



Mbugua v Iqbal (Sued as the personal representative of the Estate of the Late Ghulam Rasool Janmohamed (Deceased)) (Environment & Land Case 1107 of 2013) [2022] KEELC 15139 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15139 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1107 OF 2013
OA ANGOTE, J
NOVEMBER 24, 2022

BETWEEN

**GEORGE BONIFACE MBUGUA ALIAS GEORGE BONIFACE
NYANJA PLAINTIFF**

AND

MOHAMMED JAWAYD IQBAL DEFENDANT
**SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE
GHULAM RASOOL JANMOHAMED (DECEASED)**

JUDGMENT

Background

1. This Judgment is with respect to the assessment of mesne profits due and owing to the Defendant. By way of brief background, the Plaintiff instituted this suit vide a Plaint on May 8, 1989 which was amended on August 14, 2014, seeking inter-alia, for an order that the Defendant transfers to him LR No 1/387, Ngong Road (hereinafter after the suit property).
2. The Defendant having initially filed the Defence on July 26, 1989, amended the same and filed an Amended Defence and Counterclaim on June 19, 2014, denying the Plaintiff's assertions and seeking, inter alia, rent from the Plaintiff in the sum Kshs 25,020,000 calculated from 1986 until 2011 and thereafter at Kshs 200,000 annually until delivery of Judgment.
3. The matter proceeded for hearing and vide its decision of May 31, 2018, the court (Bor J.) found in favour of the Plaintiff and dismissed the Defendant's counterclaim. The Defendant moved to the Court of Appeal which found in his favour and overturned the decision of this Court setting it aside in its entirety.



4. The Court of Appeal remitted the matter to this court for assessment of the rent/mesne profits/damages due to the Defendant, taking into account the sum of Kshs 1,500,000 paid towards the purchase of the suit premises by the Plaintiff. The parties relied on the evidence that had been tendered before Bor J.

Hearing and Evidence

5. The Defendant called two witnesses. DW1 informed the court that after the Plaintiff failed to pay the balance of the purchase price, the Defendant vide an undated letter informed him that the rent would be charged on the property at Kshs 15,000 per month from January 1, 1986. This position was reiterated in the letters dated January 31, 1986. This position was further reiterated by another letter of February 22, 1986, in which the Defendant sought for rent of Kshs 30,000 for January and February, 1986.
6. DW2, a practicing valuer, informed the court that he was engaged in 2016 by Zenith Management Valuers Limited to conduct a rent valuation with respect to the suit property to ascertain and advise on historical market rent values for rental assessment purposes; that he used a comparative method to obtain annual equivalents of the subject property over the successive years, and that he used an income approach to obtain annual equivalents of the subject property by using market values adopted from the comparative method.
7. According to DW2, his findings were documented in the report dated November 16, 2016 in which he found that the global rent for the period under consideration, free from all encumbrances, was Kshs 93,050,00. In cross-examination, DW1 stated that prior to the evaluation, he was not given any lease by the landlord neither was he informed of the Ruling by Nyamweya J.
8. It was the evidence of DW2 that he was instructed to assess the historical market rent for the suit property from January 1, 1990 to December 31, 2011 which he did and that he got the market value of the suit property as at these dates and applied a rate of 8% return for each year. No evidence was adduced by the Plaintiff to controvert the evidence of DW1 and DW2 on the issue of the payable damages

Submissions

9. The Plaintiff's counsel submitted that what constitutes mesne profits is defined in Section 2 of the *Civil Procedure Act* and that the Defendant is seeking for Kshs 93,050,000 as mesne profit together with interest at court rates from November 8, 2019 when the Court of Appeal delivered its Judgment.
10. The Plaintiff's counsel submitted that the Defendant vide his claim of June 6, 2014 seeks for Kshs 25,020,000 being rent from the year 1986 to 2011 and thereafter Kshs 200,000 per annum until Judgment and that the Defendant has not met the threshold for assessment of mesne profits.
11. It was submitted by counsel that the aforementioned figures are exaggerated and meant to unjustly enrich the Defendant contrary to the equitable principle against unjust enrichment; that the Defendant has neither furnished a current valuation report nor tabled any evidence to confirm his averment and that the parties agreed to increase rent progressively from the year 1990 to 2011 as follows: 25,000, 30,000, 40,000, 50,000, 70,000, 80,000, 100,000, 120,000, 135,000, 145,000, 150,000, 170,000 and 200,000.
12. According to the Plaintiff's counsel, the statements dated March 24, 2015 and March 28, 2017 relied on by the Defendant only confirm that the rent paid was Kshs 15,000/= for the year 1986 and that there is no other evidence to show that the rent was increased up-to Kshs 200,000 in 2011.



13. According to counsel, evidence produced by the Defendant for assessment of mesne profits is inadequate; that as expressed by the Court of Appeal in *Peter Mwangi Mbutia & another v Samow Edin Osman [2014] eKLR*, it is incumbent for the party seeking mesne profits to place material before the court to demonstrate how the amount was arrived at and that the court in *Karanja Mbugua & Another v Marybin Holding Co. Ltd [2014] eKLR* correctly held that mesne profits, being special damages must not only be pleaded but also proved.
14. Counsel for the Plaintiff submitted that mesne profits should be assessed and be based on a yearly basis. Reliance in this respect was placed on the Court of Appeal case of *Chief Land Registrar & 4 others v Nathaniel Koech & 4 others [2018] eKLR* and that mesne profits and rent should have an approximate equal figure. Reliance in this respect was placed on the case of *Mulla Sabbir Sheikh Akberali & Another v Abbai Mohamed Haji Mohamed Nur [2013] eKLR*.
15. It was submitted by the Plaintiff's counsel that the Court of Appeal in its Judgment stated that the court should take into account Kshs1,500,000 (75%) paid as purchase price when assessing the mesne profits; that as the sum is undisputed, the Plaintiff should be refunded the same using the approximate value inflated from 1987 to 2020 which has grown to Kshs 73,000,000/= with T-Bills and Kshs 482,000,000/= with Residual Land Valuation Methodology.
16. According to counsel, in the event the court disregards the Plaintiff's report annexed on the application dated October 1, 2021 and proceeds to assess the sum using the Defendant's Valuation report dated November 16, 2016, the court should note that the Defendant's valuation report of 2016 valued the disputed property at a current open market value of Kshs 350,000,000 and therefore, if the Defendant demands payment of rent/mesne profits using the current value, the court should justly consider Kshs 1,500,000/= and assess the amount demanded using the open market value which is 75% of Kshs 350,000,000 (262,500,000/=) as per the Defendant's report.
17. The Defendant's counsel submitted that the question before the Court was the assessment of mesne profits due to the Defendant in line with his counter-claim; that mesne profits as defined in Section 2 of the *Civil Procedure Act* relates to the damages and compensation recoverable from a person who has been in wrongful possession of immovable property and that in the present case, the fact that the Plaintiff is in possession of the suit property is not disputed.
18. It was submitted by the Defendant's counsel that the fact of unlawful occupation of the land by the Plaintiff was affirmed by the Court of Appeal and the Defendant has through its evidence clearly established his entitlement to the mesne profits.
19. Reliance was placed on the cases of *Rajan Shah T/A Rajan Shah and Partners v Bipin B Shah [2016] eKLR* and *Attorney General v Halal Meat Products Limited [2016] eKLR* which affirmed that mesne profits are an entitlement to a party wrongfully deprived of its property. It was submitted that as expressed by the court in *Mistry Valji v Janendra Raichand & 2 Others*, the proper measure of mesne profits is to assess up to the date when possession is given.
20. It was submitted that the valuation report adduced provided a comparative market study of rents charged for similar properties within the same area and that the methodology used was a comparative method to arrive at market value for the subject matter and the income approach to obtain annual equivalents of the property over the years by using market values adopted by the comparative method.

Analysis & Determination

21. Having considered the pleadings and submissions by counsel, the sole issue that arises for determination is;



What is the amount of damages/mesne profits due to the Defendant

22. In its Judgment of November 8, 2019, the Court of Appeal remitted this matter to this court with the following directives:

“In exercise of our powers under rule 13 of the Rules of this court, we remit this matter to the Environment and Land Court for an assessment of the rent/mesne profits/damages the appellant (Defendant) is entitled to only, while taking into account the sum of Kshs 1,500,000 paid towards the abortive purchase of the suit premises.”

23. The only task of this court is to assess the damages/mesne profits that the Defendant is entitled to, less the Kshs 1,500,000 that he received and nothing more. Section 2 of the *Civil Procedure Act*, Cap 21 defines mesne profits as follows:

“mesne profits”, 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;”

24. Order 21 Rule 13 of the *Civil Procedure Rules* provides as follows:

“13. Where a suit is for the recovery of possession of immovable property and for
(1) 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 sub rule (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.”

25. In the case of *Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR*, the Court defined mesne profits thus;

“The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of



law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits. Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.”

26. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited(*supra*) held 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.

27. It is common ground that a claim for mesne profits being one in the nature of special damages must be specifically pleaded and proved. The burden of proof is on the party who is making the claim. This position was affirmed by the Court of Appeal in the case of *Peter Mwangi Mbutia & another v Samow Edin Osman [2014] eKLR* where the court posited as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

28. In its Counter claim dated June 6, 2014, the Defendant is seeking for a sum of Kshs 25,020,000 being rent due from 1986, which is the time the Plaintiff took possession of the suit property until the year, 2011 and thereafter, until Judgment is entered.

29. The Plaintiffs admitted in the Amended Plaintiff that indeed he took possession of the suit property immediately after entering into the sale agreement in 1985.

30. The Court has considered the record in this respect. The first issue that stands out is that the Defendant appears to be seeking two sums as mesne rent being Kshs 25,020,000 from 1986 to 2011 and thereafter until judgment is entered. The law with respect to special damages such as mesne profits is clear. They must not only be proved but pleaded. As succinctly stated by the Nigerian Supreme Court in Union Bank of Nigeria *PLC v Albaji Adams Ayabule & Another (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011))*:

“I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.”

31. It is trite that parties are bound by their pleadings and so, is the Court. As emphasized by the Court of Appeal in in *Galaxy Paints Company Limited v Falcon Guards Limited [2000] eKLR*;

“issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the *Civil Procedure Rules*, the trial court by dint of the



aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination.”

32. In his valuation report, the Defendant's valuer stated that the global rental for the period under consideration, free from all encumbrances, can be fairly stated as Ksh 93,050,000. This figure has been calculated by the valuer with effect from 1990-2011. According to the valuation report, the basis of the valuation was to “assess the historical rents for the period 1990-2011 on the unimproved site value (USV) of the subject property and provide a fair rental value to be charged.”
33. The sum of Kshs 93,050,000 in the valuation report dated November 16, 2016 was never pleaded. Having not been pleaded said sum, the same cannot be considered by the court. Furthermore, the calculation of the said amount of Kshs 93,050,000 seems to fall within the same period that the Defendant is claiming Kshs 25, 020,000 as the rent arrears between 1986-2011. The contradiction in the two claims was never clarified by the witnesses.
34. The Defendant, through its Counter-Claim, is seeking the sum of Kshs 25,000,000/= being rent from the year 1986 to 2011 and thereafter Kshs 200,000/ until determination of the suit. The Defendant adduced in evidence the letter dated January 31, 1986 which was the formal notice that was issued to the Plaintiff.
35. In the demand letter, the Defendant informed the Plaintiff that his continual stay on the property would attract rent to the tune of Kshs 15,000/= per month. Whereas this is undisputed, the Plaintiff asserts that there was no agreement with respect to any yearly increments. Indeed, this court did not come across any such agreement.
36. The Defendant relied on the valuation report of November 16, 2016. An analysis of the monthly breakdown in the report vis a vis the amount pleaded as rent per year in the Counter-claim shows a significant disparity. Having perused the valuation report and heard DW2, it is the finding of this court that what the valuer attempted to prove as mesne profits is not what was pleaded in the Counter-Claim. The valuers report therefore is of no evidentiary value at all.
37. In addition, the valuation Report indicates that it adopted a Market Derived years purchase of 8% to determine the fair annual rent of the suit property. This methodology was neither pleaded in the Amended Plaint nor substantiated by the witness.
38. It is trite that the Court is not bound by an expert report, and more so a report which is not in tandem with the pleadings. In the case of *Stephen Kinini Wang'ondou v The Ark Limited [2016] eKLR*, the court held as follows:

“In my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency



of the opinion evidence.” An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to the fact on which the opinion is based.”

39. The Court of Appeal in *Kagina v Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR)* in line with this principle agreed with the trial court’s decision to disregard expert testimony stating thus;

“Our position is that we wholly agree with the learned Judge’s decision as to why the Judge discounted the said expert’s evidence even though there was no contrary expert opinion to controvert it. Our reasons for reaching the above conclusion are as follows: firstly, the expert opinion evidence was not binding on the Judge, neither does it bind this Court.”

40. The totality of the foregoing is that the Court finds that the report dated November 16, 2016 is of no probative value, the same having not been based on the pleaded facts in the counter claim.
41. Having made the foregoing determination, and noting that the Court cannot independently enter into an assessment of the current payable rent, it follows that the only basis upon which the court can make a determination for rent are the two letters in which the Defendant claimed the sum of Kshs 15,000 as rent. These are the only documents that the court will use to determine mesne profits.
42. The same principle will apply to the ambitious claim by the Plaintiff that he should be refunded the money he paid in 1986 using the approximate value inflated from 1987 to 2020 which is Kshs 73,000,000/= with T-Bills and Kshs 482,000,000/= with Residual Land Valuation Methodology. Having not pleaded this claim, and the Court of Appeal having directed that he is entitled to Kshs 1,500,000, his claim fails.
43. Possession of the suit property by the Plaintiff is undisputed and began in 1986. From 1986 to date constitutes a period of 36 years and at the rate of Kshs 180,000 per year (15,000*12), the amount due to the Defendant is Kshs 6,480,000. Out of the said Kshs 6,480,00, the sum of Kshs 1, 500,000 is to be deducted leaving a balance Kshs 4,980,000.
44. For those reasons, the court makes the following final orders;
- a. The Defendant to be paid by the Plaintiff mesne profits of Kshs 4,980,000.
 - b. The Defendant to pay interest on the above amount at court rate from the date of filing suit until payment in full.
 - c. The Plaintiff to pay the costs of the suit and the counter-claim

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

O A ANGOTE

JUDGE

In the presence of;

Mr Kurget holding brief for Wanyama for Plaintiff

Ms Rono holding brief for Ahmednassir for Defendant

Court Assistant - June

