



**Kiambu Coffee Growers Co-operative Union Limited v Attorney General & 3 others;  
 Constituency Development Fund, Gatundu North (Interested Party) (Environment  
 & Land Petition 10 of 2021) [2023] KEELC 19273 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19273 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT THIKA  
 ENVIRONMENT & LAND PETITION 10 OF 2021  
 JG KEMEL, J  
 JULY 25, 2023  
 (FORMERLY NAIROBI ELC PET. NO. 1602 OF 2016)  
 IN THE MATTER OF ARTICLE 22(1)**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR  
 FUNDAMENTAL FREEDOMS UNDER ARTICLE 40(1), (2), (3) AND 47**

**BETWEEN**

**KIAMBU COFFEE GROWERS CO-OPERATIVE UNION  
 LIMITED ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE  
 SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER COMMANDING POLICE DIVISION, GATUNDU  
 NORTH ..... 3<sup>RD</sup> RESPONDENT**

**OFFICER COMMANDING STATION, KAMWANGI POLICE  
 STATION ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**CONSTITUENCY DEVELOPMENT FUND, GATUNDU NORTH INTERESTED  
 PARTY**



## JUDGMENT

1. On December 20, 2016 the petitioner petitioned this court *vide* a petition dated December 19, 2016 filed against the respondents seeking the following orders:-
  - a. A declaration do issue that the setting up of Gatundu North Police Divisional Headquarters and Kamwangi Police Station in the petitioner's land title No Chania/Kanyoni/642 (suit land) without the following the laid down procedures under part viii the Land Act 2012 violates article 40 (1)(2)(3) and article 47 of the Constitution and is therefore null and void.
  - b. An order of *mandamus* directed at the 3<sup>rd</sup> and 4<sup>th</sup> respondents to remove the illegal Police Divisional Headquarters and the Police Station set up in the suit land and cede vacant possession to the petitioner.
  - c. Mesne profits at the rate of Kshs 72,900/- per month from January 2011 until vacant possession is ceded.
  - d. Cost of the petition.
2. The petitioner's case in brief is that it is the registered proprietor of the suit land. That the 3<sup>rd</sup> and 4<sup>th</sup> respondents acting under the command of the 2<sup>nd</sup> respondent entered into the suit property and established a Police Divisional Headquarters for Kiambu North sub-county and Kamwangi Police Station without its consent, authority and permission. That having not been consulted and or their consent taken the actions of the respondent violated its right to fair administrative action under article 47 of the Constitution of Kenya. That the setting up of the two police stations on the suit land have deprived the petitioner the right to utilise its land for gain and in particular to set up a mobile money transfer business (Mpesa).
3. The petition is supported by the affidavit of Peter Oren Muringi, the chairman of the petitioner sworn on December 20, 2016 the deponent reiterates the contents of the petition in his affidavit.
4. It is the petitioner's case that the actions of the respondents smacks of impunity and infringe on the petitioner's right to property as enshrined under article 40(1) of the Constitution of Kenya. Further the actions of the respondents arbitrarily deprived the petitioner of its property without full, just and prompt compensation under article 40 (2) and (3) of the Constitution and part viii of the Land Act, 2012.
5. The petitioner's claim is denied *vide* the replying affidavit sworn on May 25, 2017 and deponed by Reuben M. Muli, the Officer Commanding Police Division, Gatundu North. The deponent admits that Kamwangi Police Station was established on the suit land *vide* a lease agreement between New Kamwangi Gumba Limited and Gatundu North Constituency Development Fund (CDF) who leased the suit land on behalf of Kenya Police Service, Gatundu North. That the establishment of the police stations was to serve the densely populated residence of Kamwangi and to deal with the prevailing insecurity and illicit brews in the area. That it is the new Kamwangi Gumba that availed a copy of the title deed of the suit land. He deponed that any liabilities arising from the lease should be directed to New Kamwangi Gumba Ltd (the lessor) and the Gatundu North Constituency Development Fund (CDF). That these two parties ought to be enjoined to the suit to enable them answer to the petition.
6. In a further affidavit sworn on July 31, 2017 Peter Oren Muringi avers that the lease agreement between New Kamwangi Gumba Ltd and Gatundu North Constituency Development Fund is unknown to



the petitioner. In any event the respondents occupation of the suit land is nothing but an illegality. That had the respondents carried out due diligence on the title of the suit land they would have discovered that the title held by New Kamwangi Gumba Ltd had been cancelled way back on July 10, 1982. That the respondents illegal occupation of the suit land is unjustifiable.

7. On July 28, 2022 the court was informed by the parties that the respondents moved out of the premises of the suit land and that the only issue pending was with respect to compensation to the petitioner. On November 1, 2022 parties agreed to converse the question of compensation by way of written submissions.

### **The Written Submissions**

8. The firm of Musyoka Muigai & Co Advocates filed submissions on behalf of the petitioner on February 10, 2023.
9. It was submitted that mesne profits must be pleaded and proved. Mesne profits is defined as profits of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves. See the Court of Appeal decision in *Christine Nyanjama Oanda v Catholic Diocese of Homa Bay Registered Trustees* (2020) eKLR.
10. Relying on *Halsbury's Laws of England* 4<sup>th</sup> Edition Vol 45 paragraph 26 page 1503 the petitioner submitted that where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such amount as would reasonably be paid for that use.
11. That there is no dispute that two police stations were established on the suit land without the consent of the petitioner until June 2022 when they vacated the premises. It is the submissions of the petitioner that the respondents were trespassers in the petitioner's land and the petitioner is entitled to mesne profits for the period that the respondents remained therein from 2011 to June 2022.
12. It was submitted that the monthly rent for the suit premises stands at Kshs 72,900/- per month for the period beginning January 2011 to June 2022, which period is eleven and a half years or 138 months, giving the total amount of Kshs 10,060,200/-.
13. That since the respondents were put in possession by the interested party, it is the petitioner's position that both the respondents and the interested party are joint trespassers on the land and therefore liable to pay mesne to the petitioner.
14. The petitioner filed further submissions on April 6, 2023 and highlighted the following: The petitioner was registered as proprietor of the suit land on August 30, 1982; Kiambu Thika Sacco Society Limited was its affiliate which has since been dissolved; The court in ELC No 603 of 2001 – Nairobi in its Judgment dated January 27, 2015 upheld the already existing ownership of the property by the petitioner, a position that was supported by the 1<sup>st</sup> respondent in that case; the petitioner is entitled to compensation for the entire period it was deprived of its property on account of wrongful occupation by the 4<sup>th</sup> and 5<sup>th</sup> respondents.
15. The 1<sup>st</sup> - 4<sup>th</sup> respondent (respondents) submitted that they entered into the suit land on the October 11, 2013 with the permission of the registered owner and pursuant to a lease agreement dated the June 26, 2013 between the interested party and New Kamwangi Gumba Limited. That in any event there was no injunction granted in the ELC 603 of 2011 preventing the former owner from interfering or dealing with the property pending the determination of the suit. That the burden of proof lies with the petitioner to establish trespass on the part of the respondents, which burden it has failed to discharge.



16. As to whether the petitioner is entitled to mesne profits, the respondents submitted that the respondents handed over the suit land to the petitioner on the July 1, 2022. That any legal liabilities to the lease cannot attach to them since they were not parties to the lease. Therefore, that they are not liable to the petitioner for any losses incurred for the loss of the use of the suit land. Finally, in the event that any liability is assignable to the respondents then it would have to be from the October 26, 2016 when the petitioner became registered owner of the land. Prior to that date the respondent's entry into the land was pursuant to a lease.
17. The interested party failed to file written submissions despite service.

### **Analysis And Determination**

18. The key issue for determination is whether the respondents trespassed onto the land and if yes is the petitioner entitled to mesne profits.
19. The background of this case is that the petitioner claims to be the registered owner of the suit land. It is the case of the petitioner that being the registered owner of the property, the respondents illegally trespassed onto the land depriving it of the opportunity to use and quiet enjoyment of the land including setting up a mobile money transfer business on the suit land. That it had to forgo rental income accruing from the suit land and hence the claim of mesne profits in the sum of Kshs 72,900/- per month.
20. The respondents on the other hand have admitted having occupied the suit land but pursuant to a lease dated the June 26, 2013 between the previous owner and Gatundu North Constituency Development Fund where the later leased the premises for use by the respondents for the establishment of two police station/offices. That if any liability must be attached, it must be against the interested party and not the respondents seeing that they were not party to the lease.
21. On the July 28, 2022 the petitioner informed the court that the respondents had vacated and handed over the suit land to the petitioner prompting the petitioner to abandon prayer (a) and (b). By consent parties moved the court to determine prayer (a) and (d) with respect to mesne profits and costs of the suit.
22. It is not in dispute that the suit property was subject to a dispute ELC 603 of 2001 between New Gumba Company Limited v Kiambu Coffee Growers Cooperative Union, Kiambu Thika Sacco Society and District Land Registrar. The judgement in this case was delivered on the January 27, 2015 where the petitioners title in the suit land was upheld. It is also not in dispute that according to the green card on record the petitioner became registered owner of the suit land on the August 30, 1982. On the June 20, 1996 the land was registered in the name of Kiambu Thika Sacco Society Limited. The petitioner avers that this is its subsidiary company. On the October 26, 2016, the lands reverted to the petitioner.
23. It is also not in dispute that the respondents were in occupation of the suit land until the July 1, 2022 when they vacated and handed over the suit land. The question is whether the occupation of the respondents amounted to trespass.
24. Section 2 of the *Civil Procedure Act* cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received



therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

25. Order 21 rule 13 of the [Civil Procedure Rules](#) provides as follows:-

- “ 13. Where a suit is for the recovery of possession of immovable property and for
- (1) rent or mesne profits, the court may pass a decree—
- a. for the possession of the property;
  - b. for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
  - c. directing an inquiry as to rent or mesne profits from the institution of such suit until—
    - (i) the delivery of possession to the decree-holder;
    - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or
    - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

26. In case of [Attorney General v Halal Meat Products Limited](#) [2016] eKLR considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages*, 18<sup>th</sup> Ed. para 34-42.”

27. In the case of [Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah](#) [2016] eKLR had this to say in considering an issue of whether the plaintiff had established a case for mesne profits:-

“In *Bramwell v Bramwell*, Justice Goddard stated that “... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated that these words: “mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant’s possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in *Halsburys Laws of England*, which defines mesne profits as an action by a land owner against another who is trespassing on the owner’s lands and who has deprived the owner of income that otherwise may have



been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.

*Halsburys*, op. cit, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The *Black's Law Dictionary* defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." *The Concise Oxford English Dictionary* defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession and recoverable by the landlord."

The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and also seeking an injunction against the respondent. The initial defense filed by the appellant dated October 18, 2007 was a denial of the averments in the plaint. The respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on August 9, 2010 whereby the appellant cited a notice dated March 3, 2008 in which he communicated to the respondent that he had terminated the lease and sought vacant possession. The respondent through his advocates replied to the said letter and wrote inter alia as follows:-

"..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No 585 of 2007.....The issues your clients are raising .....are the same issues already in court. Your clients notice of termination of lease ....is therefore inconsequential."

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the respondents response. It is important to point out that mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that



wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.

For starters, it should be noted that the concept of mesne profits is a remedy available to the landowner/ landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes ...”

28. The petitioner's case is that despite being the registered owner of the suit land, the respondents trespassed onto the land thus depriving it of its use and enjoyment.
29. The petitioner averred that the respondents occupied the suit land since January 2011. It is the respondents' case that they occupied the suit land pursuant to a lease between New Kamwangi Gumba Limited and Gatundu North Constituency Development Fund (CDF) dated the June 26, 2013. It is the respondents case that the suit land was leased by CDF for the creation of the divisional police headquarters.
30. It is clear from the judgement of the court delivered on the January 27, 2015 that the petitioner is the owner of the land. New Kamwangi Gumba Limited held no interest in the land at all and even at the time it entered into a lease agreement with the CDF on the June 26, 2013. The CDF therefore entered into a lease with a party that had no interest to convey in the suit land. It was therefore a trespasser. The respondent occupied the land as the licensee and with the permission of the CDF.
31. With respect to the respondents, being a licensee, they occupied the land pursuant to the permission given to it by the interested party. However, from the November 23, 2015 - when they were notified by the petitioner that they were in occupation of the land without its consent the respondents remained on the suit land as trespassers upto and including the date they vacated on the June 26, 2022, a period of 6 years 7 months.
32. In both instances the court notes that though the plaintiff was previously registered as owner as early as 1982, the land was later registered in the name of a third entity. The plaintiff led unsupported evidence that the third entity is their affiliate but failed to present any documents in support. I find that the plaintiff again regained the ownership of the land in 2016.
33. The petitioner has presented unchallenged assessment of the rent in the sum of Kshs 72,900/- per month as backed by the valuation report on record. Going by the year 2016 the period of



unauthorised occupation of the suit land runs into 6 years x 12 months x 72900/- giving a total sum of Kshs 5,248,800/- payable jointly and severally by the respondents and the interested party in equal proportion.

34. With respect to costs the court finds that the interested party was less diligent in entering into the lease with a stranger and for the respondents they continued to trespass upon being made aware that the land belonged to the petitioner. I find that they should meet the costs of the suit in equal proportions.
35. Final orders and disposal-
- a. Prayer (c) be and is hereby allowed , the petitioner is entitled to the payment of the sum of Kshs 5,248,800/- being mesne profits as per para 33 above payable jointly and severally by the respondents and the interested party in equal proportions.
  - b. The respondents and the interested party shall meet the costs of the suit in equal proportions.
36. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25<sup>TH</sup> DAY OF JULY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Muigai for Petitioner

Ms. Ndundu for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Interested Party – Absent

Court Assistants – Phyllis & Lilian

