



Mohamud v Nyokabi & 3 others (Sued as the Administrators of the Estate of the Late Rahab Nyokabi Mungai alias Nyokabi D/O Mungai alias Rahab Nyokabi) (Environment & Land Case 6 of 2023) [2024] KEELC 428 (KLR) (5 February 2024) (Judgment)

Neutral citation: [2024] KEELC 428 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 6 OF 2023
EK WABWOTO, J
FEBRUARY 5, 2024
PREVIOUSLY HIGH COURT CIVIL SUIT NO 112 OF 2016**

BETWEEN

ABDIRAHMAN ALI MOHAMUD PLAINTIFF

AND

NYOKABI MUNGAI 1ST DEFENDANT

NASRA NYOKABI MOHAMED 2ND DEFENDANT

GEORGE THIONGO MBURU 3RD DEFENDANT

PATRICK CHEGE MBURU 4TH DEFENDANT

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE RAHAB
NYOKABI MUNGAI ALIAS NYOKABI D/O MUNGAI ALIAS RAHAB
NYOKABI**

JUDGMENT

1. The Plaintiff brought this suit through a plaint dated 12th April 2016. They sought the following orders against the Defendants.
 - a. A permanent injunction restraining the Defendant by herself, agents, servants or otherwise however from terminating, evicting, trespassing, entering, alienating, allocating and/or demolishing or in any way interfering with the quit possession of Plot No. 284 Section 2 Eastleigh-Nairobi.
 - b. A declaration that the tenancy of the Plaintiff is legal and binding and the Plaintiff is entitled to quit enjoyments therein.



- c. Damages.
 - d. Costs of this suit.
 - e. Any other relief deemed just and expedient.
2. The Defendants filed a defence and counterclaim dated 28th March 2019. The counter-claim sought for the following orders;
 - a. A declaration that the Plaintiff is a trespasser on the suit property Plot Number 284 Eastleigh Section 2 Nairobi as his occupation/possession of the same is illegal.
 - b. The Plaintiff be ordered to give to the Defendant vacant possession of the said property and in default thereof he be evicted
 - c. That the Plaintiff be ordered to pay rent arrears in the sum of Kshs. 2,754,000/=
 - d. General damages and mesne profits from 1st January 2029 till vacant possession is given.
 - e. Costs of the suit be paid to the Defendant.
 - f. Interest on C, D and E above.
 3. On 20th April 2023, Counsel Ochanda for the Plaintiff confirmed that he was unable to get hold of his client who had gone to Somalia. He also confirmed that he had no instructions and could not proceed in the matter. Due to the said reasons, Hon. Visram J. dismissed the Plaintiff with costs to the defendants and the defendant's counterclaim was fixed for hearing.
 4. On 4th May 2023 before Hon. Lady Justice Meoli, the Court pronounced itself that the pleadings presented a dispute falling within the jurisdiction of the Environment and Land Court. Consequently, the suit was transferred and matter set down for hearing before the Environment and Land Court on 2nd October 2023.
 5. During the hearing of the counterclaim, Nasra Nyokabi Mohamed was sworn as DW1 and testified to a having filled a counterclaim, witness statements and list of documents which were adopted as her evidence in chief. She stated that her reason for filing the claim was because the Plaintiff had not been paying rent since April 2016 and had also refused to give vacant possession.
 6. She also stated that the lease has expired and had not been reviewed. For this reason, she urged the court to order the plaintiff to vacate the premise and pay all outstanding rent arrears.
 7. The Plaintiff never participated in the proceedings during the hearing of the defendants' counterclaim.
 8. Upon close of the Defendants counterclaim, the Defendants filed written submissions dated 31st October 2023. It was submitted that there was no dispute as to the tenancy agreement between the parties dated 1st October 2013. It was also submitted that it was not in dispute that the Plaintiff was in rent arrears.
 9. I have considered the pleadings, the evidence adduced and submissions before the court. The defendants' counterclaim was not contested. The main issue for consideration is whether the Defendants have proved their case to the required standard to warrant the grant of the prayers sought.
 10. A counterclaim is a suit and ought to be proven to the required standard. Although the same was not contested by the Plaintiff, the Defendant have a duty to formally prove their case on a balance of probabilities as is required by law.



11. In the case of *Kirugi and Another Vs 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.”
12. It is common knowledge the Courts are bound to enforce the terms of of parties in contracts, in so far as the contract is entered into legally. A perusal of the lease agreement at Paragraph 3(a) states:

“...Any breach non-performance or non-observance of the lessee of any covenants and agreements....it shall be lawful for the Lessor at any time thereafter to enter into and upon the said premises or any part thereof in the name of the whole and the same to have again repossess and enjoy as in its former state....without prejudice to any right of action or remedy of the lessor in respect of any antecedent breach...”
13. Furthermore, Page 1 of the Agreement outlines rent revisal at Kes 3,000 on 3rd, 4th and 5th years. Year 1 and 2 at Kes 80,000. Lastly, the 3 months of the 6th year at Kes 92,000. Calculations of the agreement terms arrive at a conclusion that for the duration of the contract term, the Defendants should have received a total of Kes 4,472,000/= (inclusive of Ksh 80,000/= as 1 month’s deposit).
14. Having perused the receipts presented by the Defendants, the Court has tabulated that Kes 2,131,000/= was received as rent payment, inclusive of the 1 month’s deposit. As per the receipt dated 2nd October 2013, the Plaintiff paid 2 months deposit. The Agreement dictates that in case of breach, the Defendant had a right to offset deposit against rent owed.
15. As per the Court’s tabulation, on face value, the arrears would amount to Kes 2,341,000/= and would then be further offset by Kes 80,000/= to arrive at final arrears amount of Kes 2,261,000/=
16. As for the prayers on declaration of trespass, the Court considered notice issued by the Defendants on 29th October 2018 expressing the default of the Plaintiff and the desire to cease engaging after expiry of the lease on 31st December 2018. I do agree that as per contract terms, the Plaintiff was *persona non grata* as of 1st January 2019 and would qualify as a trespasser.
17. In the absence of the defence to the counterclaim and or controverting evidence, the Court is satisfied that the Defendants have proved their case on a balance of probabilities in so far as the legitimate owner of the property is concerned and they are entitled to the reliefs sought. With regards to Mesne Profits, Section 2 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya 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.”
18. The Court of Appeal in the case of *Peter Mwangi Mbuthia & another v Samow Edin Osman* [2014] eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated 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.”

19. It is trite law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. The Court of Appeal in the case of Kenya Hotel Properties Limited v Willesden Investments Limited [2009] eKLR held that

“...once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass”, since both mean one and the same thing.”

20. In the instance case a sum of Ksh 1,000,000/- was requested as adequate compensation. The case of Stephen Makau Kanyia vs Wilson Njeru Wega & 4 Others [2021] eKLR where the court awarded Ksh 500,000/- as general damages for trespass was cited.

21. Noting the duration of the trespass it is my view that a figure in the sum of Kshs. 500,000/- being an award of general damages is reasonable in this case.

22. In respect to costs of the counterclaim, this court having considered that the same was not contested, it will direct each party to bear own costs of the counterclaim.

23. In light of the foregoing, the Court makes the following disposal orders in respect to the counterclaim.

- a. A declaratory order is hereby issued against the Defendant in the counterclaim as a trespasser on the suit premise known as Plot Number 284 Eastleigh Section 2 Nairobi.
- b. An order is hereby issued against the Defendant in the counterclaim for payment of Kes 2,261,000/= as payment for the rent arrears.
- c. The Defendant in the counterclaim is hereby ordered to vacate the suit property known as Plot Number 284 Eastleigh within (30) thirty days from the date of service of the decree herein failure of which an eviction order shall issue.
- d. General damages for trespass of Ksh 500,000/-
- e. Interest at court rates to apply to item (b) and (d) from the date of this judgment until payment in full.
- f. Each party to bear own costs of the counterclaim.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2024.

E. K. WABWOTO

JUDGE

In the virtual presence of:

Ms. Ndirangu for the Plaintiffs in the counterclaim.

N/A for the Defendant in the counterclaim.

Court Assistant: Caroline Nafuna.

