



**Willesden Investments Limited v Kenya Hotel Properties Limited (Civil Suit
367 of 2000) [2006] KEHC 673 (KLR) (Civ) (14 December 2006) (Judgment)**

WILLESDEN INVESTMENTS LIMITED v KENYA HOTEL PROPERTIES LIMITED [2006] eKLR

Neutral citation: [2006] KEHC 673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL SUIT 367 OF 2000
CM KARIUKI, J
DECEMBER 14, 2006**

BETWEEN

WILLESDEN INVESTMENTS LIMITED PLAINTIFF

AND

KENYA HOTEL PROPERTIES LIMITED DEFENDANT

JUDGMENT

1. The case between the Plaintiff Willesden Investments Ltd – and the Defendant – Kenya Hotel Properties Ltd arises from trespass to land, based on the following brief facts.
2. The Plaintiff, the Leasehold proprietor and registered owner of the suit property, LR No 209/12748, situated between Nyayo House and Hotel Intercontinental, within the City of Nairobi, states that the Defendant, without the Plaintiff's consent, entered into illegal/and or unlawful occupation of the said property from January 1994 to February 1998 when the Defendant vacated and ceased using the said property for parking and storage. The vacation was as a result of lengthy exchange of correspondence and demand notices between Counsel for both sides. As a result of the unlawful occupation, the Plaintiff further avers that it was deprived of the use and enjoyment of the said property during the said period between January 1994 and February 1998. Both parties, during their respective periods of occupation, used the suit premises as parking and, or, storage facility.
3. The Plaintiff further states that the Parking lot has the capacity to hold at least 43 cars with parking charges at Kshs 70/= per bay per hour. This is the basis of the Plaintiffs claim for loss on *Mesne* profits of Kshs 54,902,400/= for the four (4) years when the Defendant unlawfully occupied the suit premises from January 1994 to February, 1998.



4. The Plaintiff also claims general damages against the Defendant for trespass to the suit property during the material period of January 1994 and February 1998.
5. The facts of trespass are indeed not disputed by the Defendant, as it admits as much in its defence when it states, in part:

“----- at all material times, the Defendant occupied the property que tenant on a lease from the City Council of Nairobi in the honest belief that the City Council of Nairobi was the lawful owner there of and that it was entitled to receive from the Defendant the rentals which were paid by the Defendant in respect of the property until July 1997, when the Defendant vacated the property at the end of the said lease.”
6. For clarity of record, despite the above defence by the Defendant, the City Council of Nairobi was neither enjoined as a Co-Defendant, nor was the Plaintiff's title (proprietorship) of the suit premises in any way, challenged. Despite the Defendant's attempts to produce receipts for the payments to the City Council of Nairobi, no lease, and, or Agreement was produced in Court to justify the legal basis for such payments, or lease.
7. The other line of defence by the Defendant was an attempt to show that it was the Defendant's sister company, the Intercontinental Hotels Corporation Ltd, rather than the Defendant, that occupied the suit property during the said period of January 1994 and February 1998.
8. Again, for the clarity of the record and this judgment, the Intercontinental Hotels Corporation Ltd, is neither enjoined as a Co-Defendant in this suit, nor is it mentioned anywhere in the exchange of the correspondence between the Plaintiff and the Defendant, that preceded the vacation of the property by the Defendant. of even greater importance is the fact, admitted by the Defendant's witness Mr. Jaswant Singh, that the whole Hotel, the motor vehicles, furniture and moveables parked and stored at the suit property belonged to the Defendant, not the so called sister company.
9. I have closely studied the pleadings, and analyzed the submissions by the two Learned Counsels, and taken into account the evidence adduced during the hearing of this protracted case which saw the Court visit the suit premises. Subsequent upon the above, I have reached the following findings and conclusions.
10. Disputes and justice cannot be resolved, nor done, when parties to the case either deliberately embark on shere denials of even documented evidence or distortion of facts or simple principles of law, or both. I begin by stating at the outset, that the facts are basically undisputed. This comes out clearly from both the pleadings and the application of the law on matters that are common ground.
11. The two broad issues are whether there was trespass, by the Defendant, on the Plaintiffs suit premises, land parcel number LR 209/12748, situated between Nyayo House and Hotel Intercontinental, Nairobi, between January 1994 and February 1998. If the answer to the above first question is in the affirmative, the next issue, which naturally flows therefrom, is what damages – both special and general – is the Plaintiff entitled to and has the Plaintiff, on the balance of probabilities, proved his case in line with the above broad issues.
12. On whether or not there was trespass by the Defendant onto the plaintiff's suit premises, the answer is loudly yes; and no energy need be expended on the matter despite the futile and baseless and unsubstantiated efforts by Learned Counsel for the Defendant that trespass had not been established.



13. For the avoidance of confusion, it must be remembered that parties are bound by their pleadings. Here, the Defendant, in its statement of defence, admitted trespassing onto the Plaintiff's suit property, but then sought to justify such entry, and, or occupation of the Plaintiff's premises. The Defendant said: -
- “----- at all material times, the Defendant occupied the property que tenant on a lease from the City Council of Nairobi in the honest belief that the City Council of Nairobi was the lawful owner there of and that it [the Council] was entitled to receive from the Defendant the rentals which were paid by the Defendant in respect of the property until July 1997, when the Defendant vacated the property at the end of the said lease.”
14. The above is an admission of unlawful entry by the Defendant, into the Plaintiff's suit premises. It is very strange, therefore, for the Counsel for the Defendant, to submit to the contrary that there was no entry by the Defendant into the Plaintiff's suit premises when that is there in black and white in the Defendant's written defence.
15. I need not stress that Learned Counsel for the Defendant owes it to this Court, his client, and his own conscience, not to be so economical with the truth, and the ethical rules that bind him as an officer of this Court.
16. What, one may venture to ask, is the logic in vacating the property if one never entered the said property in the first instance? What lease can there be in law in the absence of any lease document or Agreement? Here, the Defendant produced no evidence to support the allegation that there was a lease between the Defendant and the City Council of Nairobi. As alluded to earlier on, if the City Council is the one which granted the lease to the Defendant, either the City Council was the owner of the suit property at the material time, in which case the City Council should have been enjoined, by the Defendant, as a co-Defendant.
17. In the course of the whole of these proceedings, nobody questioned the ownership of the suit property by the Plaintiff other than the Learned Counsel for the Defendant, Mr. Katiku, who deliberately tried to mislead and confuse this Court by submitting that the Defendant was the proprietor of LR No 209/6835. Whether that is so or not is not in issue in this suit. The property in issue, and which was said to have been trespassed into by the Defendant, is LR No 209/12748, not LR 209/6835. The Court, and all the parties, visited the suit property – LR No 209/12748, not 209/6835, and the learned Counsel – Mr. Katiku was present, and he never stated that that was the wrong property.
18. The defence raised by the Defendant to justify entry into the Plaintiff's land holds no water in law. As held by Kneller, J. in HCCA No 13 of 1980 – *M'mukanya v M'mbijiwe*, p.761 at p.769
- “----- M'Mukanya and Nyamu are liable for trespass if M'Mbijiwe has the right to possess and they intentionally entered his plot even though they honestly believed the land was their own and they had a right of entry on it or they did so under an inevitable mistake of law or fact.”
19. The point is that even an honest belief that the land belongs to the Defendant is no defence in trespass if the entry was intentional and unlawful as a matter of law and fact.
20. In the case before me, the Defence or justification for the unlawful entry and occupation of the Plaintiff's land could not be justified in the presence of Title Deed in the name of the Plaintiff, and not even in the name of the alleged lessor – the City Council of Nairobi.



21. I saw the Defendant's witnesses and from their demeanour, they did not believe, much less honestly, that they had any justification to enter into the suit property.
22. Accordingly, over and above their unmitigated entry and occupation of the Plaintiff's suit land, I find and hold the Defendant liable in trespass. It entered and occupied the Plaintiff's premises without the plaintiff's consent or any lawful justification for doing so. The purported lease with the City Council of Nairobi is as hollow as it ridiculous in both law and fact.
23. Learned Counsel for the Defendant tried, in his submissions, to mislead this Court by offering a definition of trespass to land. He submitted that trespass to land

“---- consists of an act by one party intruding upon land in the possession of another. Possession means the occupation or physical control of land. Proof of ownership is prima facie proof of possession, unless there is evidence another person is in possession.”

Then continued the Counsel:

“In this case, the Plaintiff itself has stated that although it is the owner, it was not in possession. For this reason there cannot be a cause of action for trespass.”

24. The above submission is flawed and absurd. An owner of land does not have to be physically in possession of his land to have a cause of action for trespass, especially, as in this case, where the Defendant had no authority to be on the land – neither as a tenant nor as an authorized person in any way, to be on the property. It is important to keep in mind that an owner of land has at all times constructive possession and control of his land unless it is shown that another person is in a lawful possession of the land in issue. That is not the case here.
25. Secondly, the submission exposes the contradictions in the defence case. At one point the property is alleged to belong to the City Council, who allegedly leased the same to the Defendant. At another point, as in the above submission, the land is owned by the Plaintiff. What a confusion?
26. I now turn to the general damages claimed by the Plaintiff, having found and concluded that on the basis of the pleadings and the evidence before me, the Plaintiff is both the undisputed owner of the suit land and also that he never gave any permission to the Defendant, or anybody else for that matter, to occupy the land. Accordingly, any person found in that land was there without the consent of the Plaintiff and was therefore a trespasser, unless it is shown that he/it came there by an act of God or beyond his control – force majeure; which is not the case here.
27. Addressing himself to general damages for trespass to land, Hon. Justice Bosire, as he then was, said, in *Kamau Macharia v Mwangi Kigundu & 2 others*, HCCC No 4067 of 1986, in part:

“Even without evidence of loss the Court is obliged to assess damages----. The Plaintiff has for a long time been deprived of the use of the land in dispute. He is entitled to damages. The measure of damages is such sum as the Court will consider reasonable, considering the size of the land involved and the length of time.”
28. There, the Court awarded Kshs 50,000/= owing to the small size of the land and the place where the land was situated.
29. To Hon. Bosire's holding, I need only add that general damages for trespass to land are awarded, as an expression and protection of the land owner's right or possessor's right against unauthorized persons.



Without such general damages, trespassers would establish a right, by usage, to intrude into other persons land, and with impunity.

30. On the quantum of the general damages, no two sets of facts are exactly identical, and there is no mathematical formula. Each case has its own unique facts and circumstances.
31. In the case before me, the property of which the Plaintiff was unlawfully deprived of its use and enjoyment is not that big. But it is a prime property, in the center of the Capital City, Nairobi. Its value is not given, but if the daily income from the parking slots there in is anything to go by, its value must be in tens of millions. Further, the Plaintiff was deprived of its use and enjoyment for four (4) years, and at a time which is more recent than the case handled by Bosire, J. (*supra*).
32. I have read and considered the award of Kshs 500,000/= as general damages for trespass to land in HCCC No 819 of 2000 – *Njeri Kimani & another v Joseph Njoroge Murigi & 2 others*.
33. There, the property was located in Section I in Eastleigh, a much less prestigious location vis-à-vis the property and location of the property in the case before me.
34. Keeping in mind the caution I began with, that there is no mathematical or scientific formula in these types of cases, and that the guiding factors are the circumstances in each case, it is my considered view that Kshs 10,000,000/= is a reasonable award of general damages in the circumstances of the case before me. Accordingly, I award the Plaintiff herein, under the heading of general damages, Kshs 10 million.
35. I now turn to the issue of damages in respect of loss of business opportunity, as claimed in paragraph 18 of the Plaint. Damages under such a heading cannot be quantified, unlike special damages – *infra* -. They have to be comparable to the general damages, and assessed by this Court, taking into account the unique circumstances in each case.
36. In the present case, the Plaintiff avers that it had successfully negotiated a loan with IFC, a subsidiary of the World Bank for the construction of a Hotel on the suit property, but lost this opportunity as the Defendant was unlawfully in possession of the suit property. No other details are given, nor did the Plaintiff call any evidence in support of this claim, and the Plaintiff's Counsel offered no submissions on that part of the claim.
37. On the other hand, the Defendant did not controvert the claim, nor is the prestigious position of the suit property challenged or disputed.
38. Doing the best I can under those circumstances, I award a token sum of Kshs 6,000,000/= under this claim, for lost business opportunity.
I now turn to the claim for special damages, in this suit.
39. Learned Counsel for the Defendant submitted that the Plaintiff had not proved his claim for special damages as required by the law. I confess that I am at a loss as to what the Learned Counsel means by the above submission.
40. The record before me shows that the main claim in the suit is for *Mesne* profits. These have not only been pleaded, but also particularized and proved. The Court visited the site and actually witnessed motorists paying the fees of Kshs 70/= per vehicle per slot, and the Court was told that that fee is for an hour per slot per vehicle. The Court had opportunity to see and scrutinize copies of the receipts issued, and samples of the same were produced as exhibits in Court.
41. The Defendant offered no challenge to the claim for *Mesne* profits. Accordingly, I find and hold that the special damages, in the name of *Mesne* profits have been clearly pleaded and proved, as required by the law.



42. I need only add that this Court does not assess special damages, for as held in Zacharia Waweru Thumbi v Samuel Njoroge Thuku, HCCA No 445 of 2003, at p.7 special damages are, in layman's language, a reimbursement of what the Plaintiff has actually spent or lost, as a consequence of the tortuous act by the Defendant/tortfeasor. All that the law requires is that the said special damages are pleaded, particularized, and proved. Upon that the Court awards, not assesses, the figure proved.
43. Here, I award, Kshs 54,902,400/= under the heading of special damages, as *Mesne* profits, being the sum the Plaintiff was deprived of at the rate of Kshs 70/= per hour per vehicle per a parking slot for four (4) years from January 1994 to February, 1998.
44. When the Court visited the site, it saw the 43 parking slots, upon which the above figure is based, for the said period of unlawful occupation of the suit property.
45. In the result, I hold that the Plaintiff has proved its claim on the balance of probabilities. Accordingly, I enter judgment in favour of the Plaintiff, and against the Defendant. I award the following to the Plaintiff, and against the Defendant:
- a) *Mesne* profits from January 1994 to February 1998, both months inclusive, in the sum of Kshs 54,902,400/= with interest at the Court rates from January 1994 till payment in full.
 - b) General damages for trespass for K.Shs,10,000,000/= with interest from the date of this judgment, at Court rates, till payment in full.
 - c) Kshs 6,000,000/= as damages for loss of business opportunity, with interest, at Court rates, from the date of this judgment till payment in full.
 - d) Costs of this suit, with interest, at Court rates, from the date of filing of the suit till payment in full.

DATED AND DELIVERED IN NAIROBI, THIS 14TH DAY OF DECEMBER, 2006.

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O.K. MUTUNGI

JUDGE

