



**Ware Transport Limited v Third Engineering Bureau of China City
Construction Group Company Limited (Civil Suit 252 of 2021)
[2022] KEELC 13701 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 252 OF 2021
M SILA, J
SEPTEMBER 29, 2022**

BETWEEN

WARE TRANSPORT LIMITED PLAINTIFF

AND

**THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTION
GROUP COMPANY LIMITED DEFENDANT**

RULING

(Suit by plaintiff claiming that the defendant is in occupation of her land; plaintiff filing application seeking that the defendant deposits what she considers to be the mesne profits pending hearing of the suit; defendant filing a response and asserting that what she occupies is different land which she leased from a third party; no survey report from plaintiff to show that what the defendant actually occupies is her land; in light of the reply of the defendant, it was incumbent upon the plaintiff to avail a survey report to demonstrate the land that the defendant occupies on the ground; application dismissed)

1. Through a plaint filed on 11 January 2022, the plaintiff pleads to be the registered proprietor of the land parcel MN/V/2407 measuring approximately 3.829 Ha, which land is said to be located at Kibarani, Mombasa. It is pleaded that sometimes in the year 2020, the plaintiff noticed that the defendant was operating from this land, and upon investigation, established that the defendant had leased about 2.55 acres of the suit land from a person not known to the plaintiff. In the suit, the plaintiff seeks mesne profits at the rate of Kshs. 250,000/= per acre from 1 January 2020 and an additional Kshs. 637,500/= per month from 1 July 2021 till payment in full. She also seeks an order of mandatory injunction to have the defendant vacate the property.
2. Together with the plaint, the plaintiff filed an application dated 21 December 2021. In that application, the plaintiff seeks orders that the defendant be compelled to deposit Kshs. 637,500/= per month



with effect from 1 July 2021 and thereafter at the beginning of each subsequent month, pending the hearing and determination of the case, being what the plaintiff contends to be the mesne profits. The application is based on grounds inter alia that the defendant is a foreign company with no known assets in Kenya and is currently executing a contract for the construction of the Makupa Causeway granted by the Kenya National Highway Authority (KENHA). It is averred that by the time the suit is completed, the current contract will have been finalized and the defendant will have ceased operations in Kenya. The supporting affidavit is sworn by Bob Eduard Lisaweyn, a director of the plaintiff. He has annexed a copy of the title to the suit land. He has stated that the plaintiff has not leased the land to the defendant but the defendant occupies 2.5 acres of the suit land. He has also annexed a valuation and rental report and photographs of the land.

3. The defendant filed a replying affidavit sworn by Lucy Njeri Mungai, the Administrator of the defendant. In it, she has deposed inter alia that the defendant is a company duly registered in Kenya and that the plaintiff has not demonstrated that she has intention to abscond the jurisdiction of this court. She has deposed that pursuant to a tender awarded by KENHA, the defendant is executing the dualling of the Mombasa-Mariakani Road. Owing to this, the defendant scouted and identified a property LR No. MN/V/1902 measuring 0.5952 Ha for its purposes. She then leased the land from the registered owner, Tiba Freight Forwarders Limited, through a lease dated 10 April 2018. She has denied that the defendant has been occupying the land parcel MN/V/2407 claimed by the plaintiff.
4. When the application came before me on 6 June 2022 for inter partes hearing, and after taking the submissions of counsel, I thought that the matter may be resolved if the parties engaged a joint surveyor who can confirm the occupation on the ground and confirm the particular parcel of land occupied by the defendant on the ground. I gave the parties 30 days. However, when the case came up again on 18 July 2022, counsel informed court that they were unable to engage a surveyor of which I had no option but to reserve ruling for the application.
5. I have considered the application. The plaintiff of course contends that the defendant is in occupation of her land parcel MN/V/2407. The defendant on the other hand claims that what she occupies is the land parcel MN/V/1902 for which she has a lease. This is the case of the plaintiff and it is also her application. The burden of proof therefore rests with the plaintiff for he who asserts must prove. The plaintiff has not annexed any survey report to demonstrate, prima facie, that what the defendant occupies is actually the land parcel MN/V/2407 and not the land parcel MN/V/1902. In light of the defence and denial by the defendant, it was the duty of the plaintiff to show, through expert evidence, which in my view can only come from a licenced surveyor, that the defendant occupies her land and not the land parcel MN/V/1902. I am afraid that in such circumstances, mere photographs and a valuation report, as displayed by the plaintiff are no sufficient. This is a situation which calls for thorough analysis through survey reports and which reports will show the ground position and occupation of the two parcels of land in issue. The plaintiff is yet to do this and I wonder on what material she believes that the defendant is occupying her land.
6. For the above reasons, I am not persuaded to allow this application and it is hereby dismissed with costs. The plaintiff will need to prove her case at the hearing without the orders sought herein.
7. Orders accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MOMBASA

