



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 199 OF 2018

SCHOLASTICA NJERI KINYANJUI.....1ST PLAINTIFF

JUDY WANJIRU KINYANJUI.....2ND PLAINTIFF

(Suing through their ATTORNEY JAMES KAROMO KINYANJUI

vide power of Attorney registration No. 14 of 29/6/17)

VERSUS

SAMUEL KIOKO MAKALI.....DEFENDANT

JUDGMENT

By a Plaint dated 25th March 2018, the Plaintiffs filed this suit against the Defendant and sought for orders that;

- a. That the Defendant, his agents be evicted from the Plaintiffs plot reference No. Thika Municipality Block 1/876 forthwith.
- b. The storey building the Defendant has put up in the plot reference Number Thika Municipality Block 1/876 be condemned and demolished forthwith and the defendant do meet the costs of that demolition.
- c. Mesne profits of Kshs. 600,000/= from the year 2016 till he vacates from the plot.
- d. Costs

In their statement of claim, the Plaintiffs averred that they reside in Australia and they have filed this suit through their brother whom they gave the power of Attorney on 29th June 2017, to manage the suit property. That on 27th November 2012, the Plaintiffs were registered as owners of the suit property. 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 5 storey house on the said plot from which he was receiving rent estimated to be Kshs. 50,000/= per month. That the building was being built day and night was not given 21 days curing time to allow construction to be firm and secure. Further that the building has no approval and Architectural plans and may collapse any time and the same is danger to the inhabitants and should be condemned and ordered demolished.

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

Despite being served with Summons to Enter Appearance by way of Advertisement in the Standard Newspaper dated 22nd December 2018, the Defendant did not enter Appearance and the matter proceeded for formal proof wherein the Plaintiffs called one witness and closed their case.

PLAINTIFF'S CASE

PW1 James Karomo Kinyanjui testified that he had a Power of Attorney given to him by the owners of the suit property. He adopted his witness statement dated 25th March 2018 and further produced the list of documents as Exhibit 1. It was his testimony that the suit property is Thika Municipality Block 1/876. He urged the Court to allow the orders as sought.

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

Since the Defendant did not enter Appearance nor file any defence, the **Plaintiffs evidence remain uncontroverted and unchallenged.** However, the Plaintiffs were still required to prove their case on the required standard of balance of probability as uncontroverted evidence is not automatic evidence. The Plaintiffs have a duty to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR**, where 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 Plaintiffs have sought for the eviction of the Defendant from the suit property and demolition of the **5 storey** building that has been erected on the suit property. The registration of a person as the owner of the land and Certificate of title held by such a person as a proprietor of such 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 Plaintiffs through their representative have produced as evidence a Certificate of Lease dated 27th November 2012 that confirms that they are the registered owners of the suit property. The Plaintiffs having such registration, and without the said registration and proprietorship being impeached, they remain the legal owners 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 Plaintiffs contention that the Defendant entered upon their property and without their permission or consent erected a **5 storey** building. The Court has seen a photograph of the said building, and the Plaintiffs evidence has not been controverted and therefore, the Court has no reason not to believe the evidence as presented by the Plaintiffs. The registration of a person affords him/her all the rights and privileges that appertain to the said property so registered. The Court finds that the evidence of the Plaintiffs have not been rebutted and they are entitled to have their suit property dealt with as per their wishes and they have all the rights and privileges appertaining to the suit property. Consequently, the Court finds and holds that the Plaintiffs are entitled to the orders of eviction and demolition of the 5 storey building as sought in the Plaintiff.

The Plaintiffs have also sought for mesne profits of **Kshs 600,000/=** per year from the year **2016**. Mesne profits must be specifically pleaded and proved and the Plaintiffs herein have specifically pleaded the same. Further have the Plaintiffs proved the same? 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 clear that the Defendant was in wrongful possession of the suit property that belonged to the Plaintiffs herein. The Defendant has been receiving profits from the said possession and thus the Court finds and holds that the Plaintiffs have proved that they are entitled to the mesne profits.

In the above quoted case, the Court held that measure of damages must be reasonable rent. As per the Plaintiffs, the reasonable rent is **Kshs. 600,000/=** per year. It is PW1’s contention that he asked around and learnt of the said rent from the tenants who stated that the Defendant was receiving **Kshs. 50,000/=** per month. There is no evidence of the said stated amount of **Kshs. 600,000/= per year**. With no evidence of the said amount, the Court will calculate a figure of **Kshs. 300,000/= 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 that the Plaintiffs have proved their case on the required balance of probabilities and accordingly the Court allows the Plaintiffs claim entirely with costs. With regards to prayer (c) for the mesne profits, the Court awards **Kshs. 300,000/=** per year from the year **2016** till the Defendant vacates from the plot.

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