



ICFEM Mission v Stephens & another (Environment and Land Appeal E018 of 2021) [2023] KEELC 16275 (KLR) (13 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E018 OF 2021
EC CHERONO, J
MARCH 13, 2023**

BETWEEN

ICFEM MISSION APPELLANT

AND

PATRICIA ANNE STEPHENS 1ST RESPONDENT

PAUL TREVOR CHATWIN STEPHE 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Principal Magistrate's Court at Kimilili by Hon G ADHIAMBO, P M delivered on September 3, 2021 in PM-ELC No 31 of 2020)

JUDGMENT

Background

- 1 This is an Appeal the Judgment and Decree by HO, G Adhiambo P M Kimilili Law courts in PM-ELC Case No 31 of 2020 delivered on September 3, 2021. In that former suit, the Respondents who were plaintiffs had moved the Trial Court vide a plaint dated June 10, 2020 seeking an equitable relief of Injunction against the Defendant/Appellant whether acting by themselves, agents, employees, servants, assigns, personal Representatives and/or anyone claiming through or under them from evicting them or in any manner interfering with their stay on Land Registration No Kimilili/kibingei/3632.
- 2 The Plaintiffs/Respondents had also sought an order compelling the Defendant/Appellant to compensate them for the House they built on its land at the current market value or to allow the Plaintiffs/Respondents buy the land at the current market value with an agreed upon payment plan
- 3 The Defendant/Appellant filed a defence dated July 22, 2020 denying the plaintiffs/Respondents' claim and sought to have the suit dismissed with costs.



4 After the parties complied with pre-trial direction under Order 11 *CPR*, the matter proceeded between June 10, 2021 and June 24, 2021. On 3rd September 2021, the trial Magistrate delivered Judgment in favour of the plaintiffs/Respondents. The Defendant was aggrieved and preferred this Appeal on the following Grounds;

1. The Learned Trial Magistrate erred in Law in awarding the plaintiffs a compensation of Kshs. 2.5 million without considering that they had not paid any rent for the suit land from the date they resigned from working with the Defendant
2. The Learned Magistrate's decision is contrary to the basic legal concepts of land
3. The Learned Trial Magistrate erred in fact in ordering compensation and a permanent injunction against the Defendant when it was the plaintiffs who had unilaterally caused the breach of relationship which led to this suit
4. The learned trial Magistrate erred in Law in granting a permanent injunction without any condition for payment of land rent

Plaintiffs' Summary Of Facts

5 Paul Trevor Chatwins Stephens, the 2nd Plaintiff/Respondent testified alone and closed the plaintiffs' case. In his testimony, the 2nd plaintiff/Respondent(PW1) stated on Oath that they came to work with ICFEM, the Defendant/Appellant as volunteers in the Community. He stated that they were allocated a plot of land by the Director of ICFEM, one Solomon Nabie. The witness further stated that they intended to buy land and build a house but the Director, Solomon Nabie suggested that they use mission land which was off the road and in a safer place to build the house. However, He said that there was no Agreement but the he suggested to the Director that they sign some sort of tenancy agreement to protect them but the Director did not want to be committed to anything in writing. He said that after that, they went ahead and built a house on the mission land without an agreement.

6 In January 2009, the broke the ground and took them 6 months to finish building the houses. He said that on December 14, 2011, they received a letter from the Director that they had built a house on the mission land at their cost and that they would live in there for as long as they needed and that for their furniture and effects to be shipped into Kenya. He said that in the same letter, the Director acknowledged that they had financed the building of that House.

7 He further stated that when he resigned from the mission, the Director said that there would be consequences and that one of the consequences would be that they have to vacate the house. After resigning from the mission in 2015, he contacted the Director and the chairman of the Trustee for a meeting to discuss the issue of compensation. He stated that He sent several letters and e-mails but did not get any response. He said that they received communication from the chairman of the Trust who told them to vacate the house. In March 2020, they received a letter from the Director giving him 3 Months' Notice to vacate the house

8 The court adopted the witness statement of Patricia Anne Stephens filed in court on July 27, 2020. The witness also referred his list of documents dated July 24, 2020 as P-Exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, & 13 respectively.

The Defendants Summary Of Facts

9 The defendant/Appellant called one Solomon Nabie Bwome as her witness and closed her case, the witness referred to his witness statement dated July 22, 2020 and asked the trial Court to adopt in



his evidence. He also referred to his list of documents dated also dated July 22, 2020 containing 6 items which He also produced as Exhibits. On cross-examination, the witness stated that the Plaintiffs/ Respondents were never given land but were only allocated a place to put up a house in which they were to live while they served with them as volunteers in ICFEM Mission. He stated that when Paul Trevor Chatwin Stephen(PW1) first came, He lived in his house for 5 years and never asked him to pay rent. He kept praying for Paul Chatwin Trevor Stephen to reconcile with his wife. After he reconciling, the wife joined him and he was now free to rent a house in town or buy land elsewhere. However, he was worried for his security and they allowed him to build the house with the money they would have used to pay rent. He said that they lived harmoniously with the Paul Chatwin Stephen until he resigned from the Mission. They asked him whether he understood the implication of his resignation and he answered in the affirmative. He explained him that he should therefore handover the mission files and vacate the Mission premises including the house he had built on the Mission Land. The Board also directed him to cancel his work permit.

Analysis And Determination

- 10 I have considered the abstract of the record and the evaluation and analysis of the evidence by the trial Magistrate in the Judgment delivered on September 3, 2021. I have also considered the applicable Law. This being a first appeal, my sole responsibility is to reconsider the extract of the record afresh and come up with my own independent decision. In doing so, I have to bear in mind the fact that I did see or hear the witnesses first hand. Having carefully examined the extract of the record, the following facts are not disputed;
- i. Paul Chatwin Trevor Stephens joined ICFEM Mission as a volunteer worker
 - ii. ICFEM Mission is a Charitable Organisation created to spread the Gospel in the Community.
 - iii. Paul Chatwin Trevor Stephens was verbally allowed to construct a house to live in while rendering their voluntary service to the community
 - iv. There was no written agreement that he will be compensated when he resigns as a volunteer
 - v. The 1st Respondent resigned from ICFEM Mission as a volunteer in the year 2015
- 11 In analysing and evaluating the evidence, the trial Magistrate framed three issues for determination as follows
1. What rights if any do the plaintiffs have over the subject property.
 2. Do the plaintiff have a right to continue occupying the house on the defendant's land/suit property
 3. Whether the defendant is entitled in the event the plaintiffs are ordered to vacate the said house
- 12 The Appellant was aggrieved with the Judgment and Decree by the trial Magistrate and preferred this Appeal. I now reconsider re-evaluate and re-analyse the four (4) grounds of appeal as follows;
1. The Learned Trial Magistrate erred in law in awarding the Plaintiffs a compensation of Kshs 2.5 million without considering that they had not paid any rent for the suit land from the date they resigned from working with the Defendant.
- Section 3(3) of the [Law of Contract Act](#) provides as follows;
- “No suit shall be brought upon a contract for the disposition of an interest in land unless-
- (a) The contract upon which the suit is found;



- (i) is in writing
- (ii) is signed by all the parties thereto; and
- (iii) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

The Plaintiffs’ claim in the former suit revolved around the concept of “house without land”. That concept was discussed in the case of *Christopher Baya and 2 others v Philip Kiluko and another*, Mombasa HC Civil Appeal No No 64 of 2004 where Khaminwa J held as follows;

“ This arrangement is known as “House without land” meaning the right to build on another’s under agreement which does not pass Title to the land.”

Again in the case of *Arif v Jadunath Adunath Majdma* (1930) Vol VII INDIAN APPEAL, 91QC) the privy Council Construing Section 107 and 108 of the Indian Transfer of Property Act, 1882 held as follows;

“An enforceable verbal agreement to enter upon another’s land and erect a house which is not registered as required under Section 107 and 108 of the Transfer of Property Act of India 1882 does not give rise to equity capable of protection by a court, and the land owner would be entitled to possession through the order of ejection after a month’s notice to remove his structures and restore the land to its original state.”

The Plaintiffs’ claim as pleaded in their plaint dated June 10, 2020 is for compensation of a House built on the strength of a verbal agreement over land parcel No Kimilili/Kibingei/3632 belonging to the Defendant/Appellant. For the trial magistrate to award compensation for a house built on land belonging to another based on a verbal consent or permission is an error and a misapprehension of the law. Secondly, It is clear from the extract that the 2nd Plaintiff was working for the Defendant Organisation as a volunteer worker. The Defendant through its Director stated in evidence that they allowed the 2nd Plaintiff to build the house in question for his stay while working as a volunteer worker and that he was to vacate upon resignation. to me, that explanation seems probable, justiciable credible and reasonable.

2. The Learned Magistrate’s decision is contrary to the basic legal concept of land.

The plaintiffs claim is for compensation of a house built on land belonging to the Appellant. It is not in dispute that the Plaintiffs/Respondents constructed the said house with verbal consent or permission of the Defendant’s director. It follows therefore that the “house without land” having been erected by consent means that the continued presence of the house on land parcel No Kimilili/kibingei/3632 can only be with the consent of the registered owner of the suit land parcel No Kimilili/kibingei/3632. That being the case, it is my view that the Appellant as the registered owner of the suit land parcel No Kimilili/kibingei/3632 has a right in law to withdraw and terminate the permission or consent granted to erect the “house without land” on the suit property. I am of the considered view that when the Plaintiffs who were working as volunteers resigned in the year 2015, they constructively terminated their continued presence in and occupation of the suit property. The expectation both in law and equity is that if the consent or permission is withdrawn, the Defendants/Respondents become trespassers and liable to be ejected by the owner.



From the evidence on record, the consent or permission of the Defendant/Appellant was constructively withdrawn upon resignation by the plaintiffs/Respondents from working as volunteers with the Defendant/Appellant in the year 2015. There is therefore no legal or equity doctrine of expectation that can make the Plaintiffs/Respondents continue to occupy and have the “house without land” on the suit property.

3. The Learned Trial Magistrate erred in fact in ordering compensation and a permanent injunction against the Defendant when it was the plaintiffs who had unilaterally caused the breach of relationship which led to this suit.

Having found that the Plaintiffs/Respondents were given verbal permission and or consent by the Defendant/Appellant to construct a house on their land parcel No Kimilili/kibingei/3632 for their use and comfort while working as volunteers for the Appellant/Defendant, It follows therefore that when the Defendants/Respondents resigned in the year 2015, the consent and/or permission automatically lapsed and they become trespassers and liable for eviction unless fresh consent or permission is sought and obtained.

4. The Learned Trial Magistrate erred in Law in granting a permanent injunction without any condition for payment of rent.

An order of injunction is an equitable relief granted by a court upon satisfying itself that the Applicant has established the following three principles as set out in the locus classicus case of *Giella V Casman Brown & Co Ltd* (1973) E A 358. First an Applicant must establish a prima facie case. A *prima facie* case was defined in the case of *Mrao Ltd V First American Bank Of Kenya Ltd & 2 Others* (2003) eKLR where it was held;

“---A *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicant’s case upon trial---It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter---“

I have stated elsewhere in this Judgment that there is no legal or equitable doctrine of expectation that can make the Plaintiffs/Respondents continue occupying the Defendant/Appellant’s parcel of land No Kimilili/kibingei/3632 after resigning as volunteer workers with the Defendant/Appellant. The house under contestation was allowed to be constructed on its land on condition that the Plaintiffs/Respondents worked as volunteers with the Defendant/Appellant Organisation. The Plaintiffs/Respondents right to occupy the “house without land” was extinguished after they resigned and stopped working for the Defendant Organisation who is also the registered owner of the suit property No. Kimilili/kibingei/3632.

The second condition for the grant of an injunction is that the applicant must show that he will suffer irreparable injury which cannot be compensated by damages. From the evidence on record, the Plaintiffs did not state anywhere that they will suffer irreparable injury which cannot be compensated by as award of damages unless the orders sought are granted.

The third and final condition is that where the court is in doubt, it may decide the matter on a balance of convenience. Having failed to establish a prima facie case and demonstrate any irreparable injury that cannot be compensated by damages, the balance of convenience tilted in disallowing the permanent injunction orders sought.

The upshot of finding is that this Appeal is merited and the same is allowed as follows;



1. The Judgment by the Trial Magistrate Hon G Adhiambo, P M delivered on September 3, 2021 in Kimilili P M ELC No 31 OF 2020 be and is hereby set aside
2. The Order setting aside the impugned Judgment and Decree under paragraph (1) above is substituted with an order dismissing the former suit with costs to the Defendant/Appellant

READ, DELIVERED AND SIGNED VIRTUALLY AT BUNGOMA THIS 13TH MARCH, 2023

HON E C CHERONO

ELC JUDGE

In the presence of;

Mr Wekesa for Appellant

M/S Masegeli for the Respondent

Joy C/A

