



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC SUIT NO. 1160 OF 2015**

**STEPHEN MAKAU KANYIA**

**(Suing as Legal representative & Administrator of the estate of the late**

**Haron Kanyia Makau).....PLAINTIFF**

**=VERSUS=**

**WILSON NJERU WEGA.....1<sup>ST</sup> DEFENDANT**

**JOYCE NJOKI MWANGI.....2<sup>ND</sup> DEFENDANT**

**NEHEMIAH TURUTHI KARANJA.....3<sup>RD</sup> DEFENDANT**

**CYPRIAN KITHURI ARITHO.....4<sup>TH</sup> DEFENDANT**

**EURETHER KARIMI PHARIS.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

**Background**

1. The Plaintiff is the Administrator and legal representative of the Estate of the late Haron Kanyia Makau (deceased). He filed this suit in November 2015 seeking amongst other reliefs an eviction order against the 5 Defendants, jointly and severally. The Plaintiff seeks to evict the Defendants from the parcel of land known as Nairobi/ Block 118/1079 (hereinafter referred to as Suit-land). He also seeks a permanent injunction restraining the Defendants from trespassing, encroaching, ingressing, selling, developing, disposing or interfering with the Plaintiff's quiet possession and ownership of the suit land. The Plaintiff further seeks general damages, mesne profit and costs of the suit.

2. The Defendants upon being served with summons to enter appearance, entered appearance through the law firm of Robert Muthama & Associates on 11th December, 2015 accompanied with a Notice of Preliminary Objection dated 10th December, 2015.

3. The interlocutory application filed by the Plaintiff was on 27th February, 2018 disposed off by the Consent of the parties who agreed to maintain the status quo to pave way for the hearing of the main suit. The preliminary objection had been raised in regard to the Application by the Plaintiff. With the disposal of the Application, the Preliminary objection was off course dispensed with as well.

4. The parties in their above mentioned Consent also agreed to file their respective paginated bundle of documents and detailed witness statements within 45 days. The Plaintiff complied and this was confirmed to court on 30th October, 2018. The Defendants on the said date were once more granted leave the file their Statements of Defence, and a paginated Bundle of Documents within 30 days with a default clause to the effect that the suit would proceed to hearing as an undefended suit if they (the defendants) did not comply within the 30 days granted.

5. The Defendants did not file the documents within the stipulated time span. The suit was the fixed for hearing on various dates in the presence of the advocate for the Defendants.

6. The suit was eventually heard on the 30th September, 2021. The Defendants who had been served with a hearing notice did not attend the hearing.

## **THE PLAINTIFF'S CASE**

7. The Plaintiff, Stephen Makau Kanyia adopted his Witness Statement dated 11th November, 2015 as his evidence in-chief. He too produced in evidence the documents listed in his 'Plaintiff's List of Documents' and 'Further List of Documents' as exhibits in support of his case. After the conclusion of the hearing, the Plaintiff filed his Written Submissions as directed for consideration by the Court.

8. The gist of the Plaintiff's case is that the 5 Defendants had illegally trespassed into and encroached the Suit-land on the pretext of having purchased it from a person known as Muia Kimatu. Apparently, from the Plaintiff's evidence, the said Muia Kimatu was a fraudster who had neither title nor any lawful claim to the Suit-land and could therefore not sell what he didn't have.

9. The Plaintiff stated that he and his brothers reported the Defendants illegal actions to the police and the Area Assistant Chief. The Defendants were summoned to the Assistant Chief's office but they did not honour the Summons when called upon to explain themselves. Muia Kimatu, the alleged seller however, did indeed turn up at the Assistant Chief's Office and according to the Plaintiff's testimony, he actually admitted in writing that he had no claim to the Suit-land. He admitted that he had not bought the land from the Plaintiff's father. In support of this testimony, the Plaintiff produced a document (PE 7) dated 19.6.2015 signed by himself and his brothers on the one hand and the said Muia Kimatu on the other hand. The said document bears the signature and stamp of the Assistant Chief Kamulu sub location. In the said document, the parties summarized their agreed issues as follows;

*a) Mr. Harun Kanyia Makau never sold his parcel of land to Muia Kimatu.*

*b) At his own costs Muia Kimatu should facilitate the removal of all the people he sold plots to on the said parcel which are (8) 50x100 plots.*

*c) By 6/07/15 he should give the family a feedback on the same issue on the dates of vacating from the said parcel for good.*

*d) No party will ask the other to meet costs in effect of the vacation i.e. the Kanyia's vs Kimatu.*

*e) The parcel of land should be vacant on or by December 31<sup>st</sup> 2015.*

10. The Plaintiff further in his bid to investigate the alleged Sale Agreement between the said Muia Kimatu and his late father followed up with the Law Society of Kenya to find out the particulars and whereabouts of the Advocate who allegedly had drawn and witnessed the agreement. The Law Society of Kenya wrote back stating that the alleged 'Advocate' was not an Advocate in the year 1998 since he was only admitted to the Roll of Advocates in the year 2001.

11. According to the testimony by the Plaintiff, at the time of the alleged sale of the land between the Plaintiff's father and Muia Kimatu, the Plaintiff's father who was then 91 years old was bed-ridden and had been living at Kibera with his own brother.

12. The Plaintiff is the holder of the title to the Suit-land L.R Nairobi/Block 118/1079 in his capacity as administrator of the Estate of Haron Kanyia Makau (Deceased).

13. The Plaintiff's case therefore is that the Defendants have no valid or lawful claim over the Suit-land.

## **Issues for Determination**

14. The Plaintiff in his submissions framed 5 issues for determination. In the Court's opinion, however, the issues for determination are as follows;

*A. Whether the Plaintiff is the legal owner of the suit-land.*

*B. Whether the Defendants have any rights over the Suit-land.*

*C. Whether the Plaintiff is entitled to orders of eviction and a permanent injunction as against the Defendants.*

*D. Whether the Plaintiff is entitled to general damages and mesne profits.*

*E. Who should bear the costs of the suit?*

## **Analysis and Determination**

15. I proceed to look at the issues in the said order.

## **WHETHER THE PLAINTIFF IS THE LEGAL OWNER OF THE SUIT-LAND**

16. Considering the evidence on record, the Suit-land L.R Nairobi/Block 118/1079 is currently registered in the Plaintiff's name, in his capacity as administrator of the Estate of Haron Kanyia Makau (Deceased). The Plaintiff produced in evidence a Certificate of Lease and a Lease document marked as Plaintiff's Exhibits 9 and 10 respectively. He also produced the confirmed Grant of Letters of Administration

intestate in the Estate of Haron Kanyia Makau (Deceased) as well the letter dated 6th March, 2015 from Drumvale Farmers' Co-operative Society Limited (PE 8) which confirms that his late father was indeed the original allottee of the Suit land.

17. Section 24 the Land Registration Act No. 3 of 2012 provides that;

- a. *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; and*
- b. *the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.*

18. Section 26 on the other hand provides that:-

1) *The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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—*

- 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.*

1. *A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

19. In the instant case, the Plaintiff by producing the copy of the Certificate of title has established that he is the legal registered owner of the Suit land L.R Nairobi/Block 118/1079. His evidence is not controverted. He therefore has an indefeasible and absolute Title as the registered owner of the Suit-land.

#### **B. WHETHER THE DEFENDANTS HAVE ANY RIGHTS OVER THE SUIT-LAND**

19. The Plaintiff's testimony was that the Defendants had illegally trespassed into and encroached the suit land on the pretext of having purchased it from a person known as Muia Kimatu. Apparently, from the Plaintiff's evidence, the said Muia Kimatu was a fraudster who had no title to the land and could therefore not pass any title to the defendants. The principle 'Nemo dat quod non habet', applies here. One cannot give what they do not have. Muia Kimatu, as the plaintiff stated did in fact, confess that he had no title or claim over the Suit-land. Secondly, the defendants did not controvert the plaintiff's case. It goes without saying that the defendants cannot have acquired any rights over the Suit-land from Muia Kimatu.

#### **C. WHETHER THE PLAINTIFF IS ENTITLED TO ORDERS OF EVICTION AND A PERMANENT INJUNCTION AS AGAINST THE DEFENDANTS**

20. Section 3 (1) of the Trespass Act, Cap 294 provides that:

*"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."*

21. In the case of Entick vs Carrington (1765) as quoted in the case of **Maina Kabuchwa v Gachuma Gacheru [2018] eKLR**, Lord Camden CJ had this to say:-

***"Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave".***

22. In the case of **Maina Kabuchwa v Gachuma Gacheru (Supra)**, the Learned Judge defined trespass "as the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant."

23. Having held that the Plaintiff is the legal owner of Suit-land and that the Plaintiff never authorized the defendants to enter into, occupy or possess the land, it is obvious that the Defendants have trespassed onto the Suit-land and should be evicted.

24. Further, the plaintiff is entitled to quiet possession and enjoyment of the suit-land. Accordingly, the order of a permanent injunction against the defendants jointly and severally as prayed is appropriate.

#### **D. WHETHER THE PLAINTIFF IS ENTITLED TO GENERAL DAMAGES AND MESNE PROFITS**

25. The Plaintiff stated in his testimony that the Suit-land was vacant before the Defendants trespassed into it. Neither in his pleadings nor in his testimony did the Plaintiff give any figures to guide the Court in assessing either the general damages for trespass or Mesne profits which he has claimed in his plaint.

26. The issue that arises is: what is the measure of it? This question was answered by Justice E. Obaga J in the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR where it was held as follows:

*“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damages? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).”*

27. The Plaintiff in his submissions proposes a global figure of Kshs. 1,000,000/- as an appropriate award under the heading, general damages for trespass.

28. The plaintiff relied on the authority of Park Towers Ltd –vs- John Mithamo Njikia & 7 others (2014) eKLR as cited in the case of Avid Developers Ltd –vs- Blue Horizon Properties Ltd & 2 others (2021) eKLR. In the case, the Court held that where trespass is proved, a party need not prove that he suffered any specific damage or loss in order to be awarded damages. Damages shall be awarded depending on the unique facts and circumstances of each case.

29. Noting the duration of the trespass and the size of the land, it is my view that a figure in the sum of **Kshs. 500,000/-** being a nominal award of general damages is reasonable in this case.

30. With regards to Mesne Profits, 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;**

31. The Court of Appeal, in the case of Attorney General v Halal Meat Products Limited [2016] eKLR, considered the aspect of 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, 18<sup>th</sup>Ed. para 34-42.”**

32. The court in the case of Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

**“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.**

***Halsbury’s, 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.”**

**The term ‘mesne profits’ ‘relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. It is important to point out that 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 illegal 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 provided the occupation is illegal.**

33. The Court of Appeal in the case of Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated 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.”**

34. It is trite law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. The Court of Appeal in the case of **Kenya Hotel Properties Limited v Willesden Investments Limited [2009] eKLR** held that

***“...once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass”, since both mean one and the same thing.”***

35. Further Mesne Profits must be pleaded and proved. In the case **Peter Mwangi Mbuthia & Another vs Samow Edin Osman** (Supra), the Court of Appeal held as follows:

***“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...”***

36. The Plaintiff as pointed out hereinabove has not tabled any evidence before this court to enable the court make a determination on the claim for mesne profits. In any event going by the above quoted authorities, there was no way the Court was going to award mesne profits to the plaintiff after awarding him general damages.

#### **E. WHO SHOULD BEAR THE COSTS OF THE SUIT**

37. The Plaintiff being successful in this case shall be awarded the costs of the suit.

#### **CONCLUSION**

38. The Court’s finding is that the Plaintiff has proved his case on a balance of probabilities and enters judgement in favour of the plaintiff against the defendants jointly and severally in the following terms:

***A. An eviction Order be and is hereby issued directed to the defendants ordering them to vacate the plaintiff’s parcel of land known as Nairobi/Block 1118/1079, forthwith.***

***B. A permanent injunction be and is hereby issued restraining the defendants from trespassing, encroaching, entering into, selling, developing, disposing, or in any other manner interfering with the Plaintiff’s quiet possession and ownership of parcel of land known as Nairobi/Block 1118/1079.***

***C. General damages for trespass of Kshs.500,000/- with interest at court rates from the date of this judgement until payment in full.***

***D. Costs of the suit***

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021.**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

Mr Were for the Plaintiff

None appearance for the Defendants

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**