



**Kipchrirchir v Nakweri & 8 others (Environment & Land Case
92 of 2014) [2023] KEELC 20802 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 92 OF 2014
JM ONYANGO, J
OCTOBER 19, 2023**

BETWEEN

ELPHAS KIPCHRIRCHIR PLAINTIFF

AND

PETER NAKWERI 1ST DEFENDANT

JAMES MUKUNYA KIMAIYO 2ND DEFENDANT

JAMES KWARKWAR 3RD DEFENDANT

JOHN NAGIRO 4TH DEFENDANT

MARK KIPLAGAT KOGO 5TH DEFENDANT

SAMWEL KIPKEMBOI CHERUIYOT 6TH DEFENDANT

ABRAHAM KIPSANG 7TH DEFENDANT

MUSA BOWEN 8TH DEFENDANT

ANTIPA KIPLAGAT TIROP 9TH DEFENDANT

JUDGMENT

1. By a plaint dated 20th March 2014 the Plaintiff filed suit against the defendants seeking the following reliefs:
 - a. A declaration that the plaintiff is the legal and right owner of all that land known as Plateau/ Kipkabus Block4 (Lelmwoko)/25.
 - b. A permanent injunction to restrain the defendants both jointly and severally and/or their agents and/or servants from interfering and/or dealing in any way with the plaintiff's parcel of land number Plateau/Kipkabus Block 4 (Lelmwoko)/25.



- c. An order against all the defendants both jointly and severally to vacate and/or be evicted from the plaintiff's parcel of land known as Plateau/Kipkabus Block 4 (Lelmwoko)/25.
 - d. Mesne profits from 2005 to date.
 - e. Costs and interest of this suit
 - f. Any other relief this court deems fit and just to grant.
2. Despite being served with Summons to enter appearance, the defendants neither entered appearance nor filed any defences.
 3. The suit was therefore set down for hearing by way of formal proof.

Plaintiff's Evidence

4. The plaintiff testified that he is the registered owner of land parcel number Plateau/Kipkabus Block 4 (Lelmwoko)/25 measuring 9.71 Hectares (approximately 24 acres), having inherited it from his late father Paul, Malakwen Choge. Following the demise of his father, he applied for a Grant of letters of Administration after which the suit property was transferred to him through transmission.
5. He told the court that he had sued the defendants because they had trespassed on his land. It was his testimony that some of them have constructed illegal structures on his land while others were only cultivating the land. He stated that before he instituted this suit, he wrote a demand letter to the defendants through his advocates demanding that they vacate his land but they failed to do so. He produced a copy of the title deed and demand letter as plaintiff's exhibits 1 and 2.
6. He prayed that the defendants be evicted from his land and that they be restrained from trespassing thereon. He also prayed for mesne profits.
7. After the close of the Plaintiff's case, his advocate filed his submissions which I have considered.

Analysis and Determination

8. Having considered the plaint, evidence on record and the submissions filed by the plaintiff's advocate, the following issues fall for determination:
 - i. Whether the Plaintiff is the registered proprietor of the suit property
 - ii. Whether the defendants have trespassed on the suit property.
 - iii. Whether the plaintiff is entitled to the reliefs sought.
9. It is not in dispute that the Plaintiff is the registered owner of land parcel number Plateau/Kipkabus Block 4(Lelmwoko)/25. He produced a title deed showing that the suit property is registered in his name. By dint of section 22 of the [Land Registration Act](#), the Plaintiff is has demonstrated that he is the absolute and indefeasible owner of the suit property.
10. The said section provides as follows:

“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 thereof”



11. Furthermore, section 24 of the [Land Registration Act](#) No 3 of 2012 provides as follows:

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.

12. Section 25 (1) of the said Act further provides that;

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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 to any lawful encumbrances, set out in this section.”

13. Section 26 of the same Act provides that;

“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 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 grounds of fraud, or misrepresentation to which 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.

14. Since the plaintiff’s evidence was not challenged at the hearing, it is my finding the plaintiff is the absolute proprietor of the suit property. He is therefore entitled to protection of the said title as provided for under the [Land Registration Act](#) No. 3 of 2012. Additionally, Article 40 of [the Constitution](#) guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

15. The second issue is whether the defendants have trespassed the suit land. In the case of Nyangeri Obiye Thomas v Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018 Okong’o J observed as follows:

“Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

16. The Plaintiff testified that he had issued a demand letter to the defendants to vacate his land but they had refused to do so. In the circumstances, it is my finding that the defendants have no right over the suit property and that they are occupying the same unlawfully. This amounts to trespass to land.

17. Regarding the third issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks four main remedies, a declaration that he is the registered owner of the suit property, a permanent injunction against the defendants and in default thereof an order of eviction against them. He also seeks mesne profits.



18. With regard to the prayer for a permanent injunction, the principles that guide the court in granting an injunction are set out in the celebrated case of *Giella v Cassman Brown & Company Limited* 1973. E.A 358 as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

19. From the Plaintiff’s evidence stated above, it is my finding that he has met the threshold for the grant of an injunction. Similarly, the Plaintiff is entitled to an eviction order in the event that the Defendants do not vacate the suit property.

20. With regard to mesne profits, the Plaintiff did not tender any evidence to guide the court on what should be awarded. Mesne profits are akin to special damages and must therefore not only be specifically pleaded but must strictly be proved.

21. In the case of *Hahn v Singh* Civil Appeal No 42 of 1983 1985 KLR at p. 717 learned judges Kneller, Nyarangi and Chesoni held as follows:

“Special damages must not only be specifically pleaded but also strictly proved for they are not the direct and natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”

22. In the instant case, the plaintiff needed to plead the amount that he has lost as a result of the Defendants’ unlawful use of his land. Without such evidence, it is not possible for the court to determine the claim for mesne profits. In the circumstances, I am not in a position to grant the same.

23. In the final analysis, the Plaintiff has to a great extent proved his case on a balance of probabilities. I therefore enter judgment for the plaintiff in the following terms:

- a. A declaration is hereby issued that the plaintiff is the legal and right owner of all that land known as Plateau/Kipkabus Block 4 (Lelmwoko)/25.
- b. A permanent injunction is hereby issued to restrain the defendants both jointly and severally and/or their agents and/or servants from interfering and/or dealing in any way with the plaintiff’s parcel of land number Plateau/Kipkabus Block 4 (Lelmwoko)/25
- c. An order is hereby issued against all the defendants both jointly and severally to vacate and/or be evicted from the plaintiff’s parcel of land known as Plateau/Kipkabus Block 4 (Lelmwoko)/25 within 60 days from the date of this judgment.
- d. The defendants shall bear the costs of this suit.

DATED SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 19TH DAY OF OCTOBER 2023.

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J.M ONYANGO
JUDGE



In the presence of;

- 1. Mr. Murgor for the Plaintiff**
- 2. No appearance for the Defendants.**

Court Assistant: H. Akidor

