



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KAJIADO

ELC. CASE NO. 572 OF 2017

MEPUKORI PERE.....PLAINTIFF/APPLICANT

VERSUS

SAMUEL GICHERU.....1ST DEFENDANT/RESPONDENT

ENDOLVINE INVESTMENT LIMITED.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

By a Plaint dated 27th March, 2017, the Plaintiff seeks for the following prayers:

- (a) A declaration that the Plaintiff is the rightful owner of all that Parcel of Land known as Land Reference Number NGONG/NGONG/57649 situated at Magadi Road, Ongata Rongai.
- (b) An order of eviction do issue against the Defendants jointly and severally from all that parcel of land known Land Reference Number NGONG/NGONG/57649 situated in Magadi Road, Ongata Rongai.
- (c) Recovery of outstanding rent arrears of Kenya Shillings Seven hundred thousand (700,000/=).
- (d) An order for mesne profits to be assessed by the Hon. Court
- (e) An order to the Officer Commanding Police Division Ongata Rongai and Officer in Charge of Police Station Ongata Rongai to ensure full compliance of the court order accordingly.
- (f) General damages.
- (g) Interest on prayer No.3 at court's rate.
- (h) Costs of the suit.
- (i) Any other relief that the court deems fit and reasonable in the circumstance.

The Defendants though duly served failed to file any Defense to controvert the Plaintiff's averments. The matter proceeded for hearing where the Plaintiff called one witness.

Evidence by the Plaintiff

PW1 Wilfred Mepukori Pere confirmed being the registered owner of land parcel number NGONG/NGONG/57649, hereinafter referred to as the 'suit land'. He explained that he entered into a Lease Agreement with the Defendants in December, 2013 where the Defendants were to put up containers for commercial use. Further, that the Lease Agreement was terminated on 1st June, 2015 but extended by mutual agreement for one and half years. It was his testimony that the Defendants defaulted in paying the monthly rents. PW1 testified that failure by the Defendants to pay rent resulted in a meeting held between the Defendants and himself together with the Ongata Rongai Area Chief on 1st March, 2016, upon which he agreed to extend the Lease Agreement until 31st August, 2016 on condition that the Defendants were to pay all outstanding and subsequent rent arrears. PW1 stated that the Defendants' failure to pay Ksh. 700,000/= which is the outstanding rent arrears as well as vacate the suit land, has led to loss and general inconvenience as he cannot utilize the said suit land. In support of his case, PW1 produced the following documents as his exhibits: Certificate of Title for the Suit Land; Lease Agreement made on 6th June, 2000; Mediation Agreement made on 3rd March, 2016 mediated by the Ongata Rongai Area Chief; and Business Premises Rent Tribunal Order

issued on 3rd March, 2017.

The Defendants' Counsels did not cross examine as they had failed to enter an appearance nor filed any Defence. However, the Defendants' Counsel later entered appearance and filed written submissions.

Submissions

Plaintiff's Submission

The Plaintiff submitted that there is no subsisting Lease between Defendants and himself as he entered into a Lease Agreement dated 6th June, 2013 which expired on 1st June, 2015 but the Defendants refused to vacate the suit land. Further, despite extension of the Lease Agreement until 31st August, 2016, the Defendants failed to pay the rent arrears amounting to Kshs. 500,000. He contended that the Defendants claim before the Business Premises Rent Tribunal Cause No. BPRT No.656 of 2016 was dismissed with costs as the Tribunal did not have jurisdiction to handle the matter. It was his submission that the Defendants were liable to pay him the accrued rent arrears of Kshs. 2,050,000 as at 28th February, 2020. The Plaintiff further submitted that considering the Defendants only paid the monthly rent of Kshs.500,000 until September, 2016, it was in the interest of justice that the court orders the Defendants to pay rent arrears of Kshs.2,050,000/=. He reiterated that he had proved his case on a balance of probability and would suffer more prejudice due to the Defendants continued occupation of the suit land. Further, the Defendants had violated his rights to property under Article 40 of the Constitution culminating in him suffering loss and damages as he was not able to use or draw benefits from the said suit land. He averred that he is entitled to costs of this suit. To buttress his averments, the Plaintiff relied on the following decisions: **Joseph Kang'ethe Irungu v Peter Ng'ang'a Muchoko (2018) eKLR and Bhanganji Dayalal v Mombasa Calibratin Service Limited & 3 Others (2018) eKLR and Republic V Rosemary Wairimu Munene, Ex parte Applicant Vs Ihururu Dairy Farmers Cooperative Society.**

Defendants' Submission

The Defendants in their submissions did not dispute the Plaintiff's ownership of the suit land and contended that they both entered into a Lease Agreement dated 6th June, 2013 over it. The Defendants contended that the Plaintiff failed to produce any evidence showing they had defaulted in paying rent arrears during the Lease Term and there was extension of the Lease Term. Further, no evidence was produced to prove any notice was issued to the Defendants to vacate the suit land. They further submitted that the Plaintiff was estopped from alleging that the Defendants were occupying the suit illegally as he admitted that the Lease Agreement was extended for 18 months and a further 6 months. Further, that Section 57(c) and 57(4) of the Land Act and Clause 8 of the Lease Agreement stated that failure by the Plaintiff to issue at least three months termination notice as per the Agreement indicates that he consented to the Defendants being on the suit land. They explained that they paid rent to the Plaintiff quarterly even after the lapse of the Lease Agreement. Further, that the Plaintiff's claim should be dismissed as he failed to prove that the Defendants' defaulted in paying rent and refused to vacate the suit land. On the issue of claim for mesne profits, they argued that the same can only be granted if proved by evidence and there is a valid lease termination and property is being held without permission of the landlord. Further the claim for mesne profits being special damages must fail as no evidence was produced to show termination of a valid lease or that the Defendants held the suit land illegally. They insisted that the Plaintiff was not entitled to general damages as there is no evidence of breach of Tenancy Agreement nor did the Plaintiff establish how the Defendants' default in making the payment occasioned him loss and general inconvenience as he consented to the Defendants being on the suit land. They further relied on Section 109 and 112 of the Evidence Act including the following decisions: **Miller v Minister of Pension (1947) 2 ALL ER 372; Eastern Produce (K) Ltd- Chemomi Tea Estate v Bonfas Shoya (2018) eKLR; Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another (2005) 1EA 334 and Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001; Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah (2016) eKLR; Peter Mwangi Muthia & Another v Samow Edin Osman (2014) eKLR; Peter Umbuku Muyaka v Henry Sitati Mmbasu (2018) eKLR and Gedion Mutiso Mutua V Mega Wealth International Limited (2012) eKLR** to support their averments.

Analysis and Determination

Upon consideration of the Plaintiff's Testimony of the Witness, Exhibits and rival submissions, the following are the issues for determination:

- Whether an eviction order should issue against the Defendants jointly and severally from all that parcel of land known as Land Reference Number NGONG/NGONG/57649.
- Whether the Plaintiff is entitled to recovery of rent arrears from the Defendants
- Whether the Plaintiff is entitled to General Damages and Mesne Profits in respect to the suit land
- Who should bear the costs of the suit.

As to whether an eviction order should issue against the Defendants jointly and severally from all that parcel of land known as Land Reference Number NGONG/NGONG/57649. It is not in dispute that the Plaintiff is the registered proprietor of land reference number NGONG/ NGONG/ 57649 as evident in the Certificate of Title that was produced in Court. It is further not in dispute that there was initially an Agreement of Lease between the Plaintiff and the Defendants dated the 6th June, 2013 over the suit land which lease was terminated on 1st June, 2015 as evident in the Lease which was produced as an exhibit. I note the Lease was extended by mutual agreement for one and a half years. PW1 in his testimony confirmed that the Lease Agreement was extended by mutual agreement after they had a meeting on 1st March, 2016 with the Defendants including the Chief of Ongata Rongai, which minutes were produced as an exhibit. From perusal of the said minutes, I note the parties agreed that even though the Lease had expired the Defendants were to be given a notice period of six months starting from 1st March, 2016 to 30th August, 2016. Further, that the tenant was to have cleared all the rent arrears and give vacant possession

of the suit land by 30th August, 2016 without fail. It was the Plaintiff's contention that despite extending the said Lease for a further six months, the Defendants defaulted in remitting monthly rent nor granting vacant possession. The Defendants in their submissions contend that the Plaintiff has not proved his case, there is no notice they were served with and no proof they owed rent. But I beg to disagree because as per the minutes at the Chief's Office which, excerpt I highlight hereunder: **'That the tenant Samuel Gicheru Mburu is in rent arrears of 8 months @ Kshs. 50,000 a total of Kshs. 400,000+ the month of March total Kshs. 450,000. That the tenant Samuel Gicheru Mburu to pay the arrears of Kshs. 450,000/= by 11/3/2016 and forward the bank deposit slip to the Chiefs office for confirmation of the same'**, it confirms they were indeed aware.

I note the Defendants never filed any Defence to rebut the Plaintiff's averments hence the same remain uncontroverted. From PW1's testimony, it is evident the Defendants are still in possession of the suit land and have rent arrears. In light of the impugned relationship between the Plaintiff and the Defendants, I wish to make reference to Section 60 of the Land Act which provides as follows: **'(1) If a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land.**

(2) A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired, shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land, or as having given up on any of the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease, and if the lessor continues to accept rent from a tenant who remains in possession for two months, after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force.'

In relying on these provisions, I find that since there is no subsisting lease either express or implied between the Plaintiff and the Defendants and even if the Defendants contend that the Plaintiff failed to furnish proof of rent arrears, at this juncture I find that this does not mean, the Plaintiff consented to have the Defendants remaining in the suit land to date. I opine that since there is no subsisting lease, noting that the Defendants who had earlier been directed to give vacant possession of the suit land in 2016, have declined to do so. Further, on 5th October, 2017, this Court had granted a mandatory injunction and directed the Defendants to deliver vacant possession of the suit land and they have not informed Court on whether they moved therefrom or not in adherence to the Court Order. To my mind, it seems the Defendants seek to continue to retain and use the suit land on their own terms without considering the plight of the Plaintiff who is its owner.

In the case of **Kasturi Limited v Nyeri Wholesalers Limited [2014] eKLR** the Court of Appeal held that: **'It is the duty of the courts to ensure that no individual is prevented from taking possession and or enjoying their property. A tenant cannot impose or force him/herself/itself on a landlord. In the instant case, when the lease between the parties expired, it was incumbent upon the appellant to give vacant possession.'** In the circumstances and based on the evidence before me while associating myself with the decision cited above and the quoted legal provisions, I find that the Plaintiff is entitled to evict the Defendants from the suit land and will proceed to make an order that the Defendants, their agents or servants should grant vacant possession of the suit land to the Plaintiff failure of which he can evict them.

As to whether the Plaintiff is entitled to recovery of rent arrears from the Defendants including General Damages and Mesne Profits in respect to the suit land. The Defendants never controverted the Plaintiff's averments that they have rent arrears and declined to move from the suit land. Further, I note the Defendants filed submissions insisting the Plaintiff never produced evidence to confirm they owed rent and if a notice had been issued to them. However, I note from the evidence of PW1 which was not controverted as well as the minutes from the meeting with the Chief of Ongata Rongai held on 1st March, 2016 which excerpt, I have highlighted above, the Defendants never denied in the said meeting that they had rent arrears. PW1 in his testimony confirmed the Defendants were in rent arrears and have blatantly refused to move from the suit land. It further emerged in evidence that the Defendants had even subleased the premises to one Timothy Mwangangi who filed a suit at the Business Premises Rent Tribunal being case no. BPRT Cause No. 656 of 2016 which was dismissed on 10th February, 2017 when this suit was subsisting. PW1 averred that as a result of the Defendants failure to move from the suit land, he has suffered loss, injury, mental anguish and general inconvenience. The Plaintiff in his submissions has also quantified the rent arrears owed to him by the Defendants having accrued to Kshs. 2,050,000 as at 28th February, 2020 which the Defendants oppose, yet I note they never tendered any evidence to the contrary nor controvert the averments in the Plaintiff. Further, they contend that the Plaintiff has failed to discharge his burden of proof but I beg to disagree with them. It is against the foregoing that I find that the Defendants are liable to pay rent arrears over the suit land until they give vacant possession therefrom. Further, as for mesne profits, I wish to make reference to the legal provisions governing the same. Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows: **-"mesne profits", 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;'**

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

I note the Plaintiff pleaded mesne profits in his Plaintiff, produced the expired Lease Agreement to confirm the rent that was being paid. Further, he also produced minutes from the meeting with the Chief confirming the Defendants were in rent arrears. I note from the Order of the aforementioned BPRT Case, it is evident the Defendants were still on the suit land and sub leased it to a third party who had even sued the Plaintiff. I opine that the Plaintiff has indeed discharged his burden of proof on this point.

In the case of **Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR**, the Court of Appeal while dealing with the issue

of mesne profits held as follows:

“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.”

Based on the evidence placed before me while associating myself with the legal provisions and decisions cited above, I find that the Plaintiff discharged his burden of proof in respect to his entitlement to general damages including mesne profits and I will proceed to award him Kshs. 500,000/= as general damages and Kshs. 1 million as mesne profits.

On the issue of costs, since the Plaintiff is the inconvenienced party, he is entitled to the costs of the suit.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will enter judgement in his favour against the Defendants and will proceed to make the following final orders:

- i. A declaration be and is hereby issued that the Plaintiff is the rightful owner of all that Parcel of Land known as Land Reference Number NGONG/NGONG/57649 situated at Magadi Road, Ongata Rongai.
- ii. An order of eviction be and is hereby issued against the Defendants jointly and severally from all that parcel of land known Land Reference Number NGONG/NGONG/57649 situated in Magadi Road, Ongata Rongai after Ninety (90) days from the date hereof, and the Plaintiff is at liberty to apply for it.
- iii. The Defendants be and are hereby directed to pay to the Plaintiff rent arrears amounting to Kshs. 2, 050,000/= as at 28th February, 2020 and continue to pay the outstanding monthly rent until they grant vacant possession of the suit land to the Plaintiff.
- iv. Mesne profits of Kshs. 1 million be and is hereby awarded to the Plaintiff to be paid by the Defendants.
- v. The Plaintiff is awarded Kshs. 500,000 as General damages.
- vi. An order be and is hereby issued to the Officer Commanding Police Division Ongata Rongai and Officer in Charge of Police Station Ongata Rongai to ensure full compliance of the court order accordingly.
- vii. Costs of the suit is awarded to the Plaintiff to be borne by the Defendants.
- viii. Interest on (iii), iv) and (v) at court rates until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE