



**Gaita v Kanyingi; Belgravia Services (K) Limited (Interested Party) (Environment & Land Case E424 of 2021) [2022] KEELC 13755 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13755 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E424 OF 2021  
JO MBOYA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**JOHN MAHINDA GAITA ..... PLAINTIFF**

**AND**

**MARTIN NG'ANG'A KANYINGI ..... DEFENDANT**

**AND**

**BELGRAVIA SERVICES (K) LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

**Background**

1. Vide the Complaint dated the December 9, 2021, the Plaintiff herein has approached the court seeking for the following Reliefs;
  - i. An Order do issue compelling the Defendant to deliver up vacant possession of House No. 4 at Windy Ridge Estate, being part of L.R No.192/60 to the Plaintiff within 14 days from the date of the Judgment.
  - ii. An Order do issue directing the officer in charge Karen Police Station to assist the Plaintiff herein in obtaining peaceful vacant possession No. 4 at Windy Ridge Estate, being part of L.R No.192/60.
  - iii. The Defendant do pay to the Plaintiff Mesne Profits being the rent payable from the November 26, 2019 until the date of delivery of vacant possession, at the rate of kes.292, 162/= only per month.
  - iv. Cost of the suit.
  - v. Interests of (iii) and (iv) at court rates from the date of Judgment and until payment in full.



2. The Plaint and the Summons to Enter Appearance are reported to have been duly served upon the Defendant and the Interested Party, respectively, but same neither entered appearance nor filed any Statement of Defense.
3. Suffice it to point out that indeed an affidavit of service was duly filed and lodged with the Honourable court and same indicated that truly the Defendant and the Interested Party, were duly served, in accordance with the provisions of Order 5 of the *Civil Procedure Rules*, 2010.

#### **Evidence by the Parties:**

##### **a. Plaintiff's Case:**

4. The Plaintiff's case revolves around the Written statement dated the December 9, 2021 and a Further written statement dated the July 20, 2022, respectively.
5. The Plaintiff herein testified as PW1 and same indicated that L.R No. 192/60, hereinafter referred to as the suit property, hitherto belonged to and was registered in the name of the Interested Party, as the Lease holder in respect thereof.
6. Further, the witness testified that on the November 26, 2019, same entered into and executed a Sale agreement with the Interested Party, whereupon the Interested Party sold to and covenanted to transfer the leasehold Interests pertaining to House No. 4, situated within the suit property.
7. On the other hand, the witness also testified that after the execution of the sale agreement, same paid to and in favor of the Interested Party the covenanted purchase price, which was duly received and acknowledged by the Interested Party.
8. Other than the foregoing, the witness added that upon receipt of the Purchase price, the Interested Party duly executed the lease instrument over and in respect of the designated House No. 4, situate on the suit property. For clarity, the witness testified that the lease instrument transferring the leasehold interests was executed on the November 26, 2019.
9. Premised on the foregoing, the witness testified that same thereafter became the lawful and legitimate proprietor of the leasehold interest over and in respect of the designated House, namely, House No. 4 on the Suit property. In this regard, the witness added that same was therefore entitled to absolute and exclusive occupation, possession and use of the suit property.
10. Nevertheless, the witness testified that as at the time when same purchased the designated house on the suit property, the house was under the occupation of the Defendant, who was a tenant of the Interested Party.
11. It was the witness's further evidence that despite the Defendant having been a tenant of the Interested Party, same was issued with a Notice terminating his tenancy over the designated house, but same failed and/or neglected to vacate the designated house, either as demanded or at all.
12. At any rate, the witness also testified that instead of vacating and handing over vacant possession of the designated house, the Defendant proceeded to and filed a suit against the Interested Party herein, to wit, Milimani ELC NO. 412 of 2019.
13. Notwithstanding the foregoing, the witness testified that the said suit, namely, ELC NO. 412 of 2019 was heard and determined and the Defendants claim was dismissed. Further, the Witness added that an Order of Eviction was also issued against the Defendant herein.



14. Be that as it may, the witness testified that having purchased and therefore acquired lawful rights to the suit property, the Defendant herein, was obligated to hand over vacant possession unto the witness.
15. As a result of the failure by the Defendant to hand over vacant possession, the witness contended that same was denied and/or deprived of the entitlement to and rights over the designated house. In this regard, the witness sought for payment of Mesne profits against the Defendant.
16. Though the witness had sought for Eviction and vacant possession of the designated house, the witness indicated that the Defendant vacated the premises on March 23, 2022. Consequently, the witness acknowledged that the claim for Eviction has been overtaken by events.
17. Other than the foregoing, the witness fully adopted the contents of the two sets of Written statements, which were alluded to at the onset of the Plaintiff's case.
18. Besides, the witness herein also referred to two sets of Lists and Bundle of documents, namely, the list dated the December 9, 2021 and the Further list dated the July 20, 2022. In this regard, the witness sought to rely on the documents alluded to and requested that same be admitted as Exhibits.
19. Pursuant to and at the request of the Witness, the various documents, alluded to at the foot of the two list of documents were admitted as exhibits P1 to P6, respectively.
20. With the foregoing, the Plaintiff's case was closed.

#### **b. Defendant's CaseJ**

21. It was pointed out at the inception of this Judgment that though served with the Plaint and Summons to Enter Appearance, the Defendant neither entered appearance nor filed a statement of defense.
22. Consequently, the Defendant did not oppose the subject suit.

#### **c. Interested Party's Case:**

23. Similarly, the Interested Party herein also did not enter appearance or filed statement of defense. In this regard, same also did not oppose the Plaintiff's suit.

#### **Submissions :**

24. At the close of the Plaintiffs case, counsel for the Plaintiff sought for and obtained liberty to file written submissions and in this regard, the court proceeded to and allowed counsel to file written submissions.
25. Suffice it to note that counsel for the Plaintiff thereafter proceeded to and indeed filed written submissions. For clarity, the written submissions herein form part of the record of the court and the same shall be relied upon in crafting the subject Judgment.

#### **Issues for Determination:**

26. Having reviewed and evaluated the Plaint dated the December 9, 2021, the witness statements filed therewith, the oral evidence tendered by the Plaintiff; and similarly having considered the written submissions filed, the following issues do arise for consideration;
  - i. Whether the Plaintiff has established ownership rights to and in respect of House No. 4 situate on the suit Property and if so, whether the Plaintiff is entitled to exclusive ownership rights thereto.



- ii. Whether the activities by the Defendant constitutes Trespass and if so, whether the Plaintiff is entitled to Mesne Profits.

### **Analysis and Determination**

#### **Issue Number 1 Whether the Plaintiff has established Ownership rights to and in respect of House No. 4 situate on the suit Property and if so, whether the Plaintiff is entitled to exclusive ownership rights thereto.**

27. It is common ground that the designated House, situate on the suit property hitherto belonged to and was registered in the name of the Interested party, who held leasehold interests thereto.
28. Pursuant to and by virtue of being the leaseholder over and in respect of the suit house, the Interested Party was vested and/or bestowed with the requisite rights and interests thereto. In this regard, one of the rights that inhered in the Interested Party was a right to sell and dispose of her rights over the suit house.
29. Premised on the foregoing, the Interested Party herein entered into and executed a sale agreement with the Plaintiff, over and in respect of the suit house, which sale agreement was reduced into writing and thereafter signed by the respective parties.
30. Subsequently, the title to and/or interest over the suit house were transferred and became registered in the name of the Plaintiff herein. For clarity, the Plaintiff herein tendered in Evidence copies of the Sale agreement and the transfer of lease as exhibit P1 and P2, respectively.
31. To the extent, that the suit Property was lawfully transferred to and became registered in the name of the Plaintiff, as the leaseholder, same acquired lawful rights thereto, *inter-alia*, right of exclusive occupation and possession.
32. To underscore the extent and scope of the Plaintiff's rights to and in respect of the suit house, which were in the nature of a Lease, it is imperative to take cognizance of the provisions of Section 24 (b) of the [Land Registration Act, 2012](#).
33. For convenience, the provisions of Section 25 (b) (*supra*) are reproduced as hereunder;
  24. Interest conferred by registration Subject to this [Act](#)—
    - (a) 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; and
    - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease
34. Further, under the Torrance principles, the registration of a person as the proprietor or leasee of a particular property, vests in the said proprietor indefeasible rights and interests over and in respect of the property in question.
35. Consequently and in this respect, the registered proprietor or lease holder is therefore entitled to the property in question to the exclusion of all and sundry, subject only to the the known statutory limitations, restrictions and encumbrances, if any.



36. To fortify the extent of the rights of the Plaintiff herein, as the leaseholder, it is appropriate to adopt and endorse the holding in the case of *David Peterson Kiengo & 2 others Versus Kariuki Thuo* [2012]eKLR, where the Honourable court stated and observed as hereunder;

“Where, then, does this leave us? There is no elegant way to resolve this issue. There is only a pragmatic way of doing so. It is in keeping with the objectives of the *Registered Lands Act*, and, indeed, the entire system of registration of land in Kenya. The *Registered Lands Act* is based on the Torrens’ System. Under this system, indefeasibility of title is the basis for land registration.

The State maintains a central register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the State guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealing with the land in question before acquiring an interest. That this is the essence of the Torrens System was stated as early back as 1891 in the case of *Gibbs v. Messer* (1891) AC 254:

37. Similarly, it is imperative to take cognizance of the emphasis that was laid on the import and effects and implications of registrations by the Court of Appeal in the case of *Joseph Arap Ng’ok vs. Justice Moiyo ole Keiwua*, Nairobi Civil Application No. 60 of 1997, (unreported) where the court observed as hereunder;

“Section 23(1) of the Act [*RTA*] gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be challenged on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy.”

38. In view of the foregoing, there is no gainsaying that upon the transfer and registration of the leasehold interests to the Plaintiff, same effectively accrued and attracted exclusive rights and interests to the suit property.
39. In the premises, I find and hold that the Plaintiff was indeed entitled to exclusive rights to and in respect of the suit property, including right to vacant possession, occupation and possession of same.
40. Consequently, my answer to issue number one is in the affirmative.

**Issue Number 2 Whether the activities by the Defendant constitutes Trespass and if so, whether the Plaintiff is entitled to Mesne Profits.**

41. By dint of being the registered proprietor of the suit property and therefore being entitled to exclusive rights over and in respect of the suit property, it therefore means that no third party, the Defendant not excepted could enter upon or occupy the suit premises, without the permission and or consent of the Plaintiff.
42. Granted, the Defendant herein was hitherto a tenant of the previous leaseholder, namely, the Interested Party, but it must be remembered that the tenancy agreement between the Defendant and in the



Interested Party was lawfully terminated vide termination notice issued and served upon the Defendant in the year 2019.

43. In any event, the Defendant herein proceeded to and filed a suit against the Interested Party, vide Milimani ELC NO. 412 of 2019, where *inter-alia*, the Defendant had challenged the validity of the termination notice issued by the Interested Party.
44. Be that as it may, it is common ground that the suit which was filed by the Defendant was heard and determined. For coherence, the suit was dismissed.
45. That aside, the critical point as pertains to the subject matter is that the Plaintiff herein became the lawful proprietor or leaseholder in respect of the suit house and hence same was entitled to vacant possession.
46. Consequently, and to the extent that the Plaintiff herein was the leaseholder, it therefore behooved the Defendant to procure and obtain the permission, consent and/or authority of the Plaintiff to remain in occupation of the suit house and not otherwise.
47. However, the Plaintiff testified that despite being the registered proprietor vide lease of the suit house, the Defendant herein remained in occupation, without his permission and consent and continued to remain therein, oblivious of the Plaintiff's rights.
48. Premised on the fact, that the Plaintiff did not permit, authorize and or consent to the Defendant's continued occupation and use of the suit house, it is therefore apparent that the activities by and on behalf of the Defendant were adverse to the rights of the Plaintiff and hence, same constituted Trespass.
49. Suffice it to note, that where a registered proprietor or leaseholder is deprived of possession and use of own property, the Plaintiff herein not excepted, the person in wrongful occupation of such property, in this case, the Defendant is obliged to pay Mesne profits.
50. As pertains to circumstances where Mesne Profits are due and payable, it is appropriate to take cognizance of the holding by the Court of Appeal in the case of *Attorney General versus Halal Meat Products Limited* [2016] eKLR, where the court stated and observed as hereunder;

“Furthermore, it is not in dispute that the Government took possession of the abattoir and utilized it without compensating the respondent as required by law. Consequently, its occupation of the abattoir was unlawful.

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. See *McGregor on Damages*, 18<sup>th</sup> Ed. para 34-42.

51. Additionally, the assessment and or computation of Mesne Profits is calculated and/or reckoned on the basis of Reasonable Rents, which the proprietor of the suit property would have received from the suit property, were it not for the wrongful occupation by the Trespasser.
52. Put differently, the measure for mesne profit is therefore the reasonable rent.



53. To underscore the foregoing legal statement, it is apt to refer to and adopt the words of the Privy Council in the case of *Invergue Investments v Hacketh* (1995) 3 All ER 842 cited with approval in the *Kenya Hotel Property Ltd case* (supra) as follows:

“This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land.

The question for decision is the appropriate measure of damages.”

54. The third issue which requires to be addressed is then the duration and/or period of time for which Mesne Profits is to be awarded. In this regard, it suffices to observe that Mesne Profits shall be awarded for the entire duration for which the proprietor, in this case, the Plaintiff was deprived of the suit property.

55. Without belaboring the point, I beg to refer to the holding in the case of *Kenya Hotel Properties Ltd v Willesden Investments Ltd*, Civil Appeal No.149 of 2007, where the Court of Appeal stated and observed as hereunder;

“That in a claim for mesne profits the first task is to determine the days the occupation was wrongful and the correct rate (rent) for the period in question.

56. Being well orientated on *inter-alia*, the measure for mesne profit and the duration for which same is reckoned, it is now my privileged responsibility to ascertain the extent and duration for which Mesne Profits is payable herein.

57. The starting point, is that the suit property was sold to and in favor of the Plaintiff on the November 26, 2019 and same was thereafter transferred and registered in his name.

58. Consequently, the Plaintiff herein was entitled to vacant possession, occupation and use of the suit house w.e.f November 26, 2019. However, because the Defendant was already in occupation thereof, it would have been incumbent upon the Plaintiff to afford the Defendant reasonable Notice to vacate and handover vacant possession.

59. To my mind, a reasonable notice upon the Defendant would constitute thirty (30) days. In this regard, I am inclined to discount 30 days duration as being a reasonable duration for the Defendant to hand over vacant possession.

60. In the circumstance, I would find and hold that the Defendant wrongfully remained in occupation and possession of the suit House from January 2020 up to and including the March 23, 2022, when it is admitted that the Defendant vacated the suit house.

61. Consequently, the duration of wrongful possession constitutes a total of 27 months, w.e.f January 2020.

62. In short, the Mesne Profits is calculated as hereunder;

“27 months x Kes292, 162/= Only, (same being the quantum of rent that was hitherto being paid by the Defendant to the Interested Party before the termination of the tenancy)

63. In a nutshell, the amount due is therefore kes7, 888, 374/= only. In view of the foregoing, it is my finding and holding that the activities by the defendant herein, namely, remaining in occupation of the suit house without the consent and/or permission of the Plaintiff constituted trespass.



64. It is also my finding that on the basis of trespass, the Plaintiff was wrongfully deprived of use and possession of the suit property and in this regard, the Plaintiff is entitled to recompense on account of Mesne Profits in the sum of Kshs.7, 888, 374/=only.

**Final disposition:**

65. In the course of addressing and/or dealing with the itemized issues for determination, it must have become evident, nay apparent, that the Plaintiff's case is meritorious.

66. Consequently and in the premises, I find and hold that the Plaintiff has proved and/or established his case on a balance of probabilities. See Section 107, 108 and 109 of the *Evidence Act*, Cap 80 Laws of Kenya.

67. Based on the foregoing, I therefore enter Judgment in favor of the Plaintiff as hereunder;

- I. The Defendant shall pay to and in favor of the Plaintiff Kshs.7, 888, 374/= only on account of Mesne Profits.
- II. The award in terms of clause (i) hereof shall attract interests at court rates (14%) from the date of the Judgment.
- III. Costs of the suit be and are hereby awarded to the Plaintiff and same to be taxed and certified by the Taxing officer of the Honourable Court.

68. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**OGUTTU MBOYA**

**JUDGE.**

**In the Presence of;**

Kevin Court Assistant

MR. ADIER FOR THE PLAINTIFF

N/A for the Defendant.

N/A for the Interested Party.

