



**Gathungu & 2 others v Karanja (Environment & Land Case E361 of 2021)
[2022] KEELC 15560 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15560 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E361 OF 2021
EK WABWOTO, J
DECEMBER 20, 2022**

BETWEEN

ISAAC WANJOHI GATHUNGU 1ST PLAINTIFF

FLORENCE MUGURE WANJOHI 2ND PLAINTIFF

ISABELLA NYAGUTHI WANJOHI 3RD PLAINTIFF

AND

SIMON KARANJA DEFENDANT

JUDGMENT

1. The plaintiffs brought this suit through a plaint dated October 21, 2021. They sought the following verbatim orders against the defendant;
 - a) Eviction order to issue against the defendant by himself, his respective families, his agents, his servants and whomsoever is acting on his behalf/instructions; from the suit property more specifically known as LR number 36/15/IV (IR No: 4858).
 - b) A declaration that the defendant by himself, his tenants his agents, his servants and/or whomsoever is acting on his behalf/instructions have trespassed into the plaintiffs' parcel of land more specifically known as LR number 36/15/IV (IR No: 4858).
 - c) An order of mense profits.
 - d) Costs and interest.
2. The Plaintiffs case is that they are the registered joint proprietors of property known as LR No 36/15/1V (IR NO: 4858) situate in Easteigh Section 4 within Nairobi County and that the defendant has trespassed onto the said property.



3. It was also the plaintiffs case that on or about December 2019, the defendant forcefully invaded and trespassed onto the said property and constructed temporary and semi-permanent structures which he leased out to some people. All efforts to have him vacate have not been successful and this necessitated the filing of the instant suit.
4. The defendant despite being served never entered any appearance nor filed any defence. Consequently, the suit was heard as an undefended cause on October 25, 2022.
5. At the hearing, the 1st plaintiff testified as PW1 and was the sole plaintiffs' witness in the case. He adopted his witness statement dated 21st October 2021. He also produced a list and bundle of documents dated the same day as part of his evidence in chief.
6. He testified that he acquired the parcel of land from the charge Rathlal Devan Kara Singh by a private treaty on September 19, 1974 for value which was captured as entry No 9 on the title document that was produced in his evidence. He also stated that as a precautionary measure he registered a caveat on October 1, 1974 which was later removed on October 25, 1974 after successfully registered the property to his name.
7. It was also his testimony that on December 29, 1999, he transferred 2/3 shares of the suit property to the 2nd and 3rd plaintiff to hold the same as co-proprietors while he retained 1/3.
8. After the close of the plaintiffs case, the plaintiffs filed written submissions dated November 1, 2022 through Mariaria & Co Advocates. In the said submissions, counsel for the plaintiff gave a brief background of the case and proceeded to outline two issues for determination by this court. These were; whether the plaintiffs have proved their case to the required standard and if so what are the appropriate reliefs to issue.
9. It was submitted that indeed the plaintiffs had proved their case and availed all the evidence to support their claim against the defendant. They urged this court to grant them all the reliefs sought as per their plaint.
10. I have considered the plaintiffs case, the testimony of the 1st plaintiff Eng Isaac Wanjohi Gathungu who testified as PW1 and the documentary evidence that was produced in respect to this suit and the main issues for determination is whether the plaintiffs have proved his case against the defendant to the required standard to warrant the grant of the orders sought.
11. Although the suit was undefended, the plaintiff has a duty to formally prove his case on a balance of probabilities as is required by law.

In the case of *Kirugi and another v Kabiya & 3 others* [1987] KLR 347 the Court of Appeal held that;

“The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR the court held that;

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

12. Section 24 of the *Land Registration Act* No 3 of 2012 states that 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. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.

Section 26 of the Land Registration Act, 2012 provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

13. PW1 stated that the plaintiffs are the registered owner of the suit land. From the documentary evidence vide the copy of the documents produced as his exhibits, it is evident that indeed the 1st, 2nd and 3rd plaintiffs are the registered owners.
14. The defendant had no right whatsoever to any entry and forceful occupation of the suit property to the detriment of the plaintiffs. The defendant’s actions of trespassing into the property were totally uncalled for which should not be condoned in our society.
15. In the absence of any defence and or controverting evidence, this court is satisfied that the plaintiffs has proved their case in so far as the ownership of the suit property is concerned.
16. The courts sits to administer justice. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. In the circumstances, I find that the plaintiffs are entitled to all the rights, interest and privilege that pertain to the land.
17. In respect to the relief sought, the plaintiffs sought for several reliefs including an order for eviction and mense profits together with costs and interest.
18. In respect to mense profits. Section 2 of the Civil Procedure Act 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.”
19. Order 21 Rule 13 of the Civil Procedure Rules provides 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 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.”

20. From the above reading of the law and as posited by the Court of Appeal in the case of *Attorney General v Halal Meat Products Limited* [2016] eKLR, mesne profits are profits accrued during the time the rightful owner was excluded from his land. A claim for mesne profits, being one in the nature of special damages, must be specifically pleaded and proved. 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 held 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.”

21. Whereas there is no dispute with regards to the period of occupation of the suit property by the defendant, no specific amount was pleaded and evidence was adduced with respect to the same. Having failed to comply with the ordinary rules of evidence with respect to the production of the valuation report to show the payable mesne profits, the court cannot order for an inquiry into the payable mesne profits neither can the court grant an award of a blanket figure in respect to the same. That being the case, there is no basis upon which the court can make an order for mesne profits.

Final orders

22. From the foregoing analysis, the plaintiffs has proved their case on a balance of probabilities and in this regard, this court makes the following orders;

- a) A declaration be and is hereby issued that the defendant has trespassed into the plaintiffs’ property known as LR number 36/15/IV (IR No: 4858).
- b) The Defendant is hereby ordered to vacate the suit property known as LR number 36/15/IV (IR No: 4858) within ninety (90) days from the date of service of the decree herein failure of which an eviction order shall issue and the same shall be executed in compliance with the due process of the applicable laws.
- c. Costs of the suit to be borne by the defendant.



It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

EK WABWOTO

JUDGE

In the virtual presence of: -

Mr Mariaria for the plaintiffs.

N/A for defendant.

Court Assistant: - Caroline Nafuna.

