



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 345 OF 2015

ELIAS MUCHANGI NJERU.....1ST PLAINTIFF

MOSES MUCANGI KARAGIRWA.....2ND PLAINTIFF

JOYCE WANJA KIURA.....3RD PLAINTIFF

VERSUS

GEORGE NTHIGA NYAGA.....1ST DEFENDANT

BEATRICE GATWIRI MUGAMBI.....2ND DEFENDANT

JUDGEMENT

A. Introduction

1. By a plaint dated 2nd November 2015 the Plaintiffs sought the following reliefs against the Defendants:

- a) *An order of permanent injunction restraining the defendants either by themselves, their agents, servants or any other person acting under their authority from trespassing into, constructing any structures, cultivating or in other way interfering with the plaintiffs parcel of land title No. Gaturi/Weru/5890.*
- b) *An order of permanent injunction for the defendants to remove any fence and or structures erected on or around parcel of land Title No. Gaturi/Weru/5890.*
- c) *An order of eviction against the defendants from parcel of land Title No. Gaturi/Weru/5890.*
- d) *An order for mesne profits to be paid by defendants arising out of the illegal usage and cultivation of the said parcel of land Title No. Gaturi/Weru/5890 since year 2010 to date.*
- e) *Costs of this suit.*

B. The Plaintiffs' case

2. The Plaintiffs pleaded that at all material times they were the registered proprietors of *Title No. Gaturi/Weru/5890 (parcel 5890)* whereas the Defendants were said to be the proprietors of an adjacent parcel of land known as *Title No. Gaturi/Weru/5889 (parcel 5889)*. It was pleaded that the Defendants had trespassed upon and wrongfully occupied parcel 5890 instead of parcel 5889 without the Plaintiffs' consent. It was further pleaded that despite demand and notice of intention to sue, the Defendants had refused to vacate parcel 5890 hence the suit.

C. The Defendants' defence

3. By their written statement of defence dated 12th May 2016, the Defendants admitted they were the owners of parcel 5889 and that the Plaintiffs were the proprietors of parcel 5890. They, however, denied the alleged trespass upon the Plaintiffs' property and stated that they had only developed the portion of land shown to them by the previous owner who had sub-divided his land and sold portions thereof to the Plaintiffs and the Defendants. The said two parcels i.e. Nos. 5889 and 5890 were amongst the divisions sold by the previous owner.

D. Hearing of the suit

4. When the suit was listed for hearing on 18th December 2019 the parties recorded a consent to the effect that the Defendants shall vacate parcel 5890 within 15 days. The parties also agreed that the issues of mesne profits and costs of the suit shall be determined by the court upon the filing of written submissions. The record shows that the Plaintiffs filed their written submissions on 3rd January 2020 whereas the Defendants filed theirs on 9th January 2020.

E. Outstanding issues for determination

5. As per the consent of the parties, the following issues were left for determination by the court: -

- a) *Whether the Plaintiffs are entitled to mesne profits with respect to parcel 5890 and, if so, the quantum of damages to be awarded.*
- b) *Who shall bear the costs of the suit.*

F. Analysis and determinations

6. The court has considered the material on record on the 1st issue. In the case of **Attorney General V Halal Meat Products Ltd Civil Appeal No. 114 of 2009 [2016] eKLR** the court described mesne profits as follows: -

“It follows, therefore, that where a person is wrongly 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 or her property by another. See McGregor on Damages, 18th Ed. Para 34-42”.

7. In the case of **Kenya Hotel Properties Ltd V Willesden Investments Ltd [2009] eKLR** the Court of Appeal held that mesne profits should be measured with reference to the monetary loss the proprietor may have suffered as a result of wrongful deprivation by the trespasser. If the property in question consists of rental houses, then the measure of mesne profits should be computed with reference to the reasonable market rent of such houses.

8. In the instant case, the Plaintiffs submitted that they could have earned an annual income of Kshs. 700,000/= if they had utilized parcel 5890 hence they claimed that annual sum with effect from 2011. The Defendants submitted that the claim for mesne profits was not pleaded with particularity and was not strictly proved as required by law. The Defendants relied on the case of **Vincent Koskei V Bernard Koskei [2018] eKLR** in support of that submission.

9. The court is of the opinion that a claim for general damages for trespass is distinct from a claim for mesne profits which is a claim for special damages. In the case of **Ouma V Nairobi City Council [1976-80] 1KLR 375**, Chesoni J. (as he then was) distinguished between general and special damages by quoting Lord Macnaghten in **Stroms Bruks Aktie Bolag V John & Peter Hutchison [1905] AC 515** as follows:

‘General damages’, as I understand the term, are such as the law will presume to be the direct natural and probable consequence of the act complained of. ‘Special damages’, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly.”

10. With regard to the particularity of pleading required in a claim for special damages, Chesoni J (as he then was) held as follows:

“Thus for a plaintiff to succeed on a claim for special damages, he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court’s view is as laid down in the English leading case on pleading and proof of damage, **Ratcliffe V Evans (1892) 2 QB 524 where Bowen LJ said at pages 532 & 532:**

The character of the act themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

11. The court has considered the pleadings, witness statements, and documents filed by the Plaintiffs. There were no particulars of mesne profits which were pleaded in the plaint. No such particulars were provided in the witness statements and other documents filed by the Plaintiffs. Similarly, there was no expert’s report or other evidence on record to demonstrate that the Plaintiffs could have earned an annual income of Kshs. 700,000/- from horticulture. The spreadsheet which was introduced by the Plaintiffs at submissions stage is not admissible in evidence. Accordingly, the court is of the opinion that the Plaintiffs not only failed to plead their claim for mesne profits with sufficient particularity but they also failed to strictly prove it with credible evidence as required by law.

12. The 2nd issue relates to costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful party should normally be awarded costs of the action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V**

Twentsche Overseas Trading Co. Ltd [1967] E A 287. The court finds no good reason why the successful litigants in this suit should not be awarded costs of the suit. Accordingly, the Plaintiffs shall be awarded costs of the suit.

G. Conclusion and disposal order

13. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have failed to prove their claim for mesne profits to the required standard. They shall, however, be awarded costs of the suit since they succeeded in their main claim for recovery of parcel 5890. Accordingly, the court makes the following orders.

a) The Plaintiffs' claim for mesne profits with respect to Title No. Gatari/Weru/5890 is hereby declined.

b) The Plaintiffs are hereby awarded costs of the suit.

14. It is so decided.

JUDGEMENT DATED and **DELIVERED** in Chambers at **EMBU** this **14TH DAY** of **MAY 2020** in the absence of the parties due the prevailing Covid-19 situation. The Judgement was transmitted to Plaintiffs in person and Njeru, Nyaga & Co. Advocates for the Defendants through the email addresses which they provided.

Y.M. ANGIMA

JUDGE

14.05.2020