



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO. 39 OF 2017

(FORMERLY NAKURU 315 OF 2012)

GEOFRREY NDUNGU NGURE.....SUBSTITUTED PLAINTIFF

VERSUS

JAMES MWANGI GITHAIGA.....DEFENDANT

JUDGEMENT

1. This matter was initially filed vide a plaint dated the 26th April 2010 by the original Plaintiff Ngurue Gakungu, the proprietor of the suit land herein. Upon the passing away of the said proprietor, the Plaint was amended on the 8th August 2018 wherein the substituted Plaintiff sought for declaratory orders that the deceased original Plaintiff was the sole absolute and legal owner of all that parcel of land known and described as Nyandarua/Ndemi /2016. The substituted Plaintiff sought for an order of eviction and ejection of the Defendants and members of his family, his proxies, servants, employees or agents from the said parcel of land as well as for a permanent injunction restraining the Defendant by himself, members of his family, his proxies, servants, employees or agents from entering, cultivating, remaining, erecting structures or in any manner interfering with the substituted Plaintiff's quiet enjoyment and possession of the said parcel of land. Further, the Plaintiff also sought for mesne profits, costs of the suit and interest thereon and any other or better relief that the court may deem just to grant.
2. The Defendant on the other hand had entered his appearance on the 17th May 2010 and filed a defence dated the 8th June 2010 through the firm of M/S Imali Gembe & Co Advocates wherein he sought that the Plaintiff's case be dismissed for reasons that he and his family had been legally allocated the land parcel No. Nyandarua/ Ndemi/ 716 which had been previously plot No. 1620, by the Settlement Fund Trustee wherein they had lived on the suit property since the year 1981 where they had continued to pay all the outstanding loan amount on the said parcel of land to the Settlement Fund Trustees .
3. Subsequently, Gembe Jane Imali practicing as M/S Imali Gembe & Co Advocates was struck off from the Roll of Advocates with effect from 14th April 2014 in a Disciplinary Cause No. 14 of 2013 and thus ceased to be an Advocate acting for the Defendant.
4. On the 31st October 2016, the Plaintiff filed his Notice of Motion dated the 28th October 2016 seeking to have the said Advocate cease acting for the Defendant for reason that she was no longer certified to practice law. The Application was set for hearing on the 30th May 2017 wherein it proceeded ex-parte as there was no appearance of either the Defendant or his Counsel despite service having been effected.
5. The court having satisfied itself that Ms. Gembe Jane Imeli was struck off the Roll of Advocates with effect from 14th April 2014 in Disciplinary Cause No 14 of 2013 and further pursuant to the provisions of Order 9 Rule 12 (i) of the Civil Procedure Rules as well as the provisions of Section 9 of the Advocates Act, allowed the application and further ordered that the Plaintiff extracts the order and serves the same upon the Defendant pursuant to Order 9 Rule 12(2) of the Civil Procedure Rules. The court further granted the Defendant leave to file his Notice of Change of Advocates and/or Notice to Act in Person within 30 days. The matter was then set for mention to confirm compliance and for further directions.
6. At the next mention date, the court was informed that its directions had been complied with and the Defendant served personally with its orders but that he had not filed any response and therefore it was deemed that he would be acting in person. The court was further informed that that the Plaintiff had complied with the provisions of Order 11 of the Civil Procedure Rules and therefore the matter be certified ready for hearing.
7. The matter was certified ready for hearing and the Plaintiff directed to serve the hearing notice to the Defendant.
8. Subsequently, vide an application dated the 16th April 2018, the Substituted Plaintiff sought to revive the suit that had abated upon the death of the original Plaintiff which application was heard ex-parte, the Defendant having been served but choosing not to file any response or appear in court.

9. The matter was then set down for hearing but then again there was no appearance of either the Defendant or his counsel despite service having been effected where the hearing proceeded ex-parte and the Plaintiff testified as follows;

10. That the initial Plaintiff, Ngure Gakungu was his father who had passed away on the 26th December 2013 while the matter was pending before Court. That he had then filed a Succession Cause in the Chief Magistrates' Court being Nyahuru Succession Cause No. 2 of 2018 wherein he had been issued with the letters of Administration. He produced copies of both his father's death certificate and the Limited Grant of Letter of Administration as Pf Exhibit 1 and 2 respectively.

11. The Plaintiff proceeded to testify that his father had land in Nyandarua County being No. Nyandarua/Ndemi/ 2016 wherein he had been issued with a title deed on the 19th February 1996 to the same which copy he produced as Pf Exhibit 3. He also produced a certificate of official search for the suit land dated 26th May 2009 as Pf Exhibit 4.

12. That his father had bought the said suit land from one Kiriinya M'Kiria for a consideration of Ksh 750,000/= as per the Sale Agreement dated the 4th September 1995 which Agreement was in respect of 15 acres of land which were to be excised from land parcel No. Nyandarua/Ndemi/716. He produced the sale agreement as Pf Exhibit 5.

13. He also produced a map of Ndemi Settlement Scheme that showed the original position of the parcel of land as Pf Exhibit 6 and proceeded to testify that after his father had bought the land, Mr. Kiriinya Mukira effected the transfer herein produced as Pf Exhibit 7.

14. That further, although his father had bought the land and had been given the title deed, he did not take possession of the same because the Defendant, James Mwangi Gathaiga and his family took possession of the same in the year 1996 and built a house thereon wherein he had been ploughing the same.

15. That his father did not give him permission to be on the land and despite his father having reported him to the District Officer who had asked him to move out, yet the Defendant had continued staying on the land.

16. That subsequently, his Counsel had written a demand Notice to the Defendant dated the 4th November 2009 herein produced as Pf Exhibit 8 asking the Defendant to vacate from the suit land but which notice was ignored giving rise to the filing of the present case.

17. The Plaintiff sought that the court grants the prayers sought in his amended plaint of 8th August 2018. He also sought for mesne profit for reason that the cost of 1 acre as Kshs.4,000/- on rent per year which gave a total of ksh 60,000/= per year for the 15 acres. That the Defendant had stayed on the suit land from the year 1996 therefore the amount ought to be calculated up to when he vacated the land. The Plaintiff also sought for costs of the suit. He thus closed his case and sought for judgment, electing not to file any written submissions.

Determination.

18. I have reviewed and considered the uncontroverted evidence of the Plaintiff in support of his claim and find the issue for determination as being;

- i. Whether the deceased Plaintiff is the legal proprietor of the suit land.
- ii. Whether the Defendant has encroached on the suit land.
- iii. Whether the Defendant and/or members of his family, agents/servants should be permanently restrained from trespassing on the suit land.
- iv. Whether the Defendant and/or members of his family, his agents/servants should be evicted from the suit land.

19. I have duly considered the evidence adduced before court by the Plaintiff and find that the same was believable as it was backed by genuine documents and was not contested as the Defendant did not appear at the hearing either in person or through Counsel.

20. From the documentary evidence submitted as exhibits, it is clear that there had been a sale agreement dated the 4th September 1995 between the deceased Ngure Gakungu and one Kiriinya M'Kiria for the sale of 15 acres for a consideration of Ksh 750,000/= for land which was to be excised from land parcel No. Nyandarua/Ndemi/716. Thereafter, the sale agreement had been executed wherein the deceased Ngure Gakungu had been registered as the proprietor of parcel of land No. Nyandarua/Ndemi /2016, a subdivision of parcel No. Nyandarua/Ndemi /716, on the 19th February 1998.

21. Suffice to say that although the Defendant herein did not appear on the hearing day to defend his case wherein the same proceeded ex-parte, I am compelled to consider the statement of defence which had no documents attached therein and which was dated the 8th June 2010 and filed on the equal date.

22. The said statement of Defence was a mere denial on allegations that the Defendant and his family had been legally allocated the land parcel No. Nyandarua/ Ndemi/ 716 which had been previously plot No. 1620, by the Settlement Fund Trustee wherein they had taken possession and lived on the suit property since the year 1981. That further, the Defendant had continued to pay all the outstanding loan amount on the said parcel of land to the Settlement Fund Trustee. Apart for this statement there were no documents attached confirming any proprietorship, but even if the same were attached, of what value would they have been considering that the Defendant chose to stay away from the hearing. The matter was not defended and the same remains as such.

23. Of interest to note is that this court had rendered its judgment in a similar matter in **Nyahururu ELC No. 38 of 2017** the parties being **Kiriinya Mukiira vs James Mwangi Githaiga** in which the court had found in favour of the Plaintiff, the original allottee of the initial parcel of land being Nyandarua/ Ndemi/716 land.

24. The provision of section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

Section 24(a) 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

Section 25(1) provides that;

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

25. The law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible ownerand the title of that proprietor shall not be subject to challenge...”

26. These provisions empowered the deceased Plaintiff, by virtue of being registered owner of the suit land, with vested rights and privileges therein and which no person could interfere with. I find that the deceased Plaintiff is indeed entitled to protection by the law from the Defendant who has interfered with his rights and privileges over the suit land.

27. Having found and concluded that on the basis of the pleadings and the evidence before me, that the deceased Plaintiff is both the undisputed owner of the suit land and also that he never gave any permission to the Defendant, or anybody else for that matter, to occupy the land. Accordingly, any person found in that land was there without the consent of the Plaintiff and was therefore a trespasser

28. The Plaintiff has put loss of use incurred by himself over the property (mesne profit) at the rate of Kshs.4,000/- on rent per year giving a total of ksh 60,000/= per year for the 15 acres from the year 1996 to date for 23 years giving a total of Ksh 1,380,000/-

29. *Mesne profit* is defined in **section 2** of the Civil Procedure Act to mean; -

“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”.

30. 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*.

31. As held in **Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku, [2006] eKLR** special damages are, in layman’s language, a reimbursement of what the Plaintiff has actually spent or lost, as a consequence of the tortuous act by the Defendant/tortfeasor. All that the law requires is that the said special damages are pleaded, particularized, and proved. Upon that the Court awards, not assesses, the figure proved.

32. The Defendant did not defend the suit and as such placed no material before the court to contradict the Plaintiff’s evidence. It is therefore my finding that the Plaintiff has proved his case on a balance of probability and I enter judgment for him against the Defendants as follows;

i. A declaration is hereby issued that the deceased Plaintiff Ngure Gakungu is the owner of all that parcel of land known and described as Nyandarua/Ndemi /2016.

ii. Defendant and members of his family do forthwith vacate land parcel No. Nyandarua/ Ndemi/2016 within 30 days upon delivery of this judgment and if they fail to so vacate, an order of eviction be issued against them.

iii. That a permanent injunction is hereby issued restraining the Defendant and members of his family, his proxies, servants,

employees or agents from entering, remaining on, cultivating, erecting structures or in any manner interfering with his quiet enjoyment and possession of the suit land.

iv. Mesne profits from the year 1996 to the year in the sum of Kshs. 1,380,000/- is herein awarded to the Plaintiff.

v. General damages for trespass for Kshs.100,000/= with interest from the date of this judgment, at Court rates, till payment in full is also awarded to the Plaintiff .

vi. Costs to the Plaintiff at the lower scale since the suit was undefended.

It is so ordered.

Dated and delivered at Nyahururu this 14th day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE