintiff's name. (see pg. 56)

The defendant testified that the plaintiff collected the renewed lease certificate contrary to the court order that directed that the defendant keeps the lease certificate. He stated that he is in possession of the property and his son is in occupation.

The defendant therefore urged the court to grant the orders prayed for in his counterclaim. He then closed his case.

On cross examination by Mr. Chemoyai the Plaintiff's counsel, he stated that he entered into a sale agreement with the plaintiff for the sale of the suit property. He also stated that he paid the purchase price which was Kshs. 75.000/ . He confirmed that the Plaintiff's directors signed the document showing that the property was sold to him.

On re-examination by Mr Masika, the defendant stated that the document was signed by the directors of the plaintiff and a common seal was affixed together with attestation by his Advocate. The document confirmed the amount paid as it was acknowledged and sealed.

The court ordered that submissions be filed within 14days which was done by both counsels.

Defendant's Counsel's Submission

Mr Masika Counsel for the defendant submitted that the issue for determination following the dismissal of the plaintiff's suit is whether the plaintiff sold the suit property to the defendant and whether or not it gave possession thereof after the said purchase.

Counsel submitted that the defendant had proved that the suit property was sold to him and he cited the uncontroverted evidence and the bundle of documents filed in court to support the defendant's claim as sufficient proof. He further submitted that the defendant has been in possession with the full knowledge of the plaintiff since 1973.

Mr Masika Counsel for the defendant submitted that the plaintiff had refused to execute the relevant transfer documents to enable the defendant acquire title in his name. Counsel reiterated the defendant's evidence which I have elaborately dealt with above. He urged the court to find that the defendant had proved his counterclaim on a balance of probabilities and thus entitled to the prayers sought. Counsel further highlighted the critical parts of the defendant's evidence which I have also highlighted above.

Issues and determination

The case before the court is a straightforward one of sale of a suit property and failure by a party to execute transfer documents to enable a purchaser to be registered as an owner. The issues for determination herein would therefore be:

1. Whether or not the plaintiff sold the suit property to the defendant.
2. Whether the plaintiff gave possession to the defendant.
3. Whether the defendant is entitled to the orders sought for in the counterclaim.

I had mentioned in the beginning the background of the case and how the plaintiff's suit was dismissed and the defendant allowed to proceed with the counterclaim. The plaintiff's counsel filed submissions and crafted some issues for determination for the court. Had the plaintiff's case been subsisting I would have

considered only two issues namely:

1. Whether the plaintiff sold the suit property to the defendant.
2. Whether the plaintiff should execute the transfer of lease documents over Eldoret Municipality Block 13/72 in favour of the defendant.

Having gone through the pleadings, documents in support, and the evidence of the defendant, I would have answered the issues in the affirmative in respect of the defendant's counterclaim. I will not delve into the issue as to whether the plaintiff is the registered owner of the suit property as there is overwhelming evidence to show that the plaintiff had sold the property but did not transfer it to the defendant. The issue of absolute ownership as provided for under section 24 of the land Registration Act does not apply in this case as circumstances of the case calls for analysis of why the property is still registered in the plaintiff's name.

I have looked at the cases and authorities cited to support the defendant's counterclaim and I find that they are relevant to the current case. Where a party enters into a sale agreement and thereafter refuses to execute documents to transfer the suit property, the aggrieved party has a recourse in law to either ask the court to compel the party to execute the said documents or in the alternative direct the Deputy Registrar of the Court to execute the transfer forms and all forms incidental thereto to facilitate the transfer.

In the case of **Jason Gitimu Wangara V Martin Munene Wangara & Others (2013) eKLR** Olao J. dismissed the plaintiff's claim against the defendants and entered judgement in favour of the defendants. The Judge further directed that the Deputy Registrar of the Court to execute all necessary documents for and on behalf of the plaintiff to ensure that the defendant obtained the certificate of title to the property they had proved belonged to them.

The defendant's evidence was uncontroverted and from the history of this case, the plaintiff had a hard start from the beginning. The plaintiff brought an application for a mandatory injunction which was dismissed as it did not meet the threshold for granting the same. The documents produced indicated that indeed the plaintiff entered into an agreement for sale of the suit property. The plaintiff's actions subsequently after sale are not in consonance with his prayers in the plaint. The documentary evidence tilted heavily in favor of the defendant. I have no doubt in my mind that the plaintiff sold the suit property to the defendant.

From the evidence on record I also find that the plaintiff unlawfully entered the suit property in March 2003 to November 2005. This is confirmed by a letter dated 12th November 2005 addressed to the OCS Eldoret Police Station. The defendant also testified on the same. There was trespass on the suit property by the plaintiff.

The defendant particularized the loss and damage in his defense and counterclaim but during his evidence in chief, he did not lead any evidence or produce proof of the amounts that he claimed to have lost. Even though this was specifically pleaded I find that as a special damage it ought to have been strictly proved by way of receipts. I conclude that this limb fails.

I am alive of the fact that the award of general damages is discretionary which is subject to factors such as the duration of time that the plaintiff has been in occupation. The court is also cognizant of the fact that the defendant is entitled to general damages for trespass as pleaded. However, I am unable to award the damages as the defendant has always been in occupation apart from the interrupted period from 2003 to 2005 when the plaintiff interfered. I would therefore award a token figure of Kshs. 100,000/ taking into consideration the period of trespass by the plaintiff.

I have considered all the pleadings, the evidence and the exhibits in support and against this case and I am satisfied that the defendant has established his counterclaim against the plaintiff with respect to the suit land.

In conclusion, I hereby enter judgment for the defendant against the plaintiff as follows: -

- a. It is hereby declared that the Defendant is the lawful and rightful owner of Eldoret Municipality Block 13/72
- d. The Plaintiff do execute the transfer of Lease documents over Eldoret Municipality Block 13/72 in favour of the Defendant and or do any such acts or obtain such consents that shall be required to transfer legal ownership of Eldoret Municipality Block 13/72 to the defendant and in default the Deputy Registrar of this Court to execute the transfer and all such documents as shall be required to effect the aforesaid Transfer;
- c. General damages for trespass in a token sum of Kshs. 100,000/
- d. Costs of this suit to the defendant.

Dated and delivered at Eldoret on this 25th day of May, 2017.

M.A ODENY

JUDGE