



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 116 OF 2018

PETER NGINGA KIGUTA.....PLAINTIFF

VERSUS

DENNIS MUTUKU.....DEFENDANT

JUDGMENT

By a Plaint dated **11th April 2018**, the Plaintiff herein filed this suit against the Defendant seeking for orders that;

(a) A Permanent Order of injunction restraining the Defendant whether by himself, his agents and /or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property situated in Ruiru, namely L.R No. Ruiru/ Ruiru East Block 2/4637.

(b) An eviction order compelling the Defendant by himself, servants, agents and or legal representative to move out of the Plaintiffs property situated in Ruiru, namely L.R No. Ruiru/Ruiru East Block 2/4637.

(c) Damages and mesne profits

(d) Interest on c above

(e) costs of this suit

In his statement of claim, the Plaintiff averred that he entered into a sale agreement for the purchase of the suit property on the **22nd January 2014**, for a valuable consideration and subsequently the parcel of land was transferred to him and thus he acquired absolute proprietary rights over the suit property as he was the registered proprietor of the suit property. It was his contention that at the time of the purchase, the property was vacant and beacons were pointed out to him. However, after the purchase he was in and out of the Country and sometime in **2014**, during his visits to the suit property, he noted that the Defendant and his family had invaded and trespassed on the suit property without his permission and purported to assume ownership by erecting permanent and semi-permanent structures thereon.

He further averred that despite his complaints to the relevant authorities, the Defendant had refused to vacate his property and his claim is therefore for wrongful entry upon his land and therefore eviction.

Despite being served with the Summons to Enter Appearance, the Defendant failed to enter appearance and thereby defend the suit. The matter therefore proceeded by way of formal proof wherein the Plaintiff gave evidence for himself and called no witness.

PLAINTIFF'S CASE

PW1 Peter Nginga Kiguta, adopted his witness statement and testified that he is the owner of the suit property and produced his list of documents as exhibit 1 in Court.

After close of *viva voce* evidence, the Plaintiff filed written submissions which the Court has now carefully read and considered. The Court too has considered the pleadings, the evidence adduced and the exhibits thereto and renders itself as follows;

The Defendant failed to enter appearance and thereby defend the suit. The fact that the suit has not been defended means that the Plaintiff's evidence remained unchallenged and uncontroverted .However the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it as the Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of *Shaneebal Limited ...Vs... County Government of Machakos (2018)eKLR*, where the Court cited the case of *Karuru MunyororoVsJoseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988*, where the Court held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant’s and or their Counsel to cross examine her on evidence, the Plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR**, where the Court stated;

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further in the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR**, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

Having considered the available evidence, the Court finds the issue for determination is whether the Plaintiff is entitled to the orders sought.

The Court has noted that the written submissions submitted by the Plaintiff seems to contradict with the pleadings filed in this Court. First because the parties listed as the Defendants are not the parties in the Plaint. Further the Court notes that the Plaint was dated **11th April 2018** and not **10th April 2018** as submitted. It is evident that the Plaint was never amended and there was no substitution of the Defendants nor were prayers added to the Plaint. This Court therefore finds that the written submissions as filed by the Plaintiff seems to relate to a different cause of action to the one sought in the Plaint.

Nevertheless, the Court will determine the suit based on the pleadings and the evidence adduced. The Plaintiff has alleged that the suit property belonged to him having bought it from one **Mardarian Muthoni Njuguna**. This Court has seen the title deed produced by the Plaintiff dated **15th May 2014**.

It is very clear that **Section 26 of the Land Registration Act**, gives a proprietor of land **absolute** and **indefeasible** rights over the said property. Having been registered as the proprietor, it meant that he held all the rights and privileges that appertain to the suit property in accordance with **Sections 24 and 25 of the Land registration Act**.

From the report prepared by **Geomap Surveying and Engineering Company Limited** it was stated that the Defendant was said to be the one who had encroached on the suit property and built a structure thereon. As already held, the Plaintiff’s evidence remains uncontroverted and it is therefore this Court’s considered view that he is entitled to the orders of permanent injunction and eviction as sought in the Plaint.

On the issue of trespass, it is evident that, **Trespass** has been defined by **Clerk and Lindsell on Torts, 18th edition at Pg.23** as;

“any unjustifiable intrusion by one person upon the land in possession.”

This Court is satisfied on the material placed before it that the Plaintiff is the registered proprietor of the suit land. The Plaintiff has accused the Defendant of encroaching upon his land and putting structures without his consent. The Defendant having entered onto the Plaintiff’s suit land without any lawful or justifiable cause while the Plaintiff was in possession of undisputed certificate of title, then the Defendant is a trespasser.

As to whether the Plaintiff is entitled to **General Damages** for trespass, the Court will rely on the case of **Park Towers Limited versus John Mithamo Njika & 7 others (2014)eKLR**, where the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

Further In the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014] eKLR**, the Court 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 damage. 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

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”

Having not provided the value of the land before the alleged trespass, the Court finds the Plaintiff is entitled to a nominal figure of **Kshs.100,000/=** as general damages for trespass.

Mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates. It must be pleaded and proved. However, where a party claims for both mesne profits and damages for trespass, the Court can only grant one. In this instant case the Court has already granted General Damages. Therefore the prayer of mesne profit is declined. See the case of Maina Kabuchwa ...Vs... Gachuma Gacheru (2018) eKLR, where the Court held that:-

“Where a party claims for both mesne profits and damages for trespass, the Court can only grant one.”

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.

For the above reasons the Court enters Judgment for the Plaintiff against the Defendant in terms of **prayer No.(a), (b), (c) and (e)**.

In terms of **prayer No.(c)**, the Court awards the Plaintiff Damages for trespass to the tune of **Kshs.100,000/=**. On costs of the suit, since the Plaintiff is the successful litigant, he is awarded costs of the suit and interest thereon from the date of filing the suit to the date of this Judgment.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th of April 2020.

L. GACHERU

JUDGE

Lucy- Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By consent of:

Ratemo & Company Advocates for the Plaintiff

L. GACHERU

JUDGE