



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 143 OF 2019**

**NAKURU JOY TECK ENTERPRISES.....PLAINTIFF**

**VERSUS**

**RAPHAEL K. KORIR.....DEFENDANT**

**JUDGMENT**

1. The plaintiff moved the court through plaint filed on 15<sup>th</sup> November 2011, in the High Court. The matter was later transferred to this court. The Plaintiff averred that it was at all material times it was the registered owner of all that parcel of land known as Njoro Ngata Block 2/3251 and that the defendant had trespassed on the said land and was staying in a house constructed thereon by the plaintiff.

2. The plaintiff therefore prayed for judgement against the defendant for:

*a) An order of eviction against the Defendant by himself, his agents, servants or any other person occupying land through the Plaintiff from LR NO. NJORO/ NGATA BLOCK 2/3251.*

*b) Mesne profit at KShs. 30,000/= from 26<sup>th</sup> October 2011 till date of eviction.*

*c) Costs of this suit.*

3. The defendant filed statement of defence in which he denied the plaintiff's allegations and averred that the registration of the suit property in the name of the plaintiff was procured fraudulently, is wrongful, illegal and should be cancelled. He prayed that the plaintiff's case be dismissed with costs.

4. At the hearing, Benjamin Kisoil Sila, a director of the plaintiff, testified as PW1. He stated that he engages in real estate business under the name of the plaintiff and practices as an auctioneer under the name of Legacy Auctioneering Services. That the plaintiff purchased the parcel of land known as Njoro Ngata Block 2/3251 at a purchase price of KShs 4,000,000 from Muskie Ltd on 10<sup>th</sup> October, 2011 through a sale agreement of that date. He added that the plaintiff paid the purchase price and the property was transferred to it by the seller. That they obtained consent of Land Control Board, paid stamp duty, obtained consent of the Lands Department and that title was issued to the plaintiff on 26<sup>th</sup> October, 2011 after paying KShs 1000 for registration.

5. PW1 further testified that prior to buying the suit property, he did a background check and was satisfied that Muskie Ltd had a clean title and that he conducted a search which confirmed that Muskie had purchased the mother title, Njoro Ngata Block 2/100, at an auction held by Baseline Auctioneers. He added that they have never had any challenge of the plaintiff's parcel. He stated that he was aware that there was a case concerning the mother title where the defendant had sued Muskie Ltd in ELC 216/2015 and that a ruling was delivered on 16<sup>th</sup> October, 2017 striking out the said suit. He added that when he went to take possession of the suit property the defendant refused to vacate and that the defendant remained in possession together with his family as at the date of his testimony.

6. The plaintiff's case was thereby closed.

7. The court gave a defence hearing date in the presence of counsel for the defendant. Come the said date, there was no appearance either by counsel for the defendant or even the defendant himself. Consequently, upon an application by counsel for the plaintiff, the defence case was closed without the defendant adducing any evidence.

8. Directions were given that parties file and exchange submissions. The defendant did not file any submissions.

9. It was argued on behalf of the plaintiff it is the rightful and legal owner of the suit property and that the defendant is a trespasser who ought to be evicted forthwith. The court was urged to grant the orders sought in the plaint.

10. I have considered the parties' pleadings, evidence and submissions. Only one issue arises for determination: whether the plaintiff is entitled to the reliefs sought.

11. The plaintiff's case has not been controverted by any evidence from the defendant. From the material on record, I am satisfied that the plaintiff is the registered proprietor of the suit property pursuant to the title deed issued to it on 26<sup>th</sup> October 2011. Indeed, the defendant conceded that the plaintiff is the registered proprietor. Although the defendant claimed in his statement of defence that that the registration of the suit property in the name of the plaintiff was procured fraudulently, wrongfully and illegally, the defendant did not offer any evidence to support those claims. More importantly, the defendant did not file any counterclaim seeking cancellation or nullification of the plaintiff's title.

12. As the registered proprietor, the plaintiff is entitled to all the rights and privileges accorded by **Article 40** of the **Constitution of Kenya** and **Section 25** of the **Land Registration Act**. Such rights include the right to exclusive possession. To restore the plaintiff's right to possession, the defendant must vacate the suit property or be evicted.

13. The plaintiff has also sought mesne profit at KShs 30,000 from 26<sup>th</sup> October 2011 till date of eviction. Although the plaint did not indicate the frequency of the amount, the plaintiff indicated in its submissions that the said amount should be monthly.

14. The Court of Appeal stated in the case of **Mistry Valji v Janendra Raichand & 2 others [2016] eKLR** that the measure of damages awarded as mesne profits must be reasonable rent and that the usual practice is to assess *mesne* profits down to the date when possession is given. Although the plaintiff's witness testified that the sum of KShs 30,000 per month was arrived at from an assessment of rents in the area of the suit property, no evidence was adduced as to what those rents in the area are, so as to enable the court to form its own opinion on the matter. In the circumstances, taking into account the size of the property which is indicated in the title as 0.200 hectares as well as its location in Ngata area on the outskirts of Nakuru City, I consider a sum of KShs 15,000 per month to be reasonable. The said amount will be payable from 26<sup>th</sup> October 2011 until the defendant gives possession to the plaintiff or until date of eviction, whichever is earlier.

15. In view of the foregoing, the plaintiff has established its case on a balance of probabilities. I therefore enter judgment in favour of the plaintiff as follows:

**a) The defendant, his agents or servants to vacate the parcel of land known as Njoro/ Ngata Block 2/3251 and hand vacant possession to the plaintiff within 90 (ninety) days from the date of this judgment.**

**b) In default of the defendant, his agents or servants vacating the parcel of land known as Njoro/ Ngata Block 2/3251 within the period stated above, then the defendant, his agents or servants be evicted from the said parcel of land.**

**c) The plaintiff is awarded mesne profits at KShs 15,000 per month from 26<sup>th</sup> October 2011 until the defendant gives vacant possession to the plaintiff or until date of eviction, whichever is earlier.**

**d) The plaintiff shall have costs of this suit.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF FEBRUARY 2022.**

**D. O. OHUNGO**

**JUDGE**

**Delivered through electronic mail in the presence of:**

Court Assistant: E. Juma