



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

TERESA WANGARE KINUTHIA.....DEFENDANT

RULING

Pas Communications Ltd (**hereinafter referred to as the Plaintiff**) came to court against Teresa Wangare Kinuthia (**hereinafter referred to as the defendant**) claiming to be 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 herein 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 claims to have suffered loss and damage.

The Plaintiff contends that the Defendants' actions are illegal, unlawful null and void and are a violation of the plaintiffs right to acquire and enjoy property. Such actions include forcefully collecting rent from the tenants of the Plaintiff and appropriating the same to her own use and trespassing upon private property of the Plaintiff. Moreover refusing and or neglecting and persisting in such refusal or neglect to pay rent for the premises she occupies and being a nuisance to the legitimate tenants of the Plaintiff by harassing them and being quarrelsome to them for no apparent reason at all. She has refused to yield vacant possession when called upon to do so by the Plaintiff as the owner and has forcefully remained in the said premises to the detriment of the Plaintiff. The defendant has denied the Plaintiff the fair returns of its investment estimated at Kshs.129,200/= per month and access of its premises. The plaintiff has suffered loss and damage as a result of the foregoing and shall accordingly demand to be compensated at the prevailing market rates.

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 therefore should be evicted. He further claims Kshs.129,200/- being rents so far collected and appropriated by the defendant and 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 also prays for an order of permanent injunction against the defendant restraining her from interfering with the Plaintiff ownership of the suit property known as L.R NO. ELDORET MUNICIPALITY BLOCK 14/824.

The suit was accompanied with a Notice of Motion dated 21.7.2014 wherein the Plaintiff seeks orders that a temporary injunction do issue restraining the defendant, her servants, agents and or assigns from in any way dealing and or interfering with the plaintiffs legal possession, collecting rent from the rental houses built on the suit property known as L.R. No Eldoret Municipality Block 14/824 pending the hearing and determination of the main suit.

In the alternative all the rental proceeds paid by the tenants occupying premises on land known as L.R NO. ELDORET MUNICIPALITY BLOCK 14/824 be deposited in court or in an interest earning joint account in the names of the counsels for the parties herein pending the hearing and determination of the main suit.

The application is based on grounds that the Plaintiff is the legal registered proprietor of L.R No. Eldoret Municipality Block 14/824 which he purchased for valuable consideration on 29.06.2012. The Plaintiff subsequently followed all the requisite legal procedures and had the suit property registered in its name. That the defendant herein without the knowledge or consent of the Plaintiff illegally moved into one of the dwelling units and took up resident and refused to pay rent and or vacate the premises when asked to do so, the defendant has subsequently without any colour of right been forcefully collecting rent from the tenants to the Plaintiff and appropriated the same for her own use. That it is questionable for the defendant herein to collect rent from the Plaintiff's tenant whereas she has no right over the suit premises. The plaintiff stands to suffer great loss and damage if the defendant continues to unjustly collect rent and enrich herself from the rental income at the expense of the applicants who are the legal owners. The plaintiff believes that it is therefore in the best interest of justice that rent collected from the rental premises on L.R NO. ELDORET MUNICIPALITY BLOCK 14/824 Be deposited in court or in an interest earning joint account in the names of the counsels of the parties herein pending the final determination of this matter. The defendant will not be prejudiced in anyway if the orders sought herein are granted. That the Plaintiff has demonstrated a *prima facie* case with a high probability of success and that damage shall not be an adequate remedy in the circumstance.

The application is supported by the affidavit of **Francis Major Watunu Kibithe** a director of the Plaintiff company herein, the registered proprietor of L.R NO. ELDORET MUNICIPALITY BLOCK 14/824 who states that on the 29.6.2012, the Plaintiff through a valid sale agreement purchased L.R NO. ELDORET MUNICIPALITY BLOCK 14/824 for a valuable consideration. That upon acquisition of the suit property the Plaintiff paid the requisite taxes and land levies to the government and was duly registered as the legal owner on 3.07.2012 and a certificate of lease was issued on the same date.

The Defendant filed Defence on 25.7.2014 dated 10.7.2015 denying the allegations in the Plaintiff and specifically denying that the Plaintiff is the registered owner of the whole of the land L.R Certificate of lease Eldoret Municipality/Block 14/824 having purchased the same for valuable consideration on 29.6.2012 and having been duly registered on 3.7.2012, and the Plaintiff is invited the defendant to strict proof thereof. 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 Plaintiff's care taker and put the Plaintiff to strict proof thereon. The defendant denies the Plaintiff is entitled mesne profits to be assessed by court Kshs.79,200/= and put the plaintiff to strict proof thereof. In answer to paragraph 7 of the Plaintiff, the defendant denies that the Plaintiff is not entitled to prayers sort as he acquired the said title deed by fraudulent means thus fraudulently entering into a sale agreement of the land known as Eldoret Municipality Block 14/824 and coercing and inducing the late

Hannah Nyambura Kinuthia Into signing the sale agreement and registering the land known as Eldoret Municipality Block 14/824 fraudulently in his 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.

She claims that before her demise the administratrix was sickly and the alleged agreement of sale between her and Pass communication on 29th 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. 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 L.R No. Eldoret Municipality Block 14/824 belongs to the beneficiaries of the late Kinuthia Kiarie and that there be an order of permanent injunction against the Plaintiff from interfering with the property Eldoret Municipality Block 14/824. That the title document held and registered in the name of the Plaintiff be canceled as it was irregularly obtained.

The Defendant ultimately prays that there be a declaration that the land belongs to the beneficiaries of Kinuthia Kiarie. Moreover a permanent injunction restraining the Plaintiff or their agents from trespassing, entering and or any dealing over land parcel Eldoret Municipality Block 14/824 and cancellation of title deed held by the Plaintiff in respect of land Parcel ELDORET MUNICIPALITY/BLOCK 14/824 with Costs of this suit.

In the Replying Affidavit by Teresiah Wangare Kinuthia, she states that she is the the daughter of the late Annah Nyambura Kinuthia the administratrix of her father's estate. That the property in contention is their home that they have been brought and raised for years. That prior to the purported sale there have been contentions in the High Court over the Estate of their late father and that numerous attempts by her brother Francis Kiarie and the Plaintiff with other persons to transact on this parcel have been repulsed earlier.

She believes that the alleged sale which is designed to include their late mother ought to be investigated as the alleged dates mentioned was when their late mother was ailing and that the purported purchase money was never deposited to her mother's account. That the sale if any was not by their mother or within her knowledge as efforts to even administer to her estate has been frustrated by Francis Kiarie in cahoots with the plaintiff herein. That she is in their family house where she has been residing with her mother as she is not married. She further states that attempts to warn the Plaintiff on purchase was ignored yet other purchaser heeded to the warnings and are now safe..

The Plaintiff submits that he purchased the suit property for valuable consideration from its registered owner but was denied access and utility by the defendant. He submits that he will suffer irreparable loss if the defendant continues to collect rent and reside in the suit premises.

The Defendant on the other hand submits that the Plaintiff has not established a *prima facie* case with a possibility of success and has not demonstrated that he will suffer irreparable loss which cannot be compensated adequately with damages if injunction was not to be granted.

Moreover, that the balance of convenience tilts in favour of the defendant if the case is to be heard and determined by the court.

I have considered the Application, supporting affidavit, replying affidavit and submissions of parties and do find that the principles for grant of temporary injunctions were set out in the celebrated case of **Giella – Vs- Casman Brown & Co. Ltd 1973 E.A 358** thus ***the applicant must show a prima facie case with a probability of success or that if the injunction is not granted the applicant will***

suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.

On the first principle as whether the Plaintiff has demonstrated that he has a *prima facie* case with a likelihood of success, I do find that the Plaintiff has produced a certificate of lease, agreement of sale and several documents that demonstrate a *prima facie* case with a likelihood of success in view of the provisions of sections 25 and 26 of the Land Registration Act which provide as follows:-

“2. Rights of a proprietor-

(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.”

“26. Certificate of title to be held as conclusive evidence of proprietorship-

(1) The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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.”

On the second issue of irreparable loss, the court finds that the property in dispute appears to have a colossal value going by the agreements of sale though no actual valuation has been done.

The court finds that the matter in dispute can only be determined on a balance of convenience as there is allegation of fraud and therefore on this basis, it would be just and fair that all the rental proceeds paid by the tenants occupying premises on land known as LR. No Eldoret Municipality Block 14/824 be deposited in an interest earning joint account in the names of the Advocates appearing for the parties pending determination of the suit. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF NOVEMBER, 2015.

JUSTICE OMBWAYO ANTONY

ENVIRONMENT AND LAND COURT AT ELDORET



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