



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 198 OF 2018

PETER KIARIE KINYANJUI.....PLAINTIFF

(Suing through his Attorney JAMES KAROMO KINYANJUI

vide Power of Attorney registration No. 15 of 29/6/17)

VERSUS

SAMUEL KIOKO MAKALI.....DEFENDANT

JUDGMENT

By a Plaint dated 25th March 2018, the Plaintiff has sought for judgment against the Defendant for the following orders:-

- a) That the Defendant, his agents and/or servant be evicted from the Plaintiff's plot Reference No. Thika Municipality Block 1/877 forthwith.***
- b) The storey building that the Defendant has put up in the plot Reference Number Thika Municipality Block 1/877, be condemned and demolished forthwith and the Defendant do meet the costs of that demolition.***
- c) Mesne profits of Kshs. 1,200,000/= from the year 2016 till he vacates from the plot.***
- d) Costs.***

The Plaintiff in his claim averred that he resides in Britain and he filed the suit through his brother, whom he had given the Power of Attorney on 29th June 2017, to manage the suit property. That on 27th November 2012, the Plaintiff was registered as the owner of the suit property and that in the year 2016, Mr. James Karomo Kinyanjui went to inspect the plot and found that the Defendant, a former Lands officer in Thika Municipality and Kiambu County Government had built a 6 storeyed house on the plot from which he was receiving rent estimated to be Kshs. 100,000/= per month. That the building was being built day and night and has not been given 21 days curing time, to allow construction to be firm and be secure. Further, that the building has no approval and architectural plans and may collapse any time and it would be a danger to the inhabitants and should be condemned and ordered demolished.

That the Plaintiff's Advocates made inquiries and traced the Defendant's telephone number as 0724 092567, but he indicated that he would not vacate the plot.

Despite service of Summons to Enter Appearance through the Standard Newspaper on 22nd December 2018, the Defendant did not enter Appearance and the matter proceeded by way of formal proof wherein the Plaintiff testified for himself and called no witness.

PLAINTIFF'S CASE

PW1 James Karomo Kinyanjui adopted his witness statement as his evidence in Court. He further testified that he is a brother to the owner of the suit property and was granted the Power of Attorney on 29th June 2017. He produced the list of documents as exhibit 1. Further that the suit property is **Thika Municipality Block 1/877**, and he urged the Court to allow his prayers.

Thereafter, the plaintiff filed written submissions which the Court has carefully read and considered. The issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

As already noted above, the Defendant did not enter Appearance and thus did not defend the suit. **Therefore, the Plaintiff's evidence remain uncontroverted and unchallenged.** However, the Plaintiff is still required to prove his case on the required standard of balance of

probability as uncontroverted evidence is not automatic evidence. It is trite that the Plaintiff has to discharge the burden of proof. In the case of **Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR**, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further in the case of **Gichinga Kibutha...Vs...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.”

The Plaintiff has sought for the eviction of the Defendant from the suit property and demolition of the storey building that has been erected thereon. It is trite that the registration of a person as the owner of the land and Certificate of title held by such a person as a proprietor of a property is conclusive proof that he/she is the owner of the said property. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by **Section 26(1)** of the **Land Registration Act**, which states as follows;

“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.

The Plaintiff has produced in evidence a Certificate of Lease dated 27th November 2012, that confirms that he is the registered owner of the suit property. From the said registration, it is not in doubt that without the said registration and proprietorship of the Plaintiff being impeached, he remains the legal owner of the suit property with all the rights and privileges that appertain to it as provided by **Section 24(a)** of the **Land Registration Act**, which states as follows;

a) 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.

Further, it is clear that the right of such proprietor shall not be defeated except as provided by the law. See **Section 25** of the **Land Registration Act** which provides;

“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.”

It is the Plaintiff's contention that the Defendant entered upon his property and without his consent erected a 6 storey building. The Court has seen a photograph of the said building. The Plaintiff's evidence has not been controverted. Therefore, the Court has no reason not to believe the evidence as presented by the Plaintiff. It is clear from the above provisions of law, that the registration of a person affords him/her all the rights and privileges that appertain to such property. In this instant case, the Court finds that the evidence of the Plaintiff has not been rebutted and he is therefore entitled to have his property dealt with as per his wishes. Further the Plaintiff has all the rights and privileges appertaining to the suit property and consequently, the Court finds and holds that the Plaintiff is entitled to the orders of eviction and demolition of the 6 storey building.

The Plaintiff has also sought for mesne profits of **Kshs 1,200,000/=** per year from the year 2016. Mesne profits must be specifically pleaded and proved. The Plaintiff has specifically pleaded the same, and the Court should then determine whether he has proved his claim. In the case of **Mistry Valji ...Vs... Janendra Raichand & 2 others [2016] eKLR** the Court of Appeal stated:

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”. ... Measure for mesne profit was described in the Privy Council decision in Invergue Investments v Hacketh (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (supra) as follows:

“This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land....The question for decision is the appropriate measure of damages.”

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.

With the above definition of mesne profits, it is not in doubt that the Defendant was in wrongful possession of the suit property herein that belonged to the Plaintiff. The Defendant has been receiving profits from the said possession and thus the Court finds and holds that the

Plaintiff has proved that he is entitled to the mesne profits.

In the above quoted case, the Court held that measure of damages must be reasonable rent. As per the Plaintiff, the reasonable rent is **Kshs. 1,200,000/=** per year. He contended that he asked around and learnt from the tenants that the estimated rent is **Kshs. 100,000/=** per month. There is no evidence of the said rent of **Kshs.100,000/=** per month and thus **Kshs. 1, 200,000/= per year**. With no evidence of the said amount, the Court will calculate a figure of **Kshs.400,000/= per year** from the year 2016 till the Defendant vacates the Plot. See the case of **Cleophas Wanyonyi ...Vs... Walter Otieno [2019] eKLR** where the Court held that;

“14. The plaintiff has urged the court to award mesne profits at the rate of KShs 7,000 per month from the year 2002 to the date of the judgment. The plaintiff’s basis for this sum is that the vendor told him that he was collecting rent of KShs 15,000 per month from the premises prior to selling it to the purchasers. The said vendor did not testify in this matter so as to verify that claim. In the circumstances, I find a figure of KShs 2,000 per month to be reasonable in the circumstances. According to the certified copy of extract of title the defendant became registered proprietor on 10th April 2006. I will award mesne profits at Kshs 2,000 per month from that date to the date of this judgment. That is a period of 157 months thus translating to Kshs 314,000 as mesne profits.”

Having now carefully read and considered the pleadings, the exhibits before Court and the written submissions by the Plaintiff, the Court finds and holds that the Plaintiff has proved his case on a balance of probabilities and accordingly the Court allows the Plaintiff’s claim entirely with costs. With regards to prayer (c) for the mesne profits, the Court awards Mesne profits of **Kshs. 400,000/=** per year from the year **2016** till the Defendant vacates the suit property.

It is so ordered.

Dated, signed and Delivered at Thika this 4th Day of March 2021

L. GACHERU

JUDGE

4/3/2021

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Kaimunguru for the 1st and 2nd Plaintiffs

No appearance for the Defendant

L. GACHERU

JUDGE

4/3/2021