



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL SUIT NO. 66 OF 2018

ZAINUL VELJI.....PLAINTIFF

VERSUS

ERI LIMITED.....DEFENDANT

JUDGMENT ON FORMAL PROOF

The Plaintiff sued the Defendant seeking Vacant possession of the suit property; General Damages for Trespass; Mesne Profits from 1st January 2004 until the date of Judgment; and the Costs of the suit.

1. The suit property is **L.R. NO. KISUMU MUNICIPALITY/BLOCK 3/92**.
2. It was the Plaintiff's case that she purchased the suit property at a Public Auction, which was conducted by an agent of **SOUTHERN CREDIT BANKING CORPORATION LIMITED**, when the said bank was exercising its statutory power of sale.
3. Prior to the auction, the registered proprietor of the suit property was the Defendant. And the Defendant had charged the suit property in favour of the bank, as security for a loan facility which the bank had provided to the Defendant.
4. The auction at which the Plaintiff purchased the suit property was conducted on 3rd July 2002. Therefore, the Plaintiff asserted that she became the owner of the suit property from 3rd July 2002.
5. However, the Plaintiff also indicated that it was not until 24th December 2003 that the Discharge of Charge was registered, and also that the Plaintiff was registered as the proprietor of the suit property.
6. The Plaintiff asserted that despite the change of ownership of the suit property, the Defendant refused to hand over the possession of the said property.
7. It was because the Defendant had persisted in the continued occupation of the suit property, that the Plaintiff instituted these proceedings.
8. The Plaintiff further asserted that the Defendant's continued occupation of the suit property had deprived her of her right to the peaceful use and enjoyment of the suit property. In the light of that deprivation, the Plaintiff asked the Court to order that she be compensated for the loss and damage which the Defendant had caused to her.
9. In answer to the Plaintiff, the Defendant filed a Defence and Counter-claim dated 24th November 2004.
10. On 1st August 2011 the Court struck out the Defence and Counter-claim, in its Ruling which was in respect of the Plaintiff's application dated 22nd September 2010.
11. The following were the prayers sought by the Plaintiff's said application;

"1. The Defendant's Defence dated 24.11.2004 be struck out.

2. IN THE ALTERNATIVE the Defendant's Defence and Counterclaim dated 24.11.2004 and filed on 26.11.2004 be struck out.

3. *Judgment be entered for the Plaintiff against the Defendant as prayed in the Plaintiff.*
4. *Upon the grant of Prayer (3) foregoing, a preliminary decree be ordered issued in respect of prayer (a) of the Plaintiff.*
5. *Upon the grant of Prayer 3 foregoing, prayer (b) and (c) of the Plaintiff do proceed to formal proof.*
6. *Costs of this application be provided for.”*

12. In her Ruling delivered on 1st August 2011, Hon. Lady Justice Nambuye (as she then was) granted prayers 1, 2, 3, 4 and 5. The learned Judge awarded the costs of the application to the Plaintiff.

13. I note that whilst allowing prayer 2, the Court stated, inter alia, as follows;

“..... in the absence of participation of the bank in these proceedings, there will be no direct link of a contractual nature between the defendant and the plaintiff on the basis of which the counterclaim can be based.

Further, the bank’s participation in the proceedings is necessary because if the sale is faulted then the status quo prevailing before the sale ought to revert to the bank as the chargee to hold the title, for the bank either to restart the process of realization of the security afresh or for the defendant to avail itself of its rights under the equity of redemption.”

14. Noting that the contract between the bank and the Defendant involved the provision of 2 properties as security to secure the facility which the bank had extended to the Defendant, Nambuye J. observed that following the surrender of one property to the Plaintiff;

“The defendant has not demonstrated how it is going to truncate this right, and enforce it against one property only.

This, in itself, would operate against the defendant, as it be going against the original contract of mortgaging two titles, and this alone will operate to defeat its claim against the bank and any person claiming through the bank, as the plaintiff.”

15. Having struck out the Defence and Counterclaim, Nambuye J. stated that;

“The plaintiff is at liberty to fix the matter for formal proof with regard to prayer (b) and (c), with the participation of the defendant if they wish. Notice of such formal proof has to be served upon them.”

16. In accordance with the foregoing orders of the Court, the matters that came up before the Court, when handling the formal proof, were limited to prayers (b) and (c) of the Plaintiff.

17. A perusal of the Plaintiff reveals that prayer (b) was for General Damages for Trespass; whilst prayer (c) was for Mesne Profits.

18. In the light of the foregoing, I find that the Defendant erred when it suggested that the Court was obliged, when determining the formal proof, to determine the following 3 issues;

“i. Whether the Plaintiff has proved lawful and regular title over the suit property.

ii. Whether, in the absence of proof of lawful and regular title over the suit property, the Plaintiff can legitimately claim mesne profits in respect thereof.

iii. Whether the Plaintiff’s suit ought to be dismissed with costs.”

19. By inviting this Court to delve into the questions regarding the manner in which the suit property was acquired, the Defendant was ignoring the fact that the Court had previously already made a finding that the Defendant was obliged to hand over vacant possession of the suit property.

20. This Court lacks jurisdiction to re-open a matter which had been adjudicated upon by another Judge of concurrent jurisdiction.

21. In my considered view, if the Defendant held the opinion that Nambuye J. had erred in the ruling dated 1st August 2011, it could only challenge the said ruling through an appeal.

22. If this Court were to delve into matters regarding the acquisition of the suit property; and if the Court were to conclude that the Plaintiff did not have a lawful title, that would constitute an appeal over the decision of my learned sister. It would be tantamount to saying that the orders directing the Defendant to vacate the suit property, were made without any proper legal foundation.

23. I reiterate that this Court lacks jurisdiction to evaluate, directly or indirectly, the decision made by any Court of concurrent jurisdiction.

24. My task in this case is to make a determination on formal proof, in respect of the two aspects which were specified in the Ruling dated

1st August 2011.

25. The Defendant has, quite rightly pointed out that “*formal proof*” is not a mere formality.

26. In the case of **ROSELINE MARY KAHUMBU Vs NATIONAL BANK OF KENYA [2014]eKLR**, the Court expressed itself thus;

“..... at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law.”

27. I am entirely in agreement with that legal pronouncement. Therefore, if the Court were to find that the Plaintiff failed to tender sufficient evidence to prove her entitlement to General Damages for Trespass, and Mesne Profits, the Court would dismiss the same.

28. However, as the issues for formal proof were clearly delineated by Nambuye J., I find that the Defendant erred when it sought to expand the scope of the matters about which the Plaintiff would be required to lead evidence.

29. In any event, I note that the Defendant lodged an application before the Court of Appeal, seeking, inter alia, stay of execution of the orders made by Nambuye J. The said application was **ERI LIMITED Vs ZAINUL GALIB VELJI, CIVIL APPLICATION NO. NAI. 209 OF 2011.**

30. Having given due consideration to the said application, the Court delivered its ruling on 22nd March 2012. The pertinent part of the ruling read as follows;

“In view of the foregoing we are not satisfied that the applicant has demonstrated that the intended appeal is arguable and that if this application is refused, the intended appeal, were it to succeed would be rendered nugatory.”

31. The Court of Appeal dismissed the Defendant’s application.

32. I note that some of the issues canvassed before the Court of Appeal, were concerning the alleged lack of proper advertisement and sale of the suit property. In effect, some of the matters which the Defendant was urging before me, had previously been canvassed at the Court of Appeal; and the said Court was not satisfied that they could be the basis for an order for stay of execution.

33. I further note, from the ruling of the Court of Appeal that the Defendant’s advocate put forward the following position;

“Mr. Amondi went on to submit that the transfer of the suit property was tainted with fraud; and that there were two rival title deeds. These were, in Mr. Amondi’s view, issues that were raised before the learned Judge and that she denied her client the right to be heard.”

34. If, as the Court of Appeal had previously been told by the Defendant that the suit property had been transferred, (albeit fraudulently, according to the Defendant), I am not at loss why the Defendant would now be urging this Court to hold that there was never any transfer of the said suit property.

General Damages for Trespass

35. In the Plaintiff, the prayer for General Damages for Trespass was listed as number (b).

36. The Plaintiff has submitted that she was entitled to damages for trespass because the Defendant had executed the mischief of keeping her out of the suit property, by misusing the legal process.

37. As a consequence, the Plaintiff submitted that she was denied a chance to develop and improve the property while the money market was still friendly.

38. However, the Plaintiff did not adduce evidence of her desire and intention to develop or improve the property, when the money market was still friendly or at all.

39. The Plaintiff would have been expected to produce evidence of the plans she had put together, for the physical development or improvement of the suit property.

40. She should then have also demonstrated that if she had been given possession of the suit property at the material time and had developed or improved it, at the time, the cost would have been much less than it could be now.

41. I am alive to the decision in **ASTER HOLDINGS LIMITED Vs CITY COUNCIL OF NAIROBI & 4 OTHERS, ELC CASE NO. 175 OF 2015.** in which the Court awarded Kshs 100,000,000/= as General Damages for trespass.

42. In that case there was evidence that the houses which had been on the suit property were demolished after the tenants moved out. The Court noted that;

“The houses were then demolished in preparation for development as per the approved change of user. The plaintiff had its guards which were guarding the property. These guards were chased away by the Fifth Defendant who forcefully invaded the suit property.”

43. In other words, not only did the 5th Defendant forcefully eject the Plaintiff from the suit property but the said Defendant remained in occupation thereof for 14 years.

44. In contrast, the Plaintiff herein did not lead evidence of any acts that can be construed as trespass by the Defendant; as the Defendant had been in possession from a date prior to when the Plaintiff started asserting her claim of ownership.

45. But it cannot be ignored that the continued occupation of the suit property, prevented the Plaintiff from enjoyment of her rights of possession.

46. I will revert to the consequences thereof later.

Mesne Profits

47. **PW2, NOBERT KISANYA**, testified that he was a Property Valuer. On 14th November 2011, he did an inspection of the suit property and he ascertained that the said property was occupied by the Defendant.

48. The purpose of the inspection conducted by **PW2** was to establish the rents payable for the premises.

49. **PW2** prepared his Report, and the same was adduced in evidence as “*Exhibit P1*”.

50. It was the evidence of **PW2** that the fair and reasonable monthly rent for the suit property was Kshs 218,880/=, as at 15th November 2011.

51. During cross-examination, the witness said that when the Plaintiff issued verbal instructions, the Plaintiff did not give him the title document for the suit property.

52. Although he did not have either the title document or a map, **PW2** said that he was led to the suit property by the Plaintiff.

53. He also said that he had not been asked to verify the ownership of the suit property.

54. **PW2** did not annex to his Report, the documents verifying his qualifications.

55. In its submissions, the Defendant cited **Section 48** of the **Evidence Act**, which is worded as follows;

“When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity and genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identify, or genuineness of handwriting or fingerprint or other impressions.”

56. Based on that legal provision it follows that a person who is offered as an expert witness must be qualified in the specific sphere which his evidence is in respect of.

57. It is well settled that the onus is upon the expert witness to satisfy the court that he was specially skilled.

58. The Plaintiff submitted that **PW2** testified in court about his qualifications.

59. Having perused both the oral testimony tendered during the hearing, and the Witness Statement of **PW2**, I note that he described himself as a “*Property Valuer.*”

60. In the Report, **PW2** signed above his name, against which it is indicated that he holds B.A. (Land Econ) Hons. I find that that constitutes sufficient proof of the special skill possessed by **PW2**.

61. There is no basis for the Defendant’s contention, that the Plaintiff concealed crucial information concerning the qualification of the expert witness. If anything, it is the Defendant who failed to question the witness about the alleged lack of qualification.

62. The attempt by the Defendant to adduce evidence through the final submissions is highly irregular and completely unacceptable. I so hold because submissions are not evidence.

63. Whilst evidence is adduced by witnesses, and they constitute facts that are intended to help prove the case of the person in whose favour the witness was giving evidence; submissions are the work of the advocate (usually), who will be highlighting the relevant facts and connecting the same to pertinent issues of law, with a view to persuading the court.

64. In this case the Defendant did not call any witnesses, therefore, the Defendant did not adduce any evidence. Accordingly, the attempt to produce evidence through the final submissions is hereby rejected.

65. As regards the valuation conducted by the property valuer herein, the Defendant did not challenge the substance thereof. In effect, the evidence was uncontroverted.

66. Secondly, the witness demonstrated how he came to the conclusion on what he considered to be a fair and reasonable rent for the suit property. I find that the witness took into account appropriate comparables. I consider them to be appropriate comparables because the properties were not only located along the same road, but were also of a similar lettable space.

67. I therefore find that the Plaintiff proved, on a balance of probability, that a fair and reasonable rent for the suit property was Kshs 218,880/= per month, as at November 2011.

68. I am also persuaded that it would be fair and reasonable to escalate the said rent by 2.5% per annum, moving forward; whilst applying a similar rate of percentage reduction, moving backwards.

69. In the result, the mesne profits are awarded as follows;

	YEAR	AMOUNT, IN KENYA SHILLINGS
1.	2011	2,626,560.00
2.	2012	2,692,224.00
3.	2010	2,560,896.00
4.	2009	2,496,876.00
5.	2008	2,434,452.00
6.	2007	2,373,588.00
7.	2006	2,314,248.00
8.	2005	2,256,396.00

9.	2004	2,199,984.00
	T O T A L	21,955,224.00

70. I now revert to the issue of General Damages. It is my considered opinion that if the Plaintiff had to take time to develop or improve the suit property, it would have required some interruption to the earning of rent.

71. Most probably, such development or improvement would also have required financial outlay, on the part of the Plaintiff.

72. Therefore, having awarded to the Plaintiff, mesne profits for a continuous period, I find that it would constitute unjust enrichment to also award General Damages, to the tune suggested by the Plaintiff.

73. Accordingly, I now award only a nominal sum of Kshs 1,000,000/= on account of General Damages.

74. The mesne profits and the general damages shall attract interest at Court rates, from the date when suit was filed.

75. The costs of the suit shall be paid by the Defendant, to the Plaintiff.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE