



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
CIVIL SUIT NO 410 OF 2014

THE AFRICAN ORTHODOX CHURCH OF KENYA.....PLAINTIFF

(Suing through its registered trustees)

VERSUS

JOHN ONYANGO OLOO.....1ST DEFENDANT
GEORGE OMANYA.....2ND DEFENDANT
HEZRON OPIKO.....3RD DEFENDANT
TOM WAWERU.....4TH DEFENDANT
RODGERS OBONGO ONYANGO.....5TH DEFENDANT
GEORGE OMONDI OPIYO.....6TH DEFENDANT
JAMES KAMAU MUNGAI.....7TH DEFENDANT
PATRICK JAOKO.....8TH DEFENDANT
RASHID OUMA OMBAYO.....9TH DEFENDANT
JAFFER MUZERA.....10TH DEFENDANT
EZRA TINDI.....11TH DEFENDANT
SAMUEL KIMANI.....12TH DEFENDANT
MARK ONJWANG ANYANGA.....13TH DEFENDANT
ISAIAH WANDE MUNGA.....14TH DEFENDANT

VALENTINE JUMA ODENY.....	15 TH DEFENDANT
WILLIAM ODUOR.....	16 TH DEFENDANT
JULIUS AGWANDA.....	17 TH DEFENDANT
ODHIAMBO JACK.....	18 TH DEFENDANT
GEORGE O. OGUNDE.....	19 TH DEFENDANT
ALICE OKOTH.....	20 TH DEFENDANT
PAUL OYORO.....	21 ST DEFENDANT
ODHIALO DANIEL.....	22 ND DEFENDANT
WANDERA.....	23 RD DEFENDANT
MESHACK WERE.....	24 TH DEFENDANT
OTIENO OHANGA.....	25 TH DEFENDANT
GEORGE OTIENO.....	26 TH DEFENDANT
MUTHEE & JASEMBO.....	27 TH DEFENDANT
JOSEPH ODHIAMBO ATANGA.....	28 TH DEFENDANT

(Sued on their own behalf and on behalf of all other artisans and traders occupying the suit premises L.R No. 209/5533/163)

JUDGMENT

By a Plaint dated 8th July 2013, the Plaintiff filed this suit against the Defendants jointly and severally and against all other artisans and traders operating on the property L.R No. 209/5533/163 (hereinafter referred to as the “suit property”) for :-

- a. A mandatory order requiring the Defendants by themselves, their agents, servants and/or employees to give vacant possession of the suit property to the Plaintiff within a period of fourteen (14) days from the date of the Court’s order or such other period as the Honourable court may deem just to grant.
- b. A permanent injunction restraining the Defendants by themselves, their agents, servants and/or employees from trespassing, entering upon and/or carrying on business or any other activities of whatever nature on the suit property.
- b. Mesne profits and/or rent payment for all outstanding arrears from 2003 up to the date of vacating and /or ceasing to operate on the suit property.
- c. An order directing that in the event the Defendants do not comply with prayer (a) hereinabove within the time set by the Court, the Plaintiff in conjunction with a licenced auctioneer and with the supervision and security provided by the O.C.S Buruburu Police Station in conjunction with the Director of Planning Nairobi City Council and/or any other relevant County Government organs do

evict the Defendants from the suit property using such reasonable force as may be necessary in the circumstances.

d. Costs of this suit.

e. Any other or further relief that this honourable court may deem just to grant.

Pleadings

The facts of this case are that at all material times the Plaintiff was the registered owner of the suit property situated in Shauri Moyo area of Nairobi County. The Plaintiff stated that on diverse dates in or around the year 2003 and pending its construction of a permanent church on the suit property, it granted individual licenses and/or permits to the Defendants to conduct jua kali businesses on part of the suit property on the following conditions:-

a. That the license/ permit granted was for a temporary period.

b. That each of the Defendants would individually pay subscription/commission to the Plaintiff on a monthly basis for the space occupied and which amount differed from one Defendant on to another.

c. That in the event of any default to pay the monthly subscription by any of the Defendants, the Plaintiff would be at liberty to repossess the space allotted to the defaulting Defendants.

d. That each of the Defendants would abide by all the rules and regulations set up by the Plaintiff from time to time in respect of the space allotted.

e. That the Defendants upon reasonable notice/period would voluntarily surrender the entire portion of the suit property occupied in the event the Plaintiff required the same for its own use.

The Plaintiff averred that despite the fact that the Defendants have been operating from the suit property since the year 2003 to date, they have deliberately and knowingly been in breach of all the conditions of the allotment which included the failure to vacate the suit property to enable the Plaintiff undertake construction of a permanent church. According to the Plaintiff, the Defendants failed to pay the agreed monthly subscription fees, failed to adhere to all rules and regulations imposed by the Plaintiff regarding the use of the premises and were hostile and violent against the Plaintiff. It is the contention of the Plaintiff that as a result of the Defendants' hostility, the Plaintiff has not been able to use the suit property for the purposes it had long intended to undertake being the construction of a church.

The Defendants did not enter appearance or file a response to the allegations raised by the Plaintiff in its Plaint. The Defendants were served by way of substituted service which is by advertisement after it became difficult to serve them in person. This was after the Plaintiff's application to serve by way of substituted service was allowed on 2nd July 2014.

The Evidence

During the trial on 16th July 2015, the Plaintiff's only witness, Rev. Fr. Moses Ngugi Gichuhi, stated that he was a church minister since 1985 and the National Secretary General of the Plaintiff. He stated that the Plaintiff purchased the suit property in the 1970s with the purpose of putting up a permanent church. He stated that after the acquisition of the suit property, the Plaintiff constructed a semi-permanent church which stands to date with the ultimate aim of eventually constructing a permanent church when the requisite funds were available. In a bid to raise funds for the construction of the church, the witness stated that the Plaintiff opted to grant licenses on temporary and humanitarian basis to the Defendants to carry out motor vehicle repair businesses on the suit property. He stated that the Defendants did not pay the Plaintiff even though they were supposed to do so. He further testified that the Defendants were then asked to vacate the suit property so as to allow the construction of the permanent church in the year 2006. He stated that the Defendants have refused to heed the Plaintiff's demands thereby putting the Plaintiff in

a very awkward position as it desperately needed to construct a permanent church to accommodate the growing number of worshippers and handle most of its other church related issues within the suit property. For that reason, the Plaintiff opted to file this suit in order to seek the assistance of the court to enable it evict the Defendants from the suit property once and for all.

Submissions

The Plaintiff filed its written submissions at the close of the hearing wherein it stated that it had produced a copy of the title deed which showed that it was the legal owner of the suit property and was therefore entitled to the unlimited use thereof. It further submitted that there was no challenge to the title deed held by the Plaintiff. The Plaintiff further submitted that the Defendants were licensees on the suit property for a fixed period of time and when the time lapsed, they refused to vacate and therefore they are in occupation without any right. The Plaintiff further submitted that since the Defendants did not enter any appearance or file any response to the Plaintiff's claim, the Plaintiff's claim is undefended. On that ground, the Plaintiff submitted that it should be granted the orders sought in the Plaint. As regards the payment of mesne profits, the Plaintiff submitted that the Defendants entered in the agreements with the Plaintiff for the temporary use of the suit property wherein they undertook to pay varying amounts of money to the Plaintiff as rent. The Plaintiff submitted that none of the Defendants paid the payments as agreed and but instead flouted the agreement in spite of continued to use the suit property. It was the Plaintiff's submission that in default of such payment, the Plaintiff is entitled to some mesne profits and urged the court to award the same. On the prayer for the administrative assistance in evicting the Defendants from the suit property, the Plaintiff submitted that the Defendants have not been co-operative with the Plaintiff in amicably and peacefully vacating the suit property and handing over vacant possession. The Plaintiff submitted that the Defendants had ignored notices to vacate issued by the Plaintiff through letters dated 20/1/2006 and 26/4/12, that the Defendants frustrated the service process which necessitated service by way of an advertisement in the daily newspapers and that there was therefore reasonable probability and apprehension on the Plaintiff's part that the Defendants would refuse and/or resist to vacate the suit property despite the judgment of the court. In the circumstances, the Plaintiff prayed that the court orders the assistance of a licenced auctioneer with the supervision and security provided by the OCS Buruburu police station in conjunction with the Director of Planning Nairobi City County.

Analysis and Determination

In claiming ownership of the suit property, the Plaintiff produced to this court a copy of title document which is a Lease dated 10th October 1979. The law is very clear on the position of a holder of a title deed in respect of land. **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 , ... 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.”

As far as I can tell, the Plaintiff's claim of being the registered proprietor for the suit property has not been challenged by any of the Defendants on any of the grounds cited in the legal provision cited above. In the premises, the Plaintiff has succeeded to convince this court that it is indeed the duly registered owner of the suit property. With this finding, it follows that the Plaintiff has the rights over the suit property as set out in **section 24(a) of the Land Registration Act** provides as follows:

“Subject to this Act, 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.”

One of the rights belonging to absolute ownership of land is the right to possession of the same to the exclusion of all others. This is precisely the right that the Plaintiff is seeking in this suit. This court has no difficulty in finding that indeed the Plaintiff is entitled to occupy the suit property to the exclusion of the Defendants. To that extent therefore, I find that the Defendants should vacate the suit property peacefully within 30 days from the date of delivery of this Judgment failing which the Plaintiff is entitled to the assistance of the O.C.S Buruburu Police Station in conjunction with the Director of Planning Nairobi City Council and/or any other relevant County Government organs to evict the Defendants from the suit property using such reasonable force as may be necessary in the circumstances.

On the prayer for mesne profit, the Plaintiff has annexed agreements with the Defendants for the year 2003. There are no other agreements for all the other years the Defendants have occupied the suit property. It would appear that since they allocated the space, the Defendants have never paid a single shilling to the Plaintiff. However, the Plaintiff did not make a specific claim of mesne profits of the amount it is claiming from the Defendants. Without pleading this amount, the court will not be in a position to grant the mesne profits the Plaintiff has sought. This is because the court cannot pluck figures from the air and award her without justifying how those figures arose. The Court of Appeal in **Peter Mwangi Mbuthia vs. Samow Edin Osman & Naftali Ruth Kinyua Civil Application No.NAI No.38 of 2004** stated the law on mesne profit as follows,

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded..... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

It is therefore my opinion that the Plaintiff is not entitled to mesne profits as claimed as she did not state or prove the amount of the said mesne profits.

Judgment accordingly. Costs are awarded to the Plaintiff.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF AUGUST 2016.

MARY M. GITUMBI

JUDGE