



**Ololmaitai & another v Furahia Africa Limited (Environment & Land Case 55 of 2018) [2022] KEELC 3887 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3887 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 55 OF 2018**

**CG MBOGO, J**

**JULY 28, 2022**

**BETWEEN**

**SAMSON OLOLMAITAI ..... 1<sup>ST</sup> PLAINTIFF**

**NTOORIAN KORAIATA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FURAHIA AFRICA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs filed the plaint dated August 9, 2018 and prayed that judgment be entered against the defendant and for orders that: -
  - a. A declaration do issue that by reason of the defendant's default in remitting the outstanding rent accrued as at the date of filing the suit under the lease and registered against the plaintiff's parcel CisMara/Lemek/173 on November 13, 2012, the defendant has breached the said lease and ought to be forthwith evicted therefrom to grant the plaintiffs vacant possession of the said parcel forthwith.
  - b. The defendant do forthwith pay to the plaintiffs the outstanding rent of Kshs 6,000,000/= annual rent and Kshs 1,750,000/= net tariff accrued as at the filing of the suit under the lease registered against the plaintiff's parcel CisMara/Lemek/173.
  - c. A permanent injunction do issue restraining the defendant, by itself, its invitees, servants, agents, licensees and or tenants or otherwise howsoever from trespassing, remaining upon, occupying, leasing, licensing, letting for a peppercorn fee or any other dee, constructing upon, carrying on any form of business or otherwise howsoever dealing in the plaintiff's parcel.
  - d. The encumbrances registered in favour of the defendant in parcel CisMara/Lemek/173 as lease, registered on November 13, 2012 be forthwith cancelled.



- e. The Narok South OCPD do oversee the enforcement of such orders issued herein, and the observance of the rule of law to prevent and deal with any breach of the peace by the defendant, their invitees, servants or agents in respect of the plaintiff's parcel CisMara/Lemek/173.
  - f. A declaration do issue, that by reason of the lack of the Narok South Land Control Board consent to the purported lease, usage and the taking of tourists on the plaintiff's parcel CisMara/Lemek/173 by the defendant is null and void and amounts to actionable trespass.
  - g. The defendant do forthwith pay the plaintiffs such of the mesne profits established to be due to the plaintiffs over the defendant's illegal use and occupation over CisMara/Lemek/173 from July, 2016 to the date of the defendant's eviction, as pleaded in paragraph 24 of the plaint.
  - h. An eviction order do issue that the defendant be forthwith evicted from the parcel CisMara/Lemek/173.
  - i. Costs of this suit.
  - j. Interest on (b), (g) and (i) above.
2. The defendant never entered appearance and neither did it file a statement of defence. The plaintiff filed a request for judgment under order 10 rules 4 (2) of the Civil Procedure Rules dated September 3, 2018. The matter proceeded for formal proof on May 17, 2022.
  3. The 1<sup>st</sup> plaintiff relied on his plaintiff witness statement dated August 9, 2018. He testified that they entered into a lease agreement with the defendant and the defendant fell into arrears. Further that counsel on record wrote to the defendant demanding sums owed and the defendant's advocate acknowledged that indeed the defendant was in arrears and agreed to pay Kshs 500,000/- to their bank accounts. That the defendant only paid Kshs 500,000/- to each of their accounts. The 1<sup>st</sup> plaintiff further testified that their counsel on record further wrote to the defendant claiming rent in arrears amounting to Kshs 3,168,000/- and again the defendant's advocate acknowledged the rent in arrears and sought for indulgence. That they indulged the defendant who stated that it was not willing to pay the amounts owed. The defendant later wrote to the plaintiffs seeking to have a meeting and on March 23, 2018, they requested the defendant to surrender the lease. The 1<sup>st</sup> plaintiff prays that judgment be entered against the defendant as prayed.
  4. The 2<sup>nd</sup> plaintiff confirmed that he filed a verifying affidavit sworn on August 9, 2018 and adopted the evidence of his co-plaintiff.
  5. The plaintiffs filed written submissions dated June 9, 2022. The plaintiffs raised 6 issues for determination as follows:-
    1. What is the remedy of the plaintiffs in the face of the defendant's breach of the terms of the lease and its occupation of the suit property.
    2. Whether the defendant is liable to plaintiff for loss and damages arising from the lease of the demised property and so what is the quantum of the said damages.
    3. Are the plaintiffs entitled to mesne profits? And if so what is the quantum.
    4. Are the plaintiffs entitled to general damages for arising trespass, wrongful occupation and use of the suit property by the defendant. If so what was the quantum
    5. Are the plaintiffs entitled to an order of eviction of the defendant from the suit property.
    6. Who should bear the costs of the suit?



7. The plaintiffs submitted that it was a term of the lease that the defendant would remit to the plaintiffs rent owed under the lease and that so far they have received not any rent from the defendant since July, 2016 to date and the defendant has neither surrendered the lease nor terminated its terms. Further that since the default in July, 2016, the sum due as annual rent claimed under prayer b) of the plaint is Kshs 18,000,000/- together with the net tariff that had accrued as at the date of filing of Kshs 1,750,000/- the same amounting to Kshs 19,750,000/-. The plaintiffs submitted that the defendant abandoned the demised property when it failed to pay the rent due and did not engage the plaintiff as requested, as such, it ought to pay the accrued rent as demanded. The plaintiffs relied on the case of *Jayntilal Dhamshi Gosrani versus Kenya Oil Company* [2009] eKLR, *Malack Nyambutora versus Kerubo Mbaka & 5 Others* [2018] eKLR and section 24, 25 (1) of the *Land Registration Act*.
8. On the order of removal of encumbrance on the suit property, the plaintiffs submitted that the defendant has no valid lease and by way of analogy, the subsistence of the wrongful encumbrance is equivalent to the placement of a wrongful caution on a property which is outlawed under section 75 of the *Land Registration Act*.
9. On whether the plaintiffs are entitled to mesne profits, the plaintiffs submitted that they specifically pleaded the same in paragraph 24 of the plaint and that on more than one occasion, the plaintiffs served the notice of re-entry into the suit property on account of the defendant's failure to remit rent. The plaintiffs relied on the case of *Rajan Shah T/A Rajan S Shah & Partners versus Bipin P Shah* [2016] eKLR and that this court is entitled under order 21 rule 13 of the *Civil Procedure Rules* to issue a preliminary decree pending an inquiry on the actual mesne profits calculable to the benefit of the plaintiffs. The plaintiffs claim mesne profits for the six years at Kshs 750,000/- per year amounting to Kshs 4,500,000/-. The plaintiffs relied on the case of *Attorney General versus Halal Meat Products Limited* [2016] eKLR.
10. On the issue of costs, the plaintiffs submitted that they have followed every prescription of the law in regard to leased, eviction of trespasser, proof of their claim and hence have suffered loss and damage and are therefore entitled to costs. The plaintiffs relied on the case of *Hussein Janmohamed & Sons versus Twentsche Overseas Trading Co Limited* [1967]EA 287.
11. I have considered the evidence before me and the written submissions filed by the plaintiffs. It is not in doubt that the plaintiffs are the registered proprietors of the suit property known as Narok/Cis-Mara/Lemek/173 by an official search dated June 7, 2018. It is also not in doubt that the plaintiffs and the defendant entered into a lease dated August 29, 2012 and that the defendant defaulted since July, 2016 up until the date of filing of the instant suit despite acknowledging the rent in arrears.
12. From the evidence on record, it is not in doubt that from November 11, 2013 the defendants became trespassers when they received the notice of the plaintiffs' intention to re-enter the suit property and take possession thereof as no rent was being remitted to them. In other words, the plaintiffs had clearly indicated that they were terminating the lease between themselves and the defendant but the latter did not heed. In my view the plaintiffs have demonstrated an action for trespass to land. *Black's Law Dictionary (9<sup>th</sup> Edition)* page 1643 defines trespass to land (trespass *quare claurum fregit*) as follows: -
  1. A person's wrongful entry on another's land that is visibly enclosed. This tort consists of doing any of the following without lawful justification (1) entering upon land in possession of another (2) remaining on the land, or (3) placing or projecting any object upon it. 2 at common law, an action to recover damages resulting from another unlawful entry on one's land that is visibly enclosed."



For the said trespass, the plaintiffs are entitled to general damages. The Court of Appeal in *Kenya Power and Lightning Company Ltd & Another versus Ringera & 2 others* (Civil Appeal E247 and E248 of 2020(consolidated) (2022) KECA 104 KLR (CIV) endorsed the finding of E Obaga, J in *Philip Ayaya Aluchio versus Crispinus Ngayo* (2017)eKLR where the court aptly observed as follows:-

“The defendant has constructed on the plaintiff’s land. This in itself is damage and wastage of the plaintiff’s land. The plaintiff is entitled to general damages for trespass. The issue which arises is what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiffs’ property immediately before and immediately after the trespass or the costs of restoration, whichever is less. See *Hostler Versus Green Park Development Co* 986 SW2d 500 (No Ct App 1999)”

From the evidence on record in the suit before me, the structures that the defendant herein erected on the plaintiffs’ land were for tourism business. The plaintiffs may as well utilize the structures for their own benefit if they so wish. They may also elect to pull them down just like they have indicated to the court that they intend to do. Given those circumstances, therefore, it is my view that kshs 2,000,000 would be adequate compensation for general damages and this is the award that I shall award the plaintiffs in my judgement.

Arising from the above and on a balance of probabilities, I have no doubt the plaintiffs have proved that they have a cause of action against the defendant. I, therefore, proceed to enter judgement for the plaintiffs and against the defendants as hereunder:-

- a. A declaration do issue that by reason of the defendant’s default in remitting the outstanding rent accrued as at the date of filing the suit under the lease and registered against the plaintiff’s parcel CisMara/Lemek/173 on November 13, 2012, the defendant has breached the said lease and ought to be forthwith evicted therefrom to grant the plaintiffs vacant possession of the said parcel forthwith.
- b. The defendant do forthwith pay to the plaintiffs the outstanding rent of Kshs 6,000,000/= annual rent and Kshs 1,750,000/= net tariff accrued as at the filing of the suit under the lease registered against the plaintiff’s parcel CisMara/Lemek/173.
- c. A permanent injunction do issue restraining the defendant, by itself, its invitees, servants, agents, licensees and or tenants or otherwise howsoever from trespassing, remaining upon, occupying, leasing, licensing, letting for a peppercorn fee or any other dee, constructing upon, carrying on any form of business or otherwise howsoever dealing in the plaintiff’s parcel.
- d. The encumbrances registered in favour of the defendant in parcel CisMara/Lemek/173 as lease, registered on November 13, 2012 be forthwith cancelled.
- e. The Narok South OCPD do oversee the enforcement of such orders issued herein, and the observance of the rule of law to prevent and deal with any breach of the peace by the defendant, their invitees, servants or agents in respect of the plaintiff’s parcel CisMara/Lemek/173.
- f. A declaration do issue, that by reason of the lack of the Narok South Land Control Board consent to the purported lease, usage and the taking of tourists on the plaintiff’s parcel Cis Mara/Lemek/173 by the defendant is null and void and amounts to actionable trespass.
- g. Kshs 2,000,000 being general damages.



- h. An eviction order do issue that the defendant be forthwith evicted from the parcel CisMara/Lemek/173.
- i. Costs of this suit.
- j. Interest on (b), (g) and (i) above.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON 28<sup>TH</sup> JULY, 2022.**

**MBOGO C.G**

**JUDGE**

28/7/2022

In the presence of: -

CA: Timothy Chuma.

