



**Nderitu & another v Muchemi (Environment & Land Case
22 of 2020) [2025] KEELC 212 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 22 OF 2020**

**JG KEMEI, J
JANUARY 24, 2025**

BETWEEN

WILFRED NGUNJIRI NDERITU 1ST PLAINTIFF

JANE ANN WAITHIRA NGUNJIRI 2ND PLAINTIFF

AND

DAVID M MUCHEMI DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiffs filed suit dated the 18/3/2020 against the Defendant seeking the following orders;
 - a. An order of eviction against the Defendant and or any other person occupying the suit property being Land Reference Number 7022/32 situate south of Kiambu Municipality in the Kiambu County.
 - b. For the purpose of giving effect to prayer c below, an order directing the parties to undertake a joint valuation of the suit property with a view to determining the value of the mesne profits accruing from the defendants unlawful user of the property.
 - c. As a consequential order to prayer b) above an order for the payment to the Plaintiffs of such mesne profits as shall be adjudged to have accrued from the defendant's unlawful user of the suit property from the 25/3/2008 until the date of resolution and actual return of possession of the suit property to the Plaintiffs.
 - d. Interest on the mesne profits at court rates from the date of judgment until payment in full.
 - e. Costs of the suit and
 - f. Such further or other relief as this court may deem fit to grant.



2. The Plaintiffs averred that on 17/3/2008 the suit land was advertised by for sale by public auction on 25/3/2008 in the daily newspaper by Messrs. Garam Investments Limited on instructions of the charges namely National Bank of Kenya Limited. On 25/3/2008 the 1st Plaintiff attended the auction and bid for the suit land whereupon the plaintiffs emerged the highest bidder in the sum of Kshs 8,650,000/- when they paid the sum of Kshs 2,162,500/- representing 25 % of the purchase price at the fall of the hammer and issued with a certificate of sale.
3. The Plaintiffs further aver that thereafter they paid the balance of the purchase price in the sum of Kshs 6,487,500/- to the bank and received the original and duly executed reconveyance of mortgage together with other documents relating to the suit land.
4. Armed with the documents they looked for the defendant for delivery of vacant possession of the property to them to no avail. In the month of April 2009, the 1st Plaintiff contacted the defendant via telephone and informed him that they had purchased the suit land through a public auction and notified him to vacate the property but the defendant offered to exchange the suit land with another property in Nyeri measuring 15 acres, an offer that was rejected by the Plaintiffs. Subsequent attempts to meet with the Defendant to agree on the vacation of the suit land became a cropper prompting the Plaintiffs to demand in writing vide the letter dated the 20/8/2009 that the Defendant vacates the premises by 5 pm on 9/9/2009 and pays mesne profits to the plaintiff from 25/3/2008 in default he would be forcefully evicted. That despite the notice the Defendant remained in occupation of the suit land. On 4/3/2019 the Plaintiffs served the Defendant with a 90 day notice of eviction under Section 152E (1) of the [Land Registration Act](#) but again the Defendant failed to comply.
5. As a result, the Plaintiffs plea is that the continued occupation of the Defendant of the suit land has caused them loss and damage whose particulars were pleaded under paragraph 15 of the Plaint. The court was urged to evict the Defendant and determine the quantum of mesne profits due to the Plaintiffs.
6. Simultaneously with the filing of the suit, the Plaintiffs filed a notice of motion dated 18/3/2020 seeking inter alia orders of eviction of the defendant.
7. The application is supported by a supporting affidavit sworn on even date and deposed by the 1st Plaintiff on his behalf and that of the 2nd plaintiff.
8. The Defendant entered appearance on the 7/5/2020 and filed a notice of preliminary objection to the Plaintiffs Notice of Motion dated the 18/3/2020 on the following grounds;
 - a. The plaintiffs are seeking for the same final orders of eviction of the Defendant from the said suit land that they seek in the main suit vide the interim application which thus ought not be entertained or heard. This suit ought to proceed to full hearing.
 - b. The defendant has always been and still is the registered owner of the suit land and orders for his eviction therefrom ought not be granted in an interim application.
 - c. The Plaintiffs have no title to the suit land thus have no locus to bring this suit.
9. Alongside the Preliminary Objection the defendant also filed a statement of defence dated the 22/5/2020 where he contends that he is the registered owner of the suit land according to the search in his custody. That he purchased the suit land in 1997 settled on it by constructing a matrimonial house where he resides to date until march 2020 when the 1st Plaintiff in the company of armed police officers came to the home to unlawfully harass and evict him without any colour of right or court orders.



10. He admitted that in 1997 he acquired a loan facility through a mortgage from the National Bank Limited using the suit land as a security and owing to default occasioned by financial constraints around 2008 the bank advertised the property for sale by way of public auction.
11. To redeem the property from the auctioneers hammer, he stated that he and his brother, the late Juma Michemi hatched a plan to save the property. That they turned to Juma Michemi's lawyer and personal friend, the 1st Plaintiff whom they entrusted with sufficient funds to attend the auction and bid for the property and purchase it in the name of Juma Michemi. He was emphatic that all the monies that the 1st Plaintiff alleges to have paid to the bank on a account of the suit land were given to him by the Defendant and his deceased brother. That due to the high trust and esteem they held the 1st Plaintiff with, it was not necessary to demand to peruse the documentation which he believed were safely in the custody of the 1st Plaintiff as their lawyer.
12. The defendant contented that he continued in peaceful and quiet possession of the land from 2008 until 2020 when the 1st Plaintiff came to the suit land with armed police and threatened to evict him on the basis that he had acquired the suit land through a public auction in 2008. That it then dawned on him that the 1st Plaintiff had defrauded them and was now bent on dispossessing him of the suit land. He urged the court to dismiss the claim of the Plaintiffs with costs.
13. In his counterclaim the Defendant accused the 1st Plaintiff fraud and breach of trust under para 26 on the basis that the 1st Plaintiff purported to purchase the land in his name instead of Juma Michemi; concealed the documentation of the transaction from the Defendant and his brother; acquired the property through fraud; gross professional misconduct ; fraudulently used the funds given by the Defendant and his brother to acquire the land in his name contrary to instructions; the suit land remains in the name of the Defendant and the Plaintiffs have no locus. Consequently, he sought the following orders;
 - a. The Defendant is hereby declared as the legal and rightful owner of the suit land.
 - b. All the documents fraudulently acquired by the Plaintiffs purporting to confer any title over the suit land to them be cancelled forthwith and the Plaintiffs be stopped from harassing the Defendant and attempting to evict him from the suit land.
14. The Plaintiffs vide the reply to defence and defence to the Counterclaim dated the 25/5/2020 denied the Defendants claims in toto and stated that the Defendant ceased as the registered owner of the land following the successful public auction; denied that the 1st Plaintiff was neither a family lawyer nor friend of the Defendant and or his alleged brother Juma Muchemi; denied any fraud and or professional misconduct; denied ever receiving any instructions or monies to purchase the land on behalf of the Defendant; and sought to put the Defendant to strict proof.

The evidence

15. PW1 – Wilfred Ngunjiri Nderitu testified and introduced himself as an Advocate of the High Court of Kenya practicing as such since 1989 and since 2020 holding the rank of a Senior Counsel. He relied on his witness statement dated the 18/3/2020 and produced documents in support of his claim marked as PW1- 1-16.
16. He stated that he and his wife purchased the property through a public auction on the 25/3/2008 in which he participated and bid in person for the property that was being sold by Garam Auctioneers. He was declared the highest bidder in the sum of Kshs 8,650,000 at the fall of the hammer and he paid 25% of the purchase price in accordance with the conditions of sale and consequently was issued



- with a memorandum of sale and the certificate of sale both dated the 25/3/2020. That later he paid the balance of the purchase price and the bank handed over the original title documents to him.
17. The witness further informed the Court that he sought a meeting with the Defendant to discuss the handover of the property in vain and when they did meet the Defendant offered to exchange the suit land with a 15-acre piece of land in Nyeri which he declined. That despite notifying the Defendant to vacate the suit land he remained in occupation leading to the filing of the instant suit in 2020.
 18. In addition, he stated that he was neither a lawyer nor friend of the Defendant and his alleged brother Juma Muchemi. He also denied that he bid and purchased the suit land on their behalf using monies from the duo. He stated that in any event if the Defendant was desirous of redeeming the property nothing stopped him from approaching the bank and pay for the property as he did not need to go through an intermediary. He stated that none of the parties namely the defendant and his alleged brother instructed him to bid and purchase the suit land.
 19. The witness added that he evicted the Defendant on the 10/11/2020 from the suit property pursuant to the orders of the Court.
 20. PW2- Job Kimani Ndungu introduced himself as a registered valuer practicing in the name and style of Mark Property Limited in the City of Nairobi and a member of the Institute of Surveyors of Kenya of good standing. He stated that on receipt of instructions from the 1st Plaintiff he inspected the suit land on 22/5/2021 and thereafter prepared the valuation report dated the 10/9/2021 and produced in court. He stated that at the time of inspection, the suit land was vacant. That the valuation was based on assessment of market rentals for the period of 1/4/2008 to 30/10/2020 a period of 12 years and 7 months. The witness informed the court that he used the deferral rental methodology since 2008 till 30/10/2020 with a 5% appreciation for both the land and the house giving the total rental value as follows;
 - a. Buildings and improvements – Kshs 7,550,000
 - b. Land -Kshs 11,325,000/-Total -Kshs 18,875,000/-
 21. The Defendant did not attend the hearing despite service having been effected and served upon him severally.

The written submissions

22. The Plaintiff filed written submissions dated the 3/10/2024 which I have read and considered in the judgment.

Analysis and determination

23. The gist of the Plaintiff's case revolves around two issues which are whether the Plaintiff is entitled to orders of eviction and secondly whether mesne profits are payable to the plaintiff and if yes the quantum.



Resolved matters

24. The record bears evidence that the issue of eviction of the Defendant was resolved vide the ruling delivered on the 15/10/2020 in which the court held as follows;

“The court is therefore satisfied that the order of eviction as sought by the Plaintiffs/ applicants is merited and the same is allowed.”

25. Arising from the above decision of the court therefore the issue remaining before the court for determination is that of mesne profits and whether it has been proved and of course the costs of the suit.

Acquisition of the suit land

26. It is not in dispute that the suit land was charged to the National Bank of Kenya Limited and upon the due exercise of its statutory power of sale, the suit land was sold by way of a public auction on the 25/3/2020 to the highest bidder, the Plaintiffs. There is also no evidence placed before the court to show that the Defendant challenged the said sale of the suit land at all.

27. The Defendant in his defence and counterclaim made scathing but unfounded allegations of fraud, professional misconduct, breach of trust, inter alia against the 1st Plaintiff and averred that the Plaintiffs have no right interest and benefit in the suit land given that he remained the registered owner of the land in accordance with the title search annexed to his pleadings dated the 20/5/2020. Whilst acknowledging that the land had been used to secure loan facilities in his favour from the National Bank of Kenya Limited and that because of default in loan repayments, the bank duly exercised its statutory power of sale, the Defendant's case is that he and his late brother namely Juma Muchemi instructed the 1st Plaintiff to bid for the property on behalf of the Defendant deceased brother. That the funds used to purchase the property was given by the duo and the only role of the 1st Plaintiff was as an agent and counsel for the parties. He accused the 1st Plaintiff of diverting the property to his name and waiting until his brother had passed away to evict him the suit land.

28. The Plaintiff averred that he acquired the suit land through a purchase in a public auction advertised in the Daily Newspapers by Garam Auctioneers. For the 25/3/2020. That he attended the said auction and bid for the property emerging the highest bidder in the sum of Kshs. 8,650,000/- and paid a deposit of 25% in accordance with the terms and conditions of sale dated the 25/3/2020. The witness adduced a memorandum of sale dated the 25/3/2020 duly executed by the 1st plaintiff and the Auctioneers and a certificate of sale of even date. Various correspondences exchanged between the bank and the Plaintiff on the payment of the balance of the purchase price were adduced leading to the surrender of the original documents of title by the bank to the plaintiff on payment of the full purchase price. The Plaintiff has explained that what impeded the registration of the land in the name of the Plaintiff was the illegal occupation of the Defendant which prevented him from obtaining the requisite rates clearance certificate, one of the documents required for registration.

29. It is not in dispute that the Defendant did not defend the case nor prosecuted his counterclaim.

30. The said defence and counterclaim having not been defended and prosecuted, the case of the Plaintiffs remains undefended. The Defendant failed to adduce evidence in form of instructions to the 1st Plaintiff in the nature of agency or as legal representation to bid for the land at the public auction and purchase the land in their names. Secondly there was no iota of evidence tabled before the court in support of any payment of the purchase price by the duo to the 1st Plaintiff. The court is of the view that the acquisition of the suit lands by the Plaintiffs has not been impeached. So I find.



Mesne Profits

31. Mesne profit is defined in Section 2 of the *Civil Procedure Act* to mean;

“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”.

32. Order 21 Rule 13 of the Civil Procedure Rules provides for the manner in which Courts may deal with awards for mesne profits as follows;

- (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;
 - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under subrule (1)(b) or (1)(c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

33. Another name for mesne profits are special damages for loss suffered as a result of trespass. This was the holding of the court in the case of Attorney General vs. Halal Meat Products Limited [2016] eKLR when the court stated;

“... 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”.

34. The rationale of award mesne profits was aptly captured in the case of Bolori vs Offorke [2010] LPELR – 3886 [CA] and Osawaru vs Ezeiruka [1978] NSCC [Vol. 11] 390, when the Supreme Court of Nigeria stated thus;

“In a claim for mesne profits the landlord by implication is challenging the continued occupation of the premises by the tenant whom he now regards as a trespasser, and is therefore claiming damages, which he has suffered through being out of possession of the premises. Mesne profits being, therefore, damages for trespass can be claimed from the date when the Defendant ceased to hold the premises as a tenant and became a trespasser”



35. Similarly, in the case of Bramwell vs. Bramwell [1942] 1 K.B. 370: [1942] 1 ALL ELR. 137 at p.13S, Goddard, L.J. described the expression: “mesne profits” as;

“only another term for damages for trespass arising from the particular relationship of landlord and tenant” that the expression “...mesne profits” simply means intermediate profits – that is, profits accruing between two points of time that is between the date when the Defendant ceased to hold the premises as a tenant and the date he gives up possession.”

36. In this case the rights and interest in the suit land passed to the Plaintiffs at the fall of the hammer on the 25/3/2020 and any occupation of the suit land between 25/3/2020 and the date of the actual eviction by the defendant amounted to trespass. The Plaintiffs adduced evidence in form of a valuation report which assessed the market rent to Kshs 18,875,000/- for the period covering 1/4/2008 and 30/10/2020. The court is satisfied that the Plaintiff has proved the quantum of mesne profits. I so grant.

Costs.

37. Although costs of an action or proceeding are at the discretion of the court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. The court has noted that the Plaintiffs case was filed after the adamancy of the Defendant to vacate the suit land. This suit was undefended and the appropriate orders in the circumstances, is that each party to bear their own costs.

Final orders for disposal

38. In the end I find that the Plaintiffs case succeeded. It is allowed as follows;

- a. The sum of Kshs 18,750,000/- being mesne profits for the period from 1/4/2008 to 30/10/2020 be and is hereby granted in favour of the Plaintiffs.
- b. Interest on above at court rates from 11/10/2020 until payment in full.
- c. Each party to bear their own costs.

39. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JANUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Wilfred Nderitu for Plaintiff

Judith Adhiambo – Court Assistant

