



**Githunguri & 2 others v Boro (Environment & Land Case
255 of 2011) [2022] KEELC 31 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 31 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 255 OF 2011**

OA ANGOTE, J

APRIL 28, 2022

BETWEEN

STANLEY M GITHUNGURI 1ST PLAINTIFF

PRISCILLA NGARURU MUGACHA 2ND PLAINTIFF

WANGUI MUGACHA 3RD PLAINTIFF

AND

EVANS KAGECHE BORO DEFENDANT

JUDGMENT

A. Background

1. The Plaintiffs instituted this suit against the Defendant vide a Plaint dated 21st June, 2011 seeking for the following orders;
 - i. An order of eviction do issue against the Defendant evicting him from L.R No 398/19 forthwith and vacant possession of the same be given to the Plaintiffs forthwith.
 - ii. An order that the Defendant pays Mesne profits for his illegal occupation of the suit premises to be computed on the rent that the Defendant was paying at the time of the termination of his lease from the date of the decree in H.C.C.C No 1519 of 1993, till he vacates the suit property.
 - iii. Costs of the suits.
 - iv. Any other or further relief as this court may deem just to grant
2. In the Plaint, the Plaintiffs averred that at all material times, the late Mugacha Thaara was the owner of $\frac{1}{4}$ share in the property known as L.R No 398/10-Naivasha which property he jointly owned with Geoffrey Mbugua, Njoroge Mugo and John Mungai in equal shares pursuant to a conveyance to the four proprietors dated the 21st May, 1965.



3. It was averred by the Plaintiffs that vide a written agreement dated 29th November, 1980 between Njoroge Mugo, Mugacha Thaara, Mrs. Peninah Wambui Mbugua (as personal representatives of Geoffrey Mbugua) and Alexander Kaburu Mwangi each representing their ¼ share in the property and Evans Kageche Bora, the Defendant herein, it was agreed that the whole of L.R 398/10 Naivasha would be leased to the Defendant for a three-year term commencing on 1st March, 1981 to 29th February, 1984.
4. According to the Plaintiffs, the aforesaid tenancy agreement expired on 1st March 1984 and that at the Defendants' request, the lease was verbally extended to 12th March, 1984 after which a notice dated 27th August, 1984 was issued to the Defendant formally notifying him of the expiry of the lease.
5. According to the Plaintiffs, the Defendant, rather than vacate the suit property, instituted HCCC No 1519 of 1993-Evans Kageche Boro vs S.M Githunguri & Others where he sought inter-alia a declaration that he was a bona fide purchaser for value and sought that the land be transferred to him and injunctive orders restraining the Plaintiffs from evicting him from the suit property. It was averred that the suit was compromised by a consent recorded on 28th January, 2000, and formalized as an order of the court on the following terms;
 - i. That the suit property known as L.R No 398/10-Naivasha be partitioned into 4 equal portions
 - ii. That each of the four separate portions be registered in the following names
 - a. The Administrators of the Estate of Mugacha Thaara or their nominees
 - b. The Administrators of the Estate of Geoffrey Mbugua or their nominees
 - c. Alexander Kaburu Mungai
 - d. The Administrators of the Estate of Njoroge Mugo or their nominees
 - iii. That upon separate titles being issued for each of the four portions, their owners be at liberty to enter into negotiations for sale of their portions to the Plaintiff (Defendant herein) or to any other purchaser of their choice.
 - iv. That the original title to L.R No 398/10 having been lost, the Commissioner of Lands be and is hereby authorized and ordered to issue a provisional title in replacement of the original title.
6. The Plaintiffs state that the suit property was sub-divided and registered in accordance with the consent orders aforesaid giving rise to L.R No. 398/19 (the suit property); that the Defendant thereafter filed various applications related to the consent order which delayed the full execution of the consent order and that following the disposal of the applications, the Plaintiffs issued to the Defendant a formal notice to vacate dated the land on 16th October, 2009, which notice was not complied with.
7. It has been pleaded that in a further effort to evict the Defendant, the Plaintiffs filed an application dated the 4th October, 2010 in HCCC 1519 of 1993 seeking to evict the Defendant; that vide a Ruling delivered on 17th March, 2011, the court whilst stating that the Defendant was illegally occupying the Plaintiffs' property, declined to evict the Defendant stating that the consent order and decree in HCCC 1519 of 1993 did not include an order for the eviction of the Defendant and that the court directed that any such orders should be sought in a fresh suit.
8. In response, the Defendant filed a Defence and Counter-Claim dated 1st July, 2011 in which he denied the allegations as set out in the Plaint. The Defendant averred that he was granted a three-year lease on L.R No. 398/10 and that on or about the month of November, 1984, after the expiry of the lease, the four proprietors of L.R No. 398/10 gave him an irrevocable option to purchase the suit property for the sum of Kshs 2,000,000 at the rate of Kshs 500,000 for each of the proprietors.



9. It was averred in the Defence that upon the passing on of Mugacha Thaara, it was agreed between the Defendant and the legal representatives of the Estate that the purchase price would be paid to the heirs of the Estate and that between the years 1990 and 1996, the Defendant paid a total sum of Kshs 500,000 in installments and thereafter made an application for the consent of the Land Control Board to transfer the share held by the late Mugacha Thaara which consent was duly issued on 20th June, 1996 while he was in occupation of the property.
10. According to the Defendant, the court in HCCC 1519 of 1993 issued orders of injunction on 10th March, 1994 which orders are still in force; that the consent entered into in HCCC 1519 of 1993 is a nullity as at the time of executing and filing the consent, no letters of administration had been issued to the Plaintiffs and subsequently, the Plaintiffs lacked capacity to enter into any consent binding the Defendant and that the sub-division of the suit property was illegal and/or fraudulent and that if he was served with a notice to vacate, the same was irregular.
11. In the counter claim, the Defendant sought as against the Plaintiffs a declaration that he is a bona-fide purchaser for value of L.R No. 398/19 and is entitled to the transfer of the suit property in his name and to be registered as the owner thereof, an order for specific performance of the contract between the Plaintiffs and himself, injunctive orders restraining the Plaintiffs from evicting him from L.R No. 398/19 and in the alternative, a declaration that he is entitled to a refund of consideration paid to the Plaintiffs and compensation in full of all the improvements and developments carried out on the suit land.

B. Hearing & Evidence

The Plaintiff's case

12. The matter proceeded for hearing on 22nd May, 2014. PW1 was Stanley Thaara Mugacha, the son of Mugacha Thaara and one of the Administrators of his Estate. It was his testimony that L.R 398/10-Naivasha was registered in the names of four people being Geoffrey Mbugua, Mugacha Thaara, Njoroge Mugo and John Mungai as tenants in common having equal shares.
13. PW1 stated that on or about 29th November, 1980, the registered owners aforesaid entered into a Lease Agreement with the Defendant herein for a term of 3 years and that on 17th August, 1984, the Defendant was given notice to vacate the land signed by all the co-owners.
14. According to PW1, the Defendant, rather than vacating the property, filed several suits in court including Civil Case No 319 of 1998 in Naivasha; that the matter was decided in the Defendants' favour but reversed on Appeal and that the Defendant also filed HCCC No 1519 of 1993 which matter was determined by consent upon which the property was subdivided into four portions and the Estate of the Late Mugacha had its title registered in its name.
15. PW1 informed the court that upon receiving the title, they served the Defendant with a notice to vacate the land which notice was not complied with; that after the consent aforesaid in HCCC No 1519 of 1993, the Defendant proceeded to the Court of Appeal vide Civil Application No 353 of 2004 which was dismissed; that the Defendant further filed applications in the High Court challenging the consent which were unsuccessful and that as at 1996 when the Sale Agreement was purportedly entered into, the consent order had not been entered into and there was no grant.
16. PW1 stated that in 1996, the deceased assets had not been identified and the Administrators had no title to the Estate; that Maria Wanjiru Mugaacha who purportedly sold the property to the Defendant had no capacity to sale the land as the grant had not been confirmed in 1991 and that even after



confirmation of the grant, none of the deceased's wives were direct beneficiaries but held the property in trust for the deceased's children.

17. On cross-examination, PW1 stated that he became aware of the payment by the Defendant to Millie Wangui Mugacha, one of the deceased's wife, for the purchase of the suit property when he was informed by counsel; that he was not present when the lease was first given to the Defendant but was present when the lease was extended and that there is an affidavit by Kiboro Thaara, his uncle, confirming that the Defendant was allowed to purchase the property.
18. It was the evidence of PW1 that Kiboro Thaara has no interest in the suit property; that he is unaware of the payments made to various family members by the Defendant allegedly being the purchase price and that they objected to the sale of the suit land and the consent was never set aside.
19. During re-examination, PW1 stated that the dispute herein is not with respect to L.R No 398/10 but L.R 398/19; that Kibara Thaaro was not a registered owner of the suit property; that the property was leased for three years and the lease was never renewed and that he is unaware of any sale agreement in respect of the suit; that the decision in the Naivasha Court was set aside vide Civil Appeal No 217 of 1992; that the grant in respect of the deceased estate was issued on 19th July, 1996.
20. It was the evidence of Pw1, that the alleged sale agreement for the property and the payments thereof were made before the issuance of the grant; that the deceased's wives could not sell the suit property because they were holding the same in trust for the children and that there is no injunction as the existing case was compromised.
21. PW2 informed the court that he is the son of the deceased and one of the Administrators of his estate; that the suit property was co-owned by his father and three other proprietors; that a lease agreement for a term of three years was signed between the proprietors of the property and the Defendant, which lease lapsed in August 1984, and that sometime in 1993, the Defendant filed HCCC 1519 of 1993 seeking to stop his eviction from the property.
22. It was the evidence of PW2 that the suit was compromised by consent; that the Defendant proceeded to the Court of Appeal which dismissed his case; that after the Court of Appeals' dismissal, a fresh notice to vacate the land was issued to the Defendant dated 16th October, 2009; that the Defendant failed to vacate the suit property; that the estate of the late Mugacha Thaara got a title number L.R 398/19 after sub division of the main title which has never been sold to the Defendant and that the Plaintiffs seek for damages for the use of the land.
23. It was PW2's further testimony that they did not sell the property to the Defendant; that it is untrue that the Defendant paid monies to the late Mugacha Thaara; that he is unaware of any Land Control Board Consent; that the applicant for the Land Control Board Consent in the Defendants' bundle is Nugasha Thaara but the application is undated and does not have the name of the late Mugacha Thaaruu's signature and that the application also does not have the co-proprietors signature.
24. According to PW2, the confirmation of grant was issued on 19th July, 1996; that Maria Wanjiru and Nelly Wangui did not have any authority to sell the suit property as they were holding the properties in trust for the children of the deceased and that if the wives of the deceased received money from the Defendant, he should pursue them for a refund of the same.
25. During cross-examination, it was PW2's statement that he became aware of the lease through his siblings; that after its expiry in 1984, it was verbally extended for 6 months and there was no further extension thereafter; that upon expiry of the lease, the Defendant was asked to voluntarily move; that



the persons who were dealing with the suit property had no capacity to do so and that by the time the land control board consent was being granted, his father was deceased.

26. On re-examination, he affirmed that all payments for the land were made before the confirmation of grant; that he does not know why Kibiro Thaara was being paid Kshs 125,000; that those who were purporting to sell the land to the Defendant had no capacity to do so; that the deceased's wives held the property in trust for the children and could not sell it even after confirmation of grant and that the issues raised by the Defendant herein are the same issues raised in HCCC 1519 of 1993.
27. Having failed to attend court, the court dismissed the Defendants' counter-claim for want of prosecution and closed the Defence.

Submissions

28. The Plaintiffs' counsel submitted that the terms of the consent order of 28th January, 2000 in HCCC No. 1519 of 1993 have not been controverted by the Defendant; that the effect of the said order of 3rd July 2000 in HCCC No. 1519 of 1993 was to put to an end all claims to the suit property by the Defendant and that the consent order not having been overturned by any court is still binding on the Defendant.
29. Counsel submitted that the Defendants counterclaim having been dismissed, the claim of having purchased the suit property fall by the wayside; that further, at the time of the purported agreements of sale of the suit property was been entered into, the certificate of confirmation of grant in respect of the estate of Mugacha Thaara had not been confirmed.
30. The Defendant's counsel submitted that the Plaintiffs had sold off the property to third parties; that in the circumstances, the orders of eviction do not lie as the Defendant no longer resides on the suit property and that with respect to the orders for mesne profits, no specific amounts has been tabulated or claimed and as such has not been proved.

Analysis & Determination

31. The Plaintiffs instituted this suit against the Defendant seeking to inter-alia have the Defendant evicted from the suit property and grant them vacant possession of the same, and for mesne profits for the Defendant's illegal occupation of the suit property.
32. The Defendant filed a Defence and a Counter-claim in which he asserted that he is a bona fide purchaser of the suit property. The Defendant, despite filing his Defence and Counter-claim, did not attend court during the hearing of the case and thus did not call any witness nor adduce any evidence in support of his pleadings.
33. It is trite that pleadings are not evidence and the legal position has always been that in the absence of evidence, the pleadings of a party remain mere allegations. This position was recently reaffirmed by the Court of Appeal in the case of *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR where the learned judges held;

“First and foremost, there can be no quarrel with the statements...that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in *CMC Aviation Ltd v Crusair Ltd* (No1) [1987] KLR 103 when he stated:

“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof



is the foundation of evidence...As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

34. The above notwithstanding, the burden on the Plaintiff to prove its case remains the same and that burden of proof is in no way lessened because the Defendant did not adduce any evidence. In this respect, the Court of Appeal in the above cited Charterhouse Bank Limited case(supra) stated as follows:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct. While the defendant’s failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

35. This matter began as a dispute over the property known as L.R 398/10-Naivasha, measuring approximately 100 acres, that was owned by four proprietors, including the deceased, whose estate the Plaintiffs represent. According to the parties, the Defendant and the four proprietors of L.R No. 398/10 entered into a lease agreement wherein the Defendant was leased the property for three years. It is contended by the Plaintiffs that the lease with respect to L.R 398/10 lapsed and the proprietors of the suit property issued the Defendant with a notice to vacate.
36. According to the Plaintiffs, the Defendant refused to vacate the suit property and instituted HCCC 1519 of 1993 in which he contested the notice to vacate issued to him by the proprietors of L.R 398/10. In the said suit, the Defendant averred that he had purchased the property. The Defendant herein sought for a declaration that he was a bona fide purchaser for value of L.R 398/10 and that the same be transferred to him. The Defendants in HCCC No. 1519 of 1993 including the Plaintiffs herein, filed a Defence and Counter-claim in which they denied having entered into any sale agreements with the Defendants.
37. In the said suit, the proprietors of LR No. 398/10 averred that any purported sale of the property was void for want of the Land Control Board Consent and lack of capacity by the purported sellers. They sought for a declaration that the Defendant’s lease had expired and for orders of eviction of the Defendant from the suit property.
38. Vide a consent dated 28th January, 2000 recorded as an order of the court on 28th June, 2000, the parties in HCCC No. 1519 of 1993 agreed to have L.R 398/10 partitioned into four equal portions which would be registered in the names of the four proprietors and/or their administrators or nominees, after which the parties would be at liberty to enter into negotiations for the sale of their portions with the Defendant herein or any other person.



39. Pursuant to the aforesaid consent, the Plaintiffs herein applied to have caveats placed on the property removed, which application was allowed vide the Ruling of 15th July, 2004.
40. The Plaintiffs thereafter filed an application seeking to have the Defendant evicted from the suit premises. Vide its ruling of 17th March, 2011, the application was disallowed on the basis that the suit was compromised on terms that did not include the Defendant's eviction and subsequently, execution could not issue beyond the orders in the decree resulting from the consent order. The court in that matter stated that the Plaintiffs could only seek eviction orders in a fresh suit.
41. The Plaintiffs have filed the present suit pursuant to the orders of the court in HCCC No. 1519 of 1993 seeking for the eviction of the Defendant from LR No. 398/19 (the suit property). They have produced in evidence copies of the proceedings of HCCC 1519 of 1993, the consent order of 28th January, 2000 and orders issued therefrom, Rulings & Orders in Civil Appeals No 353 of 2004 and 271 of 2006, Rulings delivered by the court on 28th July, 2010 and 17th March, 2011 and copies of titles derived from the sub-division of L.R No 398/10 including the suit property herein, L.R 398/19.
42. Having regard to the evidence before this court, it is apparent that any question with respect to the proprietorship of L.R 398/10 was determined vide the consent of 28th January, 2000, which consent has as far as this court is concerned not been set aside. Although the Defendant challenged the validity of the consent entered into in HCCC 1519 of 1993 and the legality of the sub-divisions that were carried out pursuant to the consent order, the consent order can only be varied or set aside in that suit.
43. As stated above, L.R 398/10 was sub-divided pursuant to the consent order in HCCC No. 1519 of 1993, giving rise to the suit property herein being L.R No. 398/19 registered in the names of the Plaintiffs. Considering that it is undisputed that L.R No. 398/19 is registered in the names of the Plaintiffs, and there being no evidence to show that the property was purchased after its sub-division and registration, it follows that the Plaintiffs are the owners of the property.
44. In fact, any purported purchase of the suit property by the Defendant between the years 1990-1996 was cancelled by the consent order of 3rd July, 2000 in HCCC No. 1519 of 1993. The said consent order having not been set aside by the Defendant, it follows that the Defendant has no known claim over the suit property.
45. Having found that the Plaintiffs are the rightful owners of the property, it is the finding of this court that they are entitled to all the rights and privileges appertaining to the suit property, which of necessity includes vacant possession thereof, and in as far as the Defendant is on the suit property without their permission, he ought to be evicted.
46. The Plaintiffs have claimed for mesne profits. Order 21 Rule 13 of the [Civil Procedure Rules](#) provides as follows:

“ 13.

- (1) Where a suit is for the recovery of possession of immovable property and for 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.”

47. The term mesne profits is defined by Section 2 of the *Civil Procedure Act* 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.”

48. This definition was reiterated by the Court of Appeal in the case of *Attorney General vs Halal Meat Products Limited* [2016] eKLR 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.”

49. The above notwithstanding, a claim for mesne profits being one in the nature of special damages must be specifically pleaded and proved. This position was affirmed by the Court of Appeal in the case of *Peter Mwangi Mbutia & another vs Samow Edin Osman* [2014] eKLR where the court posited as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

50. In the instant matter, it is clear that other than pleading a claim for a mesne profits for use of the suit property, the Plaintiff did not specifically plead any sum nor lead any evidence in that respect. Asking the court to compute the mesne profits on ‘the rent that the Defendant was paying at the time of the termination of his lease’ is not of any particular help where the said rent has not been specifically stated.

51. Considering that this is a long standing dispute that began in the 1980’s, it is apparent that the value of money and land has changed over time. It would have been prudent therefore for the Plaintiffs to lay a proper basis for this claim. Having not specifically pleaded and proved mesne profits, it follows that the claim for mesne profits is not available to the Plaintiffs.

52. Except for the claim of mesne profits, the court finds that the Plaintiffs have proved their case on a balance of probabilities. Consequently, the Plaint dated 21st June, 2011 is allowed as follows:

- i The Defendant be and is hereby directed to give vacant possession of LR. No. 398/19 to the Plaintiffs within 30 days from the date hereof, failure of which eviction orders to issue.
- ii. The Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28 TH APRIL, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kingara for the Plaintiffs



No appearance for the Defendant

Court Assistant – John Okumu

