



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Medical Research Institute v Mbuvi (Civil Case E449 of 2021)
[2022] KEELC 14870 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL CASE E449 OF 2021
JO MBOYA, J
OCTOBER 31, 2022**

BETWEEN

KENYA MEDICAL RESEARCH INSTITUTE PLAINTIFF

AND

JENNIFER MUTHOKI MBUVI DEFENDANT

JUDGMENT

1. Vide Plaintiff dated the December 22, 2021, the plaintiff herein sought for the following Reliefs;
 - i. An Order for Eviction of the defendant, her agents, servants, employees, or anybody claiming under her from the suit property Nairobi LR No. 209/10362 and delivery of vacant possession thereof to the plaintiff.
 - ii. An Order for Permanent injunction against the Defendant by herself or through her servants, employees, agents and anyone acting under her direction or authority from entering, accessing, trespassing, occupying, interfering with the plaintiff's quiet possession or dealing in any way with Nairobi LR No.209/10362.
 - iii. An order for mesne profits at Kes 233,000 per month from 23rd March 2020 to the date of judgment.
 - iv. One months' rent of Kes 233,000 Only, to cater for costs of repairs.
 - v. Cost of the suit.
 - vi. Interest on (c) and (d) at court rates
 - vii. Any other relief that this honourable court shall deem fit to grant in the Interest of Justice.



2. Upon being served with the plaint and summons to enter appearance, the defendant duly entered appearance but, did not file any statement of defense. For clarity, the plaintiff's suit proceeded to formal proof.
3. Nevertheless, it is appropriate to state that the plaintiff herein simultaneously with the filing of the Plaint herein, took out a Notice of Motion application, wherein same sought inter-alia, orders of Mandatory Injunction directed against the Defendant to vacate and hand over vacant possession of the suit property.
4. For coherence, the said application was heard and allowed vide ruling rendered on the February 24, 2022. Essentially, the court proceeded to and granted the Orders of Mandatory Injunction in the manner sought.
5. Be that as it may, the suit herein was ultimately fixed/listed for formal proof on the July 25, 2022, when the plaintiff called one witness and thereafter closed her case.

EVIDENCE BY THE PARTIES:

PLAINTIUFF'S CASE:

6. The plaintiff's case gravitates or revolves around the evidence tendered by one Antony Wachira who testified that same is the acting director, corporate services and deputy director finance and accounts with the plaintiff institute. In this regard, the witness pointed out that same is authorized and mandated to testify for and on behalf of the plaintiff.
7. On the other hand, the witness further testified that the plaintiff herein is the lawful and registered proprietor over and in respect of all that property known as LR No 209/10362, situate within the city of Nairobi.
8. Further, the witness testified that the plaintiff and the defendant herein entered into a Lease agreement, wherein the plaintiff demised to and in favor of the defendant premises situate on a portion of the suit property. For clarity, the witness added that the Lease was for a period of 2 years.
9. Other than the foregoing, the witness also testified that the 2-year duration lapsed and terminated on the July 1, 2002, but despite the termination or extinction of the lease, the Defendant failed, neglected and refused to vacate and hand over vacant possession of the suit property.
10. The witness further added that despite the extinction of the Lease, the defendant remained in occupation of the demised premises and same continued to operate her business therein, albeit without due regard to the rights and interests of the plaintiff.
11. Besides, the witness also testified that on or about the year 2008, the defendant herein proceeded to and mounted a reference before the business premises rent tribunal, wherein same sought to defeat the plaintiff's efforts to recover/regain vacant possession over and in respect of the demised premises.
12. Be that as it may, the witness added that on the March 23, 2020, the plaintiff issued a one month notice and served same upon the defendant and in respect of which, the plaintiff sought to recover vacant possession.
13. Nevertheless, evidence was tendered that upon receipt of the notice to vacate and surrender vacant possession, the defendant herein proceeded to and mounted a reference before the business premises rent tribunal.



14. However, it was the testimony of the witness that the plaintiff herein raised and canvassed a preliminary objection challenging the jurisdiction of the business premises tribunal to hear and determine the Reference that was lodged by the defendant.
15. At any rate, the witness added that the preliminary objection challenging the Jurisdiction of the business premises rent tribunal was thereafter heard and disposed of *vide* ruling rendered on the November 26, 2021, whereupon the tribunal found and held that same was not seized of the requisite Jurisdiction to entertain the dispute that was mounted before it.
16. The witness further testified that upon the determination of the Reference that was lodged before the business premises rent tribunal, the plaintiff herein was obliged to and indeed filed the subject suit seeking to recover vacant possession over and in respect of the demised premises.
17. In any event, it was the evidence of the witness that simultaneously with the filing of the plaint, the plaintiff herein also took out an application for mandatory injunction which application was ultimately heard and concluded *vide* ruling rendered on the February 24, 2022.
18. On the other hand, the witness also testified that upon the delivery of the ruling rendered on the February 24, 2022, the defendant herein finally vacated the demised premises. For clarity, the witness added that the defendant vacated the premises on the March 28, 2022.
19. Other than the foregoing, the witness also testified that pursuant to the lease agreement which was entered into and executed in the year 2000, the mutual rent in respect of the demised premises was Kes 8, 000/= only, per month.
20. Nevertheless, the witness has added that in the year 2020 the defendant herein only paid the sum of Kes 12, 000/= Only, which was stated to be rents for three months.
21. Other than the foregoing, the witness added that in respect of the year 2021, the defendant herein did not pay or make any payments on account or rents, whatsoever.
22. Notwithstanding the foregoing, the witness added that the premises in question were thereafter subjected to valuation at the instance of the plaintiff with a view to ascertaining the reasonable rent, derivable therefrom.
23. In this regard, the witness added that the plaintiff engaged and retained the services of a registered valuer who undertook the valuation exercise and thereafter prepared a valuation report.
24. It was the further evidence of the witness that from the valuation report which was prepared on behalf of the plaintiff, it was established that the demised premises would fetch monthly rents of Kes 233, 000/= only. Consequently, the witness implored the honourable court to use the said figure as the reasonable rents and thereafter to decree payments of mesne profits computed and reckoned on the basis of the said amounts.
25. Other than the foregoing, the witness alluded to the witness statement dated the December 22, 2021 and sought to adopt and rely on same. Consequently, the witness statement dated the December 22, 2021, was admitted and constituted as the witness Further Evidence in chief.
26. On the other hand, the witness also referred to the list and bundle of documents dated the December 22, 2021 and same sought to adopt, produce and rely on the various Documents alluded to thereunder.
27. Pursuant to and at the request of the witness, the documents alluded to at the foot of the list dated the December 22, 2021, were admitted and produced in evidence as exhibits P1 to P18, respectively.



28. Upon the production of the assorted documentary exhibits, the plaintiff's case was marked as closed.

b. THE DEFENDANT'S CASE:

29. It was indicated elsewhere at the onset that after the rendition and delivery of the ruling dated the February 24, 2021, which essentially granted orders of mandatory injunction, the defendant herein did not file any statement of defense.

30. Premised on the foregoing, the defendant's case was closed without any evidence being tendered or adduced, whatsoever.

SUBMISSIONS BY THE PARTIES:

31. The plaintiff herein filed written submissions dated the August 10, 2022 and in respect of which the plaintiff isolated, identified and highlighted two issues for consideration by the Honourable court;

32. First and foremost, counsel for the plaintiff submitted that the plaintiff and the defendant entered into an agreement to lease, dated the July 1, 2000.

33. Pursuant to the said agreement to lease, it was submitted that the defendant was to occupy and use the designated premises for a duration of 2 years. For clarity, it was pointed out that the 2-year period lapsed and terminated on the July 1, 2002.

34. On the other hand, counsel for the plaintiff added that despite the lapse and extinction of the duration of the lease, the defendant herein failed, neglected and refused to vacate the demised premises.

35. At any rate, counsel for the plaintiff added that the defendant herein thereafter filed several references before the business premises rent tribunal, whose purport was calculated to defeat the recovery of vacant possession of the designated premises.

36. Be that as it may, counsel further added that however on March 23, 2020, the plaintiff herein issued and served a thirty days' notice upon the defendant, whereby the plaintiff intimated to the defendant that same was obliged to vacate and hand over the demised premises within the stipulated duration.

37. Nevertheless, counsel added that upon receipt of the termination notice dated the 23rd Day of March 2022, the defendant herein proceeded to and lodged another Reference before the Business Premises Rent Tribunal.

38. However, counsel submitted that the Reference that was lodged by the defendant, was thereafter disposed of vide ruling rendered on the November 26, 2021, whereupon the Business Premises Rent Tribunal found and held that it was not seized of the requisite jurisdiction to entertain and adjudicate upon the impugned reference.

39. Premised on the foregoing, counsel for the plaintiff has therefore submitted that the defendant herein became a trespasser effectively upon the lapse of the 30 days' notice, which was issued to and duly acknowledged by the defendant.

40. In view of the foregoing, counsel has therefore invited the Honourable court to find and hold that the defendant was a trespasser. In this regard, it was pointed out the rights of the defendant to occupy and to remain on the suit property lapsed with the expiry of the notice period.

41. In support of the foregoing submissions, learned counsel for the plaintiff has cited and relied on the decision in the case of Rajan Shah T/a Rajan S Shah and Partners v Bipin P Shah (2016)eKLR, to support the contention that the defendant was a trespasser.



42. Secondly, counsel for the plaintiff has submitted that having remained and retained possession of the suit premises, despite the issuance and service of the requisite legal notice, the defendant therefore denied and deprived the plaintiff of the right to benefit from the suit property.
43. As a result of the offensive actions and activities, it was submitted that the plaintiff is therefore entitled to payment of Mesne profits, for the entire duration that the defendant remained in occupation of the premises, albeit without the permission or consent of the plaintiff.
44. As pertains to the quantum and mode of assessment of mesne profits, counsel for the plaintiff invited the honourable court to take cognizance of the valuation report that was produced before the court by the plaintiff's witness. In this regard, counsel invited the court to find and hold that the reasonable rents in respect of the demised premises was Kes 233, 000/= only, per month.
45. Premised on the basis of the valuation report dated the July 14, 2020, Counsel therefore submitted that the plaintiff is entitled to Mesne Profits reckoned from the date of issuance of the Termination Notice.
46. In support of the foregoing submissions, counsel cited and relied on the decision in the case of *Kenya Hotels Properties Ltd v Willesden Investments Ltd*, Civil Appeal No. 149 of 2007 (Unreported) and *Mistry Valji v Janendra Raichand & 2 others* (2016)eKLR.

ISSUES FOR DETERMINATION:

47. Having reviewed the plaint dated the December 22, 2021, the Witness Statement attached thereto, the bundle of documents and having considered the oral testimony tendered by the plaintiff's witness; and having similarly considered the written submissions dated the August 10, 2022, the following issues are worthy of determination;
 - i. Whether the defendant became a trespasser upon the lapse of the notice period *vide* termination notice dated the March 23, 2020.
 - ii. Whether the plaintiff herein is entitled to mesne profits and if so, the quantum thereof.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1 - Whether the defendant became a Trespasser upon the lapse of the notice period *vide* termination notice dated the March 23, 2020.

48. It is common ground that the plaintiff and the defendant entered into and executed a lease agreement over and in respect of the demised premises, which lease agreement was to subsist for a duration of 2-years.
49. On the other hand, there is no dispute that despite the lapse of the 2-year period, indicated *vide* the lease agreement, the defendant continued to and remained in occupation of the demised premises.
50. Be that as it may, on the March 23, 2020, the plaintiff herein generated and issued a termination notice, which was duly served upon the defendant herein. For clarity, the termination notice was acknowledged by the defendant in terms of the letter dated the April 15, 2020.
51. It is important to observe that the termination notice had given to and in favor of the defendant a period of 30 days within which to vacate and hand over the demised premises. Consequently, the notice period terminated on or about the April 22, 2020.



52. Though the defendant herein filed and lodged a Reference before the Business Premises Rent Tribunal wherein same challenged the propriety and validity of the impugned Notice, there is no gainsaying that the Reference was struck out on the basis of want of Jurisdiction.
53. Following the striking out of the Reference by the Business Premises Tent tribunal, the defendant's continued occupation of the demised premises, became unlawful, illegal and without any color of right, whatsoever.
54. In any Event, having been duly served with the termination notice and knowing that indeed the plaintiff was a Governmental Institution or Parastatal Body, the defendant herein knew or had reasons to know that the Business Premises Tent tribunal would not be seized of the requisite Jurisdiction to determine the dispute.
55. Notwithstanding the foregoing, upon the lapse of the termination notice, the defendant herein had no more lawful basis or reasonable cause to remain in occupation and possession of the Demised premises.
56. Consequently and in the premises, I find and hold that the defendant's continued occupation and possession of the demised premises w.e.f April 22, 2020, amounted to and constituted Trespass.
57. To this end, it is appropriate to take cognizance of the definition of trespass. In this regard, the provisions of Section 3 of the [Trespass Act](#), chapter 294 Laws of Kenya, become relevant and appropriate.
58. For convenience, Section 3 of the [Trespass Act](#), (supra) are reproduced as hereunder;

3.	Trespass upon private land
(1)	Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
(2)	Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

59. Additionally, it is also important to take cognizance of the holding in the case of [Rajan Shah T/a Rajan S.Shah & Partners v Bipin p Shah](#) (2016)eKLR, where the Court stated and observed as hereunder;

“Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law”.



60. Notwithstanding the foregoing, it is important to point out that the tenancy relationship between the plaintiff and the defendant became a periodic tenancy, after the lapse of the lease agreement that was entered into and executed on the July 1, 2000.
61. Arising from the foregoing, either party to the tenancy, whether it be the plaintiff or the defendant, would therefore be at liberty to terminate the tenancy upon issuance of the requisite notice.
62. As pertains to the duration of the requisite notice, the provisions of section 106 and 107 of the *Indian Transfer of Property Act*, now repealed, would be appropriate and succinct.
63. Nevertheless, having been issued and served with a 30 days' notice, it is sufficient to find and hold that the defendant herein was obliged to vacate and hand over vacant possession, which same failed to comply with or adhere to.
64. In the premises, I find and hold that the defendant's tenancy over and in respect of the demised premises was lawfully and duly terminated in accordance with the relevant and obtaining provisions of the law.

ISSUE NUMBER 2

Whether the plaintiff herein is entitled to Mesne Profits and if so, the Quantum thereof.

65. The defendant's tenancy having been lawfully terminated pursuant and by dint of the notice dated the March 3, 2020, same was obliged to vacate and hand over vacant possession.
66. However, instead of vacating and handing over vacant possession, the defendant remained in occupation of the Demised Premises, albeit without lawful basis and or colour of Rights or at all.
67. Premised on the foregoing, the defendant became a trespasser, (in line with the observation made herein before) w.e.f April 22, 2020.
68. Consequently and with effect from April 22, 2020, the defendant denied or deprived the plaintiff of lawful entitlement to benefit from the demised premises. In this regard, a claim for Mesne Profits is well grounded and becomes payable.
69. To underscore the circumstances where mesne profits becomes due and payable, it is appropriate to adopt and reiterate the holding of the Court of Appeal in the case of *Attorney General v Halal Meat Products Ltd* (2016) eKLR, where the honourable court stated as hereunder;

“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, 18th Ed. para 34-42.
70. In respect of the quantum payable, it is imperative to state that such quantum is assessed on the basis of reasonable rent, which the claimant has been denied or deprived of. In this regard, the applicable scheme was underscored by the Court of Appeal in the case of *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR, where the Honourable Court stated as hereunder;

Measure for mesne profit was described in the Privy Council decision in *Invergue Investments v Hackett* (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.”

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.

71. From the holding of the honourable court in the decision of the *Mistry Valji case* (*supra*), it is settled that mesne profits are reckoned, calculated and premised on the reasonable rent that was derivable from the suit premises.
72. Consequently, the question that now remains outstanding and deserving due attention is what was the reasonable rent over and in respect of the Demised property and which should therefore be relied upon for purposes of ascertaining the amount due and payable.
73. To this end, it is appropriate to state and underscore that the plaintiff and the defendant agreed on monthly rents in the sum of Kes 8, 000/= only. For clarity, the said amount of rents was never subjected to revision, variation or review.
74. On the other hand, even though the plaintiff and the defendant had disputes, which were variously referred to the Business Premises Rent Tribunal, one thing is clear and not in doubt. This is, that no Notice for variation of rents was ever issued or at all.
75. In the premises, despite lapse of time up to and including the year 2020, the operative rent that was guiding the relationship between the plaintiff and the defendant, remained the sum of Kes 8, 000/= only, per month.
76. In my considered view, the Monthly rents having not been varied, reviewed and or adjusted, same remains the reasonable rents and thus the yardstick upon which Mesne Profits ought to be reckoned and computed from.
77. On the other hand, I am aware that counsel for the plaintiff invited the Honourable court to take cognizance of the valuation report, which was produced in evidence and to use the assessment at the foot thereof as the basis for reasonable rents.
78. Be that as it may, it is appropriate to point out and observe that the Valuation report which the plaintiff is seeking to rely on was never produced by the registered valuer or such other authorized expert.
79. Contrarily, the impugned valuation report was produced in evidence by PW1, who was neither the maker nor a registered valuer by profession. Consequently and in my humble view, the contents of the impugned valuation, remained unexplained, whatsoever and howsoever.
80. Notwithstanding the foregoing, I wish to add that being an expert opinion/document, it was incumbent upon the plaintiff to procure and bring forth the maker thereof. For clarity, it is the maker thereof or such other expert witness, who would have been able to explain the basis of the Valuation and how the Assesment was arrived at.
81. To my mind, the failure to procure and bring the maker, renders the impugned valuation report devoid of probative value and therefore of no legal effect.
82. In the premises, I am afraid that the assessment contained at the foot of the valuation report, which was neither produced by the maker nor by such other authorized expert, cannot be used or utilized as a basis for computation/ ascertainment of reasonable rents.



83. Having dealt with and addressed the measure of the mesne profits, what now remains outstanding and which requires to be addressed relates to the duration of computation. For coherence, this is the period for which mesne profits is awardable.
84. In this respect, I beg to reiterate that the termination notice took effect w.e.f April 22, 2020, yet vacant possession was only handed over on the March 28, 2022. Consequently, the duration in question amounts to 23 months and 6 days only.
85. Premised on the foregoing, the mesne profits due and payable to and in favour of the plaintiff, therefore works out as hereunder;
Kes.8, 000 x 23 Months = Kes 184, 000/= only.
86. In a nutshell, I am minded to assess and award mesne profits in the sum of Kes 184, 000/= only.

Final Disposition:

87. In conclusion, it is my finding and holding that the plaintiff herein has proved and established her claim at the foot of the Plaint dated the 22nd December 2021, with the exception of the Reliefs which were overtaken by events.
88. Effectively, I am therefore minded to enter Judgment in favor of the plaintiff in the followings terms;
- i. A declaration that the defendant became a trespasser on the suit property, upon the lapse of the termination notice issued by the plaintiff.
 - ii. The plaintiff is entitled to mesne profits.
 - iii. Mesne profits be and are hereby assessed and awarded in the sum of Kes 184, 000/= only.
 - iv. The award of mesne profits shall attract and accrue Interests at court rates w.e.f December 22, 2021.
 - v. Costs of the suit be and are hereby awarded to the plaintiff and same to be taxed and certified by the deputy registrar of the honourable court.
89. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31st DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant.

Mr. Wesonga for the plaintiff.

N/A for the defendant

