



**Wahonjo v Mogere & another (Environment & Land Case
27 of 2018) [2023] KEELC 15888 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15888 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 27 OF 2018**

**A NYUKURI, J
MARCH 1, 2023**

BETWEEN

BARASA ERIFAZI WAHONJO PLAINTIFF

AND

ASKA MOGERE 1ST DEFENDANT

PAMELA BWARI 2ND DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 2nd May 2013 and filed in court on 8th May 2013, the Plaintiff herein sought judgment against the Defendants jointly and severally for the following orders;
 - a. An order of vacant possession of the suit property.
 - b. Damages or Mesne profits.
 - c. Demolition of the perimeter wall.
 - d. Costs of the suit.
2. The Plaintiff averred that he is the registered proprietor and entitled to possession of Land Reference No. 28682 in Mavoko Municipality (hereinafter referred to as “the Suit Property”) Further, that without any colour of right, the Defendants wrongfully entered the suit property, took possession and constructed a perimeter wall and are still trespassing thereon. He complained that the acts of the Defendants had deprived him of the use and enjoyment of the suit property thereby causing him to suffer loss and damage.
3. On 11th June 2013 the Defendants filed their statement of defence dated 10th June, 2013. They stated that they were not aware that the suit property herein which was already allocated to them, had also



been allocated to the Plaintiff as alleged in the Plaint. They maintained that their possession of the suit property was lawful.

Plaintiffs' Case

4. PW1, Barasa Erifazi Wahonjo adopted the contents of his witness statement dated 29th April, 2013 as his evidence in chief. He testified that he was the registered proprietor of L.R No. 28682 situated at Mavoko Municipality in Machakos County. He further stated that his title deed was registered as No. 127171/1 on 31st December 2010.
5. He further testified that in September 2012, he learnt that the Defendants had entered the suit property on allegations that they had been allotted the suit property. The Plaintiff disputed the Defendants' claim on grounds that having been earlier allotted the suit property, the same was not available for fresh allotment. It was his testimony that he sought from the lands department to establish whether indeed the Defendants had been allotted the suit property and he got to know that the 2nd Defendant had an allotment letter allegedly issued by one I.A. Machuka on 24th January 1998. According to him, the matter was investigated and the officer named I.A. Machuka working in the Lands Department denied issuing or signing the allotment letter held by the Defendants. That the said officer wrote a letter stating that the allotment letter held by the Defendants was a forgery.
6. The witness also informed court that he learnt of plans in the lands department to issue a separate and parallel title to the suit property to the Defendants, which prompted him to complain to the Commissioner of Lands. That the Department of Lands halted the process by recalling for cancellation of deed plans No. 31517 and 321515 contained in FR No. 506/49 and cancelling the Defendants' title. He stated further that the 2nd Defendant had erected a perimeter wall on the suit property thus denying him access to his property.
7. He produced as exhibits the documents listed in his list of documents dated 2nd May 2013. He produced a copy of Title deed dated 31st December, 2010 as P-Exhibit 1; Letter of Allotment to 1st Defendant dated 24th January, 1998 as P-Exhibit 2 ; Letter to the officer seeking confirmation of signatures dated 22nd March, 2013 as P-Exhibit 3; Reply letter from the officer dated 22nd March, 2013 as P-Exhibit 4; Letter to the Commissioner of Lands dated 26th October, 2013 as P-Exhibit 5; Recall letter for cancellation of Deed Plans No. 321517 and 321515 from Department of Lands dated 14th September, 2012 as P-Exhibit 6; Copy of alleged fraudulent title to 1st Defendant dated 9th October, 2012 as P-Exhibit 7; Memo from Deputy Commissioner of Lands to Director of Surveys dated 15th March, 2013 as P-Exhibit 8; Letter of Allotment to the Plaintiff dated 12th August, 2010 as P-Exhibit 9; Letter of acceptance by the Plaintiff dated 23rd August, 2010 as P-Exhibit 10; Copy of Bankers cheque No. 49282 dated 23rd August, 2010 as P-Exhibit 11; Delivery note for the letter of Acceptance dated 28th August, 2010 as P-Exhibit 12; Receipt from department of lands dated 31st August, 2010 as P-Exhibit 13; Letter from Survey of Kenya dated 12th November, 2010 as P-Exhibit 14 and Letter of Demand dated 11th April, 2013 as P-Exhibit 15.
8. On Cross-examination, he stated that the parcel number of his land was 28682 and that his claim against the Defendants was in respect to the entire suit property which they had put a perimeter wall. He further stated that he filed Case No. 45 of 2012 in the lower court where the court ordered that the District Surveyor visits the site and files the report and that the report showed that the beacons were in place and its him who put the same beacons which the Defendants used to fence the land.
9. He further stated that there is no decision in CMCC No. 45 of 2012 that he is aware of. That marked the close of the Plaintiff's case.



Defence Case

10. The Defence did not call any witnesses and parties were directed to file written submissions. None of the parties filed any submissions.

Analysis and Determination

11. The court has carefully considered the pleadings as well as the Plaintiff's testimony and is of the view that the issues that arise for determination are;
 - a. Whether the Plaintiff is the lawful owner of the suit property.
 - b. Whether the Defendants' occupation of the suit property is lawful.
 - c. Whether the Plaintiff is entitled to the orders sought.
 - d. Who should bear the costs of the suit.
12. Registration of Land vests in the registered proprietor absolute and indefeasible ownership unless the title is challenged on grounds of fraud, misrepresentation, illegality, want of procedure or corruption. Section 24(a) of the [Land Registration Act](#) provides as follows:

Subject to this Act, 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.

13. Section 26 (1) of the [Land Registration Act](#) states as follows:

The Certificate of Title issued by the Registrar upon registration ... 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... 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.
14. I have considered the documents of produced by the plaintiff to demonstrate ownership. Among them is a grant Number IR 127171 for L.R 28682, which clearly show that the suit property is registered in the name of the Plaintiff, being a leasehold of 99 years from 1st August 2010. The Plaintiff further produced the letter of allotment in his favour dated 12th August 2010, his letter of acceptance dated 22nd August 2010 attached with cheque No. 049282 for the sum of Kshs 73,190/= in favour of the Commissioner of Lands, as well as the delivery note dated 24th August 2010. Those documents show that the Plaintiff's acquisition of the suit property began with the issuance of the letter of allotment, then there was acceptance of the offer made in the allotment letter by payment of the requisite levies and subsequently the suit property was registered in the Plaintiff's name pursuant to the allocation. This position was confirmed by the Commissioner of Lands vide the letter dated 14th September 2012.
15. In their defence, the Defendants did not challenge the legality of the Plaintiff's title at all. They only stated that they were not aware that the land allocated to them had also been allocated to the Plaintiff. The Plaintiff stated that when he found the Defendants on his land who alleged that they



were also allocated the suit property, he sought for the matter to be investigated and pursuant to that investigation, he received several documents which included a letter of allotment in favour of Aska Mogere dated 24th January 1998, allegedly signed by one I. A. Machuka, a letter dated 22nd March 2013 by a Mr. I.A. Machuka, then the District Land Officer Kajiado denying signing the allotment letter to Aska Mogere, a letter from the Commissioner of Lands dated 14th September 2012 stating that the Plaintiff's parcel had unlawfully been surveyed as Nos. 28692 and 28693 on FR No. 506/49 when there were no records of allocation or ownership of the latter L.R numbers. As can be seen from the letter of the Commissioner of lands dated 14th September 2012, the defendants' documents were not supported by any official records from the lands department, and therefore the same did not confer rights on the defendants. Besides, the purported letter of allotment allegedly signed by a Mr. I.A. Machuka was denounced by the said officer who denied authoring or signing the same, terming it a forgery. In addition, the official records at the lands department confirm that the Plaintiff is the lawful registered proprietor of the suit property. I am therefore satisfied that the evidence on record sufficiently proves that the Plaintiff lawfully acquired the suit property and is the lawful registered proprietor and owner thereof.

16. On whether the Defendants' entry on the suit property was lawful, The Black's Law Dictionary defines trespass as a wrongful entry on another's real property. The Plaintiff testified that in 2012, the Defendant entered the suit property and put up a perimeter wall thereon without any colour of right or his permission. The Defendants have not denied entry on the suit property and construction of a perimeter wall thereon. Their contention is that they are on the suit property lawfully by virtue of a letter of allotment in their favour. As earlier discussed in this judgment, the lawful owner of the suit property is the Plaintiff, and there are no official documents in support of the Defendants' claim on the suit property. As the Plaintiff denied granting the Defendants permission to be on the suit property, their entry and occupation remains wrongful, unlawful and amounts to trespass.
17. On whether the Defendants should grant the Plaintiff vacant possession of the suit property and demolish the perimeter wall thereon, I note that the Defendants entry and occupation of the suit property amounts to trespass. The Plaintiff who is the lawful owner of the suit property has a right under Article 40 of *the Constitution* and Section 24 (a) of the *Land Registration Act* to the full enjoyment of his property, being the absolute and indefeasible owner thereof, without any interference from any other person. The Defendants' presence on the suit property limits that right and therefore to enable the Plaintiff fully enjoy his property rights in respect of the suit property, the Defendants must grant him vacant possession, and in default, be forcefully removed from the suit property and his illegal constructions thereon demolished.
18. On the question of mesne profits, the same are damages for loss suffered as a result of the wrongful period of occupation by a person on another's property. The Black's Dictionary 11th Edition defines mesne profits as;

The profits of an estate received by a tenant in wrongful possession between two dates.

19. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines "profits" as follows: -

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;
20. Order 21 Rule 13 of the *Civil Procedure Rules* provides as follows: -



1. Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
 - a. for the possession of the property;
 - b. for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - c. directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - i. the delivery of possession to the decree-holder;
 - ii. the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
 - iii. the expiration of three years from the date of the decree, whichever event first occurs.
 - 2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.
21. In the case of *Rajan Shah t/a Rajan S. Shah & Partners v Bipin P. Shah* [2016] eKLR, the court defined mesne profits as follows;

Mesne profits are the rents and profits which a trespasser has or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated while a claim for mesne profits is always unliquidated.

In *Bramwell vs. Bramwell*, Justice Goddard stated that "... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant." Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated that these words: "Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in *Halsbury's Laws of England*, which defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.

Halsburys, op. cit, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The *Black's Law Dictionary* defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." The *Concise Oxford English*



Dictionary defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.”

22. The Court of Appeal in the case of *Attorney General v Halal Meat Products Limited* [2016] eKLR considered when mesne profits could be awarded. The court stated as follows: -

It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.

23. It is clear therefore that mesne profits are damages paid by a trespasser to the true owner of the land for the period the trespasser has deprived the owner of its use. Mesne profits being damages must not only be pleaded but the same must also be proved. In the instant suit, the plaintiff sought for mesne profits but did not in both his pleadings and evidence specify what the defendants received or would have received as profits in regard to their trespass of the suit property. No valuation or any other evidence was tendered in respect to this claim. I therefore find that the claim for mesne profits was not proved and I decline to grant the same.
24. In the end, it is the finding of this court that the Plaintiff has proved his case as against the Defendants on the required standard and I enter judgement for the Plaintiff against the Defendants jointly and severally as follows;
- a. The Defendants to vacate the Plaintiff’s Land Reference No. 28682 in Mavoko Municipality in 90 days of this judgment and in default they be evicted from the suit property.
 - b. The Defendants to demolish the perimeter wall on the suit property forthwith and in default the same to be demolished by the Plaintiff at the Defendants’ cost.
 - c. Costs of the suit shall be borne by the Defendants.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1ST DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Isoe for the Defendants

No appearance for the Plaintiff

