



Thairu v National Land Commission & 54 others (Environment and Land Case 376 of 2014) [2023] KEELC 21330 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 376 OF 2014
AA OMOLLO, J
NOVEMBER 2, 2023**

BETWEEN

PROF KIHUMBU THAIRU PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

NANCY WARUGURU IRUNGU & 53 OTHERS 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the National Land Commission and 53 other Defendants vide amended plaint dated 2nd June 2022 seeking for the following prayers;
 - a. A declaration that the Plaintiff is the lawful and rightful owner of plot No.LR 209/9459(IR.63446) issued on 2nd August 1994 and that the same is valid and has never been cancelled /revoked nor has the said parcel of land ever been compulsory acquired by the Government of Kenya.
 - b. That an order be made for eviction against members of the 2nd to 54th Defendants from the suit land and the eviction be executed with the help of officer commanding police Division-Buru-Buru Nairobi County.
 - c. Cost of this suit
 - d. Mesne profits
 - e. Interest on c and d at court rates.
 - f. Any further or better relief this Honorable court may seem fit to grant.
2. The Plaintiff pleaded that he is the registered proprietor of plot No.LR 209/9459(IR.63446) off Kangundo Road, measuring 0.7513 Hectares, survey plan number 17529 herein after referred to as



- “the suit property”. He stated that a certificate of title issued on 2nd August 1994 with a lease hold term of 99 years which has never been revoked or cancelled.
3. He averred that around the year 2004 the 2nd-54th Defendants purported to assert unlawful interest by trespassing and encroaching onto the suit property without any valid documents. That through the letters dated 18th March 2013 and 22nd October 2013, the 2nd – 54th Defendants wrote to his then Advocates and indicated that they were willing to purchase the suit property.
 4. The Plaintiff contended that the 2nd to 54th Defendants and their agents or servants have trespassed on the suit property without his consent and particularized the trespass as entering the suit property without his consent, erecting developments on the suit property, utilizing the resources of the suit property without his permission and continuing to stay on the suit property even after being asked to leave and thus he has been unable to economically utilize the said plot for his benefits; incurring suffering loss and damage.
 5. Umoja (III) B before the amendment of the plaint had filed a defence and counter claim dated 30th April 2014 seeking for the following orders;
 - a. A declaration that the 1st Defendant’s members are entitled to be the registered as the proprietors of the whole of L.R No.209/9459(IR No.634446) in place of the Plaintiff, Prof.Kihumbi Thairu pursuant to the provisions of section 38 of the Limitation of Actions Act.
 - b. An order do issue directing that the 1st Defendants members be registered as the proprietors of the whole of the land parcel known and identified as Land Reference Number 209/9459(IR.63444) in place of the Plaintiff, Prof.Kihumbi Thairu (or his successors in title) by virtue of the operation of the doctrine of adverse possession.
 - c. A permanent injunction do issue restraining the Plaintiff by himself, his servants or agents or otherwise howsoever, from interfering with the 1st Defendant’s members quiet use and possession of the parcel of land known as Land Reference Number 209/9459(IR No.63444).
 - d. Any other further or better relief that this honourable court may deem fit to grant;
 - e. Costs of this suit and interest;
 6. This particular defendant’s name was struck off pursuant to the amendment of 2nd June 2022. The 2nd to 54th Defendants in the amended plaint did not file any statement of defence. Thus, the Plaintiff’s suit is undefended.
 7. On 25th April 2023, the Plaintiff gave his evidence by adopting his witness statement recorded as evidence in chief. He also produced documents contained in the list dated 2.6.2022 and further list dated 24.3.2023. He testified that the plots were advertised in the press in 1992 when he applied, paid for and was issued with title L.R. 209/9459 (the suit property) in the year 1994.
 8. It is his testimony that after returning from abroad, he visited the land in the year 2004 and started preparation to develop that land. However, his evidence is that he has been unable to develop the suit property because when he went to identify the beacons, he found the 2nd -54th Defendants had invaded the land and were in occupation. That he and his development team were violently attacked and they reported the matter to the OCS. Buruburu Police Station and the local administration.
 9. PW1 testified that the 1st Defendant confirmed that he owns the suit land and advised him to obtain eviction orders against the 2nd -54th Defendants.



10. The Plaintiff filed written submissions dated 19th May 2023, submitting that he is the registered owner of the suit property as evidenced by a copy of certificate of title Grant Number I.R 63446 and a deed plan processed and sealed on the 15th December 1993.
11. Further, the Plaintiff submitted that he has been dutifully paying the land rents and rates over the suit property and produced the receipts thereof. The Plaintiff submitted that the 1st Defendant vide its letter dated 8th August 2014 confirmed that their records indicate that he is the owner of the suit property. The Plaintiff also submitted that the Attorney General who was the 3rd Defendant before the plaint was amended wrote to the Plaintiff vide a letter dated 16th September 2015 enclosing a certified search confirming him as the registered proprietor and also produced several correspondences between him and the Commissioner of Lands regarding payments and extension of payments.
12. The Plaintiff submitted that his Certificate of Title is conclusive evidence of proprietorship by virtue of Sections 26 and 30 of the Land Registrar Act, 2012 and in support cited the case of *Hexmead Investments Ltd vs McDonald Mariga, Noah Wanyam & Mildred Wanyama Nairobi Elc No.552 of 2010*.
13. The Plaintiff submitted that the mesne profit that the 2nd -54th Defendants ought to pay include the payment of the rates and rent in respect to the suit property from 24th June 2004 to date and the rent applicable to the suit property from 24th June 2004. Further that the court should take into consideration the valuation report produced which returned a value at 11,500,000/=. In support of this argument, the Plaintiff cited the case of *Rajan Shah t/a Rajan S.Shah & Partners v Bipin P.Shah* [2016] eKLR, *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR and *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR.
14. I have read the filed pleadings, considered the evidence tendered by the Plaintiff and his submissions and find the following to be the issues for the court's determination.

Issues for determination

- a. Whether or not the Plaintiff is legal owner of the suit property?
 - b. Whether the Plaintiff is entitled to mesne profit
 - c. Cost
15. The Plaintiff's claim as the legal proprietor of the suit property is premised on the certificate of title issued to him on 2nd August 1994 with a lease hold term of 99 years from 1.8.1979. To prove his case, the Plaintiff presented a certificate of title which has not been challenged. Section 107 to 109 of the *Evidence Act* provides:
 - 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 16. Section 26 of the *Land Registration Act*, Act. No. 3 of 2012, provides that a certificate of title is held as conclusive proof of proprietorship unless there is evidence or factors which fall under the exceptions provided in the Section, for instance, fraud, misrepresentation, illegal acquisition, or illegality in the procedure followed. That means that absent of the exceptions, the registration of a person or entity as



- the owner seals the status of the land by conferring to the person or entity absolute and indefeasible ownership status.
17. The initial 1st Defendant which was a group of the 2nd -54th Defendants in the amended Plaintiff contended that the certificate of title held by the Plaintiff was acquired fraudulently. They however failed to particularized the said fraud or pursue the matter by giving evidence to prove the same.
 18. The Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
 19. In the second prayer, the Plaintiff sought to this court to be awarded general damages and mesne profits to the value of the suit property to wit Kshs.11,500,000/= as per the valuation report produced. *Civil Procedure Act* Section 2 defines mesne profits in relation to property to mean:

“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. The Court of Appeal in the case of *Eliud Njoroge Gachiri vs Stephen Kamau Nganga* (2018) eKLR, for the holding, *inter alia*, that continuing trespass consists of a series of acts done on consecutive- days that are of the same nature and repeated or continue from day today so that the acts are aggravated forming indivisible harm. In the case of *Fleetwood Enterprises Ltd vs Kenya Power & Lighting Co. Ltd* (2015) eKLR held that the award of damages for trespass is discretionary in nature but which discretion should be exercised by the Court judiciously after taking into consideration all relevant factors.
 21. Further, in the case of *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR stated: “Measure for mesne profit was described in the Privy Council decision in *Invergue Investments v Hackett* (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case 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.”
 22. The Plaintiff has demonstrated that he has been denied possession of his property from the year 2004. This is shown by the Plaintiff’s demand letter to the 2nd -54th Defendants dated 9th March 2013 seeking for vacant possession which letter was acknowledged by the Defendants advocate then on record dated



18th April 2013. In this letter of 18th April 2013, the 2nd to 54th Defendants proposed to purchase the suit property at Kshs 11,500,000. In the Fleetwood case supra, the Court of appeal affirmed

“ that where trespass is proven, the affected party need not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case by case basis.”

23. The Plaintiff stated that he had visited the suit land in the year 2004 with intention to develop when such intention was thwarted when the occupants violently chased them away. Thus, it is settled by precedent that once trespass is established, it is actionable per se and that no proof of damages is necessary for the court to award damages (see the case of *Kenya Power & Lighting Co. Ltd vs Ringera & 2 Others* (2022) KECA 104 (KLR)). In this instant, the Plaintiff having proved unlawful occupation by the 2nd to 54th Defendants is entitled to be awarded damages.
24. Hence, in assessing damages, I have considered the time the Plaintiff has been denied use of the suit land to run from June 2004 until when he receives vacant possession. Consequently, I award him a sum of Kshs 500000 per year from 2004 until the decree is executed to be reasonable compensation for the Plaintiff.
25. The rule of the thumb on costs is that it follows the event. The 2nd to 54th Defendants in the amended plaint did not defend their claim but because their actions generated the filing of this case. Therefore, it is in the interests of justice that the Plaintiff be awarded costs of the suit as against the 2nd to 54th Defendants.
26. I enter judgement for the Plaintiff in the following terms;
 - a. A declaration is made that the Plaintiff is the lawful and rightful owner of plot No. LR 209/9459 (IR.63446) issued on 2nd August 1994.
 - b. The 2nd to 54th Defendants are given 120 days from the date of service of this decree upon them by pasting on a visible place on the suit premises to surrender vacant possession to the Plaintiff.
 - c. In default to comply with (b), an order for eviction does issue against them requiring their eviction from the suit land with the security provided by the Officer Commanding Police Division-Buru-Buru Nairobi County during the exercise.
 - d. The Plaintiff is awarded general damages for trespass/mesne profits at Kshs 500000 every year from 2004 until the year when vacant possession is surrendered
 - e. Costs of the suit awarded to the Plaintiff
 - f. Interest on (d) and (e) at court rates from date of this judgement.

JUDGEMENT DATED, SIGNED AND DELIVERED THIS 2ND DAY OF NOVEMBER, 2023.

A. OMOLLO

JUDGE

