



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 914 OF 2012

HARROW INVESTMENT LIMITED.....PLAINTIFF

VERSUS

HARBAJAN SINGH SEMBI.....DEFENDANT

JUDGEMENT.

By a plaint dated 15th October 2012 the plaintiff herein sued the defendant seeking for the following orders:

- a. A declaration that the Plaintiff is entitled to quiet possession and use of the land parcel known as Eldoret Municipality Block 15/323.
- b. A declaration that the Defendant's claims for distress for rent from the plaintiff is illegal.
- c. A permanent injunction against the Defendant from trespassing, settling and or otherwise interfering with the Plaintiff's right of ownership and possession of Eldoret Municipality Block 15/323.
- d. Damages by way of mesne profits.
- e. Costs of this suit.
- f. Any other or such further relief as the Honourable court may deem just and fair to grant.

PLAINTIFF'S CASE

The Plaintiff called two witnesses who testified in support of his case. PW 1 Ahmed Mohammed Liban testified that he is a director of the plaintiff company who bought the property from Rural Housing Estates Limited vide a Sale Agreement dated 20th December, 2002 and upon payment of the purchase price, he took possession of the suit property. He further testified that the title was in the name of Rural Housing and the process of transfer is yet to be completed.

PW 2 a director of Rural Housing Limited testified in support of the plaintiff's case and confirmed that the company sold the suit property to the plaintiff and after the purchase, sub-divisions were done leading to the suit property being issued with a new land reference number. He stated that the defendant has never claimed any land from the company.

PW1 produced the following documents

- a. Copy of resolution of Board of Directors.
- b. Sale Agreement dated 20/12/02.
- c. Certificate of Official Search dated 23rd October, 2012.
- d. Bundle of 14 photographs.
- e. Copy of company search.

- f. Copy of certificate of incorporation
- g. Copy of Memorandum and Articles of Association of the company.
- h. Copy of certified official search for Eldoret Municipality/ Block 323.
- i. Official company search for Rural Housing Estate.
- j. Company filed returns.
- k. Copy of certified certificate of lease.
- l. Copy of certified official search.
- n. Copy of Judgment in HCC 124 OF 1998 delivered on 2/4/01.
- m. Letters dated 26th March, 1996 and 23rd February, 1999

PW1 testified that there is no lease agreement between it and the defendant and that any distress for rent levied against them is illegal and urged the court to grant the orders as prayed in the plaint.

DEFENDANT'S CASE

In opposition to the suit the defendant filed a statement of defence wherein he denied the allegations contained in the plaint. He challenged the plaintiff's identity as a limited liability company and averred that the suit is a nullity in the absence of any corporate consent or approval for the filing of the suit.

It was DW1 's evidence that there exists no lease agreement between the plaintiff and the defendant and he has never made any such allegation. The defendant denied the plaintiff's prayer for permanent injunction as well as the claim for mesne profits.

DW1 further stated that they purchased the suit plot in 1991 from its previous owner Mr. Malakwen Arap Sisiwa and has been in full physical occupation and has made substantial developments/improvements on the suit plot which is different from what the plaintiff is claiming.

DW1 testified vide the father's power of attorney who was unable to come to court due to illness. He stated that the land was sold to the defendant by Malakwen Arap Sisiwa and the title deed was to be processed. He prayed that the matter be dismissed with costs.

DW1 produced the following documents as exhibits

- a. Medical report dated 16th February, 2021.
- b. General Power of Attorney and receipt.
- c. Statement of 22nd February, 2021.
- d. Agreement of 1991.
- e. Agreement for Sale dated 19th August, 1997.
- f. Letters dated 19th March, 1993, 26th March, 1998 and 23rd February, 1998 and 12th August, 1999.
- g. Report dated 19th September, 2013.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff listed the following issues for determination by the court

- a. Whether the plaintiff is the legal owner of the suit land?
- b. Whether the plaintiff entitled to quiet possession/use of the parcel?
- c. Whether the plaintiff is entitled to damages?
- d. Who should bear the costs of the suit?

Mr Songok counsel for the plaintiff submitted that the plaintiff bought the suit parcel of land known as Eldoret/Municipality Block 15/323 from Rural Housing Estates Limited who was the bona fide owner of the property. Counsel further submitted that the defendant at no point claims ownership of Plot Number 15/323 but avers that he owns Plot Number 775/1 which does not exist after subdivision of the said parcel of land.

Counsel relied on the provisions of Section 26(1) of the Land Registration Act which provides as follows:-

"26(1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon 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-

- i. On the grounds of fraud or misrepresentation to which the person is proved to be a party, or*
- ii. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."*

It was therefore counsel's submission that the defendant has not disputed the ownership of Rural housing as a registered owner and urged the court to consider the production of the title as prima facie evidence of ownership.

Counsel further submitted that the plaintiff had been enjoying quiet possession and utilization of Plot Number 15/323 until they were surprised with a proclamation notice for distress of rent from the defendant through Jomuki Auctioneers yet the defendant does not occupy any portion of the land.

Counsel relied on **Eldoret High Court Civil Case No. 124 of 1998** I where the court held that Eldoret Municipality Block 15/323 is the sole and exclusive property of Rural Housing Estate Ltd, who sold the land to the plaintiff vide an agreement dated 20th December 2002.

Mr Songok counsel for the plaintiff further stated that the Plaintiff has been paying rent to the to the County Government of Uasin Gishu through Rural Housing Estates Ltd and the most current invoice is dated 08/01/2020 and that the claim that the defendant purchased the land in 1997 cannot be substantiated for the reason that Rural Housing Estate bought plot number 775/1 in the year 1980 and the same could not be sold twice.

On whether the plaintiff entitled to quiet possession/use of the parcel the counsel submitted that the defendant has attempted to take possession of the suit land and utilize it for his own benefit, the actions amount to violation of the Plaintiff's right as guaranteed in the constitution and must be stopped. Counsel urged the court to adopt the judgement if HCC NO 124 OF 1998.

Mr Songok also cited the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where ustice J.M. Mutungi stated that

"the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law."

On the issue of mesne profits, counsel submitted that the plaintiff is entitled to damages for the sole reason that the defendant intends to trespass on to the suit property and harassing the plaintiff repeatedly which disturbed the quiet and peaceful possession as can be demonstrated by the proclamation notice.

Mr Songok cited the case of **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2010] eKLR** where the court held as follows regarding the issue of mesne profits;

"...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 Tobiason 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 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."

The term mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits."

Further in Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:-

- a. If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c. Where the Defendant has made use of the Plaintiffs land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.

Counsel also relied on the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** where the Court held as follows;

"...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass."

Counsel therefore urged the court to allow the plaintiff's claims as prayed in the plaint.

DEFENDANT'S SUBMISSIONS

Counsel for the defendant submitted that the plaintiff's claim is fatally defective for the reasons that Order 4 rule 1(4) of the Civil Procedure Rules, 2010 provides that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer duly authorized under seal of the Company. It was the defendant's averment that the plaintiff produced a resolution of the Board of Directors made on the 28th May, 2019 wherein Ahmed Mohamed Liban was appointed to swear affidavits on behalf of the plaintiff company but the plaint herein was accompanied by an affidavit sworn by Ibrahim Hassan who had no document authorizing him to depone to the affidavit on behalf of the company and as such the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 was contravened.

Counsel further faulted the institution of the suit without a company resolution appointing the Advocates on record. Counsel submitted that the issue for determination is whether the defendant interfered with the plaintiff's ownership of the suit land and that the claim does not raise a cause of action against the defendant.

Mr Kapere counsel for the defendant submitted that a survey was done by the County Land Surveyor and the report filed in court which indicates that the defendant does not occupy any part of the disputed parcel of land and that the said report was never contested hence remains part of the court record.

Counsel further submitted that the defendant purchased about 4 acres of L.R NO. 775/1 from Mr. Malakwen Arap Sisiwa (deceased) in 1991 for valuable consideration and upon the purchase of the 4 acres, the defendant moved into possession of the parcel and commenced developments and has been in possession of his 4 acres-portion ever since and that Mr. Ahmed Liban, the director of the plaintiff Company is well aware of the defendant's title to the said 4 acres of L.R 775/1 having transacted over the same with the defendant as proved by the defendant's exhibits adduced in evidence and the plaintiff has never been the defendant's tenant.

Mr Kapere counsel for the defendant submitted that the plaint does not disclose any cause of action against the defendant as the allegation for distress for rent according to the defendant was not properly pleaded and or proved by the plaintiff. Further that there is no proof that the defendant has trespassed on to the suit land.

Counsel relied on the case of **MALINDI HCCA NO. 24 OF 2016:- KENYA POWER AND LIGHTING COMPANY LIMITED =VS= SHERIFF MOLANA HABIB** and stated that in the absence of any pleading on the acts by the defendant that infringe on the plaintiff's property rights and in the absence of any evidence to prove the same, a permanent injunction cannot issue.

Regarding mesne profits, counsel submitted that the same are only awarded if it can be proved that a person is in wrongful possession of another's property yet the evidence on record proves that the defendant is not in possession of the suit land. Trespass by the defendant upon the plaintiff's property is not pleaded and not proved and without evidence of trespass and deprivation, a claim for mesne profits cannot stand.

Counsel submitted that mesne profit is a special damage claim which must be pleaded and proven under the provisions of Order 21 Rule 13 of the Civil Procedure Rules and also relied on the cases of **ELDORET ELC NO. 213 OF 2012: KIBOIT KOSGEI CHEPSAIGUT VS CHERUIYOT KIMETTO & ANOTHER.** and **KERICHO ELC NO. 104 OF 2017: FREDRICK KORIR =VS= SOIN UNITED WOMEN GROUP**

Mr Kapere therefore urged the court to dismiss the plaintiff's case with costd to the defendant. And ignore the Judgment in **ELDORET HCCC NO. 124 OF 1998** which had different parties hence not binding in this case.

ANALYSIS AND DETERMINATION

The issues for determination in this case are as to whether the plaintiff has proved its claim for an order for quiet possession against the defendant, whether the plaintiff is entitled to mense profits and an order for injunction against the defendant for trespass and whether the distress for rent by the defendant was illegal.

Before I deal with the above issues it is important to clear the issue raised by the defendant regarding legality of the pleadings taking into account that there was no resolution authorizing the deponent of the verifying affidavit in support of the plaint and a resolution for the appointment of the law firm of Nyaundi Tuiyot and Company Advocates to act for the Plaintiff in this matter.

It is trite that an incorporated person is a legal person in the eyes of the law as was held in the case of **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000:**

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

When this matter came up for hearing on 28th May 2019, the plaintiff’s witness took the stand but counsel made an application for adjournment to allow him regularize the pleadings as they had neither got authorization to file the verifying affidavit nor a company resolution,

From the **Assia Pharmaceutical Case (supra)**, an action commenced without authority is capable of being ratified and it would therefore not be in the interests of justice to dismiss this suit on the ground merely that there was no authority to depone to affidavits as it is a defect that does not go to the root of the jurisdiction of the court and as such it an omission that is curable.

In the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460 Ringera, J** (as he was then) expressed the same viewpoint as follows:

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”

The issue as to whether it is mandatory to file alongside the Plaint a resolution of a Company under seal authorizing a particular Director to swear a Verifying Affidavit and appointing an advocate to file the suit on behalf of the Company has now been settled by the court. It is therefore the court’s finding that while a suit filed without a resolution of a corporation or company may attract some consequences, the mere failure to file the same with the plaint does not invalidate the suit.

In the case of **Republic v. Registrar General and 13 Others [2005] eKLR** Kimaru J held that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing and that there is no requirement that the same be filed at the same time with the suit. The court further held that the absence of the resolution is therefore not fatal to the suit.

Further in the case of **Space Geo Enterprises Limited vs. Kenya National Highways Authority [2019] eKLR**, Muchemi J. held as follows:

“32. Clearly from the foregoing provision, nowhere is it required that the authority given to the counsels instituting suit be filed. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit.

*33. In **Leo Investments Ltd vs. Trident Insurance Co. Ltd (2014) eKLR and Republic vs. Registrar General and 13 Others (2015) eKLR**, Odunga J. and Kimaru J. respectively rendered that the legal position is that a resolution of the Board of Directors of a company may be filed at any time before the suit is fixed for hearing. This is the same position by the Court of Appeal in **East Africa Safari Air Ltd vs. Antony Ambaka Kegodre & Another (2011) eKLR** where the Court reversed the decision of the High Court of striking out the suit instead of giving the appellant the opportunity to demonstrate that the appointment of its advocates, even if irregular at the beginning, had been regularized.*

34. It is therefore established by case law that proceedings can be ratified after filing a case in a meeting of the shareholders or by authority of the Board. This means that failure to file the authority together with the petition cannot lead to nullification of the proceedings.”

The court finds that the issue of resolution of the company authorizing the filing of the suit was cured by the subsequent filing of such resolutions therefore it is no longer an issue for determination by the court.

On the first issue as to whether the plaintiff is entitled to a claim of quiet possession, the plaintiff pleaded that it bought the suit land in December 2002 from Rural Housing Estate Limited who is the registered owner but the transfer has not been affected in the name of the plaintiff

From the pleadings the plaintiff states that the issues relating to the property were determined by ELDORET HCC No 124 of 1998 on 2nd April 2001 in the case of RURAL HOUSING ESTATES LIMITED VS EDWARD KOECH & 3 OTHERS. The plaintiff further averred at paragraph 7 of the plaint that there was no lease agreement between the plaintiff and the defendant.

It should be noted that the plaintiff goes straight ahead to seek for a permanent injunction against the defendant for trespass and mesne profits. In the final prayers the plaintiff seeks for a declaration that it is entitled to quiet possession, declaration that the defendant’s claim for

distress for rent from the plaintiff is illegal, permanent injunction, mesne profits and costs.

It is instructive that the plaintiff is not asking the court to declare it as the owner of the suit land as it stated that the issue had already been settled in ELDORET HCCC NO. 124 OF 1998 as mentioned above. The plaintiff has not pleaded any complaint against the defendant in the plaint. The plaint at paragraph 8 states that “as a consequence of the above, the plaintiff is disposed of its duly acquired parcel of land and has suffered loss and damage. The paragraphs above paragraph 8 are basically introductory ones with no particulars of harm complained of.

It is a well settled precedent that parties are bound by their pleadings and the evidence should be geared towards proving what has been pleaded and not extraneous evidence which is not before the court. The court is not aware of the distress for rent and the trespass complained of as they were not properly and specifically pleaded in the plaint. What is the nature of the trespass by the defendant which the plaintiff wants the defendant to be restrained by a permanent injunction?

Pleadings are the foundation upon which the proceedings are anchored and if they are not properly crafted to include the litigant’s claim then the same might fail. It therefore means that any evidence adduced in a matter must be in tandem with the pleadings. Further it should be noted that even when a party adduces very strong evidence but if it is inconsistent with the pleadings then the same must be disregarded.

The Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

..In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

In the current case, the plaintiff does not disclose a cause of action against the defendant. Both the plaintiff and the defendant admit that there was no lease agreement between them and that the defendant did not levy distress against the plaintiff.

Further the plaintiff together with the witnesses did not adduce any evidence on the issue of distress for rent. It is trite that a party who alleges must prove. The plaintiff failed to plead and adduce evidence on distress for rent, how it was done and what occasioned the distress.

The plaintiff also stated that the proclamation notice was issued by Jomuki Auctioneers on the instruction of the defendant who were neither sued nor called as witnesses. The proclamation notice was also not produced as evidence to show that it was issued under the instruction of the defendant.

I notice that the plaintiff’s suit started on a wrong footing from the beginning by not having authorization and resolutions to file this suit. The plaintiff had an opportunity to amend the plaint but they did it piece meal and forgot the crucial parts of the plaint.

On 31st January 2013, the court had made an order that the County Surveyor goes to the suit land and ascertain the occupation on the ground. The report was filed in court whereby it indicated that the defendant does not occupy any part of the disputed parcel of land. The report further stated that the plaintiff occupies 4.031 acres of the disputed land and that part of the land is vacant and other portion occupied by third parties.

This report has neither been disputed by plaintiff nor the defendant. It therefore follows that the defendant is not in occupation hence not a trespasser of the suit land. If the defendant is not in occupation, then what is the cause of action that the plaintiff has against it? For a cause of action to arise there must be acts or omission by the offending party which the aggrieved party can complain about.

On whether the plaintiff is entitled to a permanent injunction restraining the defendant against trespassing on the suit land, the report by the County Surveyor established that the defendant was not in occupation of the suit land. The plaintiff has not proved a wrong that has been committed by the defendant. It is trite that a remedy cannot issue in the absence of a wrong. Courts do not give orders in vain.

In the absence of any pleadings on the wrong that the defendant has committed or omitted to do that infringes on the plaintiff’s rights, it would be impossible for the court to give orders in vain.

On the issue as to whether the plaintiff is entitled to mesne profits, courts have held in many cases that mesne profit is a special damage which must be specifically pleaded and specifically proved. The plaintiff did not specifically plead for mesne profits apart from mentioning it in the final prayers. How much does the plaintiff expect to be granted as damages in the absence of pleading it in the plaint and leading documentary evidence to assist the court with coming up with the amount lost during the purported period of trespass.

The Court of Appeal in **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR** stated:

*“This Court in **Peter Mwangi Mbutia & another vs. Samow Edin Osman [2014] eKLR** expressed that it is upon a party to place evidence before the court upon which an order of mesne profits could be made. It was stated:*

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

Further in the case of **Micheal J C K Kapsot v Kotut arap Too [2020] eKLR** this court held that a claim for mesne profits is a special damage which must be specifically pleaded and proved. I find that the plaintiff did not specifically plead mesne profits and did not also lead any evidence to prove the same. This limb therefore also fails.

Even though the plaintiff did not claim for a declaration that it is the owner of the suit land, the plaintiff however pleaded that the issue of ownership had already been determined in ELDORET HCC NO 124 OF 1998 of which the plaintiff nor the defendant were parties. It was between RURAL HOUSING ESTATES LIMITED VS EDWARD KOECH & 3 OTHERS. The determination in that case was in respect of the parties in that case and cannot apply to the parties in this suit.

I have considered the pleadings, the evidence adduced and the submissions by counsel and come to the conclusion that the plaintiff has not proved its claim against the defendant and is therefore dismissed with costs to the defendant.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF JUNE, 2021

M. A. ODENY

JUDGE