



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 47 OF 2019**

**ANGELINE NJERI MACHARIA..... APPELLANT**

**VERSUS**

**ROSE ALUOCH AROKO**

**NANZALA SIWENKOLO GONDA**

**KANDIRE NJERI NAKATONDA GONDA**

**(Suing as Personal Representatives and Administrators of the Estate of**

**GONDA ELKANA SYONGOHO (Deceased).....RESPONDENTS**

**JUDGMENT**

**Background**

1. This appeal arises from the Judgment of Hon A M Obura, Senior Principal Magistrate, rendered on 10/6/2019 in **Nairobi CMCCC Number 6427 of 2002**. In the said suit, the Late Gondah Elkana Syongoh (**the deceased**) sued the present appellant, contending that the appellant had failed/refused/neglected to vacate Land Title Number **Nairobi Block 93/31 (the suit property)**, situated in Golden Gate Estate, South B, Nairobi. His case was that he purchased the suit property in a public auction conducted by M/s Fidelity Bank Limited on 19/10/2001 and he subsequently became the duly registered proprietor. The appellant had, however, refused to vacate the suit property.

2. After hearing evidence from the parties, the Learned Magistrate allowed the deceased's suit in the following verbatim terms:

*a) A permanent injunction is hereby issued against the defendant whether by herself, agents, or servants from entering or in any manner interfering or dealing with the suit property known as LR No Nairobi/Block 93/31 Golden Gate South B Nairobi.*

*b) The defendant is hereby ordered to vacate the suit property LR No Nairobi/Block 93/31 Golden Gate South B Nairobi within the next two (2) months hereof failing which the plaintiff/applicant shall be at liberty to apply for eviction orders.*

*c) The plaintiff is awarded costs in the suit and interest thereto*

3. Dissatisfied with the Judgment of the trial court, the appellant brought this appeal citing the following grounds:

*1. The Learned Magistrate erred in law and fact in disregarding the orders of Hon Justice Sheik Amin in HCCC 2433 of 1998 on 27th October, 1999.*

*2. The Learned Magistrate erred in law and in fact by disregarding the orders issued by Hon Ringera, J in HCCC 1804 of 1999 on 22nd October 2001 and its implication on the registration of the plaintiff as the owner of the property on 8th March, 2002.*

*3. The Learned Magistrate erred in law and in fact in disregarding the Ruling of Hon T W C Wamae dated 9th October, 2002 and disregarding the finding therein that when the suit property was transferred, Hon Justice Ringera's orders were in force.*

*4. The Learned Magistrate erred in law and in fact in assuming that the defendant failed to file a defence and proceeding to make a determination without considering the defendant's defence.*

4. The appellant sought the following reliefs in the appeal:

*a) This appeal be allowed*

*b) The judgment of the honourable court (Hon A M Obura (Mrs), Senior Principal Magistrate) delivered on 10th June 2019 be set aside.*

*c) The suit CMCC 6427 of 2002 be remitted to the Magistrate Court for hearing by any other magistrate other than Hon A M Obura (Mrs), Senior Principal Magistrate*

*d) The appellant be awarded the costs of this appeal*

5. The Administrators of the Estate of the Late Gandoh Elkana Syongo in turn brought a cross-appeal through a memorandum of cross-appeal dated 21/7/2019 in which they sought the following orders:

*a) The appeal be dismissed*

*b) The cross-appeal be allowed*

*c) The respondents/cross-appellants be awarded mesne profits in amounts to be assessed by the court.*

*d) The other prayers granted in the judgment delivered on 11th June, 2019 by the Trial Court do remain uninterrupted*

*e) Costs to the respondent/Cross-appellant*

6. The cross appeal was premised on the following grounds:

*1. That the court erred in law and in fact in failing to appreciate that having found that the defendant was a trespasser on the suit property, the plaintiff was entitled to mesne profits as prayed*

*2. That the court erred in law and in fact in holding that mesne profits are recoverable only in Landlord –Tenant relationship and failing to appreciate recoverability of mesne profits in the present case.*

*3. That the honourable court erred in law and in fact in failing to award mesne profits as prayed while wrongly holding that mesne profits is a special damage claim to be specifically pleaded.*

*4. That the Learned Magistrate erred in law and in fact in failing to appreciate that the court has discretion to assess mesne profits where the same are deemed to be recoverable in compensation.*

*5. That the court erred in law and in fact in failing to utilize the expert evidence availed by the Valuer/Assessor in his report on assessment on rent in awarding mesne profits*

## **Submissions**

7. Both the appeal and the cross-appeal were canvassed through written submissions. The appellant filed written submissions dated 24/10/2019 through the Firm of Ataka, Kemori & Okoth Advocates. On the first ground of appeal, the appellant submitted that the trial court erred in disregarding the following previous High Court interim orders: (i) Order issued on 27/10/1999 by Sheik Amin J in Nairobi HCCC No 2433 of 1998; and (ii) Order issued on 22/10/2001 by Ringera J in Nairobi HCCC No 1804 of 1999. Counsel contended that the sale and transfer of the suit property to the deceased violated the above orders and was consequently illegal, null and void. Relying on the ELC decision in **Pauline Muthoni Njoroge v James Njoroge Kamocho & Another [2018] eKLR**, counsel submitted that the transfer to the deceased was null and void and the trial court had erred in upholding it.

8. Counsel for the appellant further submitted that Hon T W C Wamae (**as she then was**) had in her ruling rendered on 9/10/2002 found that the orders issued by Ringera J were still in force when the suit property was transferred to the deceased. Counsel faulted the trial court for arriving at a different finding on the same issue after full trial.

9. On the fourth ground of appeal, counsel submitted that the trial court erred in assuming that the appellant did not file a statement of defence, without bothering to enquire from the parties. Counsel argued that due to this error, the trial court ended up framing issues and rendering a determination without the benefit of the appellant's pleadings.

10. On the cross appeal, counsel for the appellant argued that damages in form of *mesne profits* are only available in a landlord and tenant relationship, hence the trial court properly declined to award the respondent *mesne profits*. It was further argued that *mesne profits* are special damages which must be specifically pleaded and proved, and the respondents having failed to specifically plead and prove *mesne profits*, they were not entitled to them. Counsel urged the court to allow the appeal and dismiss the cross appeal.

11. The respondents filed written submissions dated 5/2/2020 through the firm of Wanyonyi & Muhia Advocates. On the first ground of the main appeal, counsel for the respondents submitted that the Learned Magistrate gave due regard to the previous interlocutory orders alluded

to by the appellant before arriving at the findings she made. Counsel added that the trial court duly considered the ruling rendered by Hon T W C Wamae (**as she then was**) on 9/10/2002 and indicated that, as a trial court, she was not bound by the interlocutory findings of the court. On the fourth ground of appeal, counsel submitted that no prejudice was occasioned to the appellant by the trial court's conclusion that the appellant had not filed a statement of defence. It was argued that the trial court considered all the evidence placed before it by the appellant. Counsel contended that even if the appellant's defence had been considered, the trial court would inevitably have arrived at the same decision because no part of the decision arrived at, or the issues framed, departed from the defence.

12. On the cross-appeal, counsel for the respondent cited Section 2 of the Civil Procedure Act and Order 21 rule 13 of the Civil Procedure Rules and contended that *mesne profits* are not restricted to land-tenant relationships. Relying on the decisions in (i) **Cleophas Wanyonyi v Walter Otieno [2019] eKLR**, and (ii) **Kenya Hotel Properties Limited v Willesden Investment Limited [2009] eKLR**, counsel urged the court to allow the cross-appeal.

### **Analysis and Determination**

13. I have considered the entire record of appeal, the grounds of appeal, the grounds of cross-appeal, and the parties' respective submissions. The appellant raised four grounds of appeal. The first three grounds of appeal focus on the trial court's interpretation of some previous interlocutory court orders. The fourth ground of appeal raises the question as to whether or not there was a mis-trial occasioned by the trial court's decision to render a judgment from the premise that the appellant did not file a defence, when in fact, the appellant filed and served a statement of defence. I will first dispose the fourth ground of appeal because if it succeeds and a retrial is ordered, it will be prejudicial for the court to pronounce itself on issues falling for determination in the fresh trial.

14. The broad issue raised in the cross-appeal is whether the Trial Magistrate erred in her finding that *mesne profits* were not available because the parties involved were not in a landlord-tenant relationship. I will dispose the grounds in the main appeal before I turn to the cross-appeal.

15. The fourth ground of appeal is that the Trial Magistrate erred in assuming that the defendant failed to file a statement of defence and in proceeding to make a determination without considering the defendant's defence. The respondents do not dispute the fact that the Trial Magistrate made her determination from the premise that the defendant did not file a defence. Paragraphs 4 to 6 of the impugned Judgment read as follows:

*“4. The defendant participated in this suit. However, I have perused the court record over and over and do not see any statement of defence to this suit. There is only an assessed copy of a memorandum of appearance dated 17th April 2003, drafted by Okwach & Company Advocates. It bears no official court stamp and no accompanying Court receipt to ascertain whether it was properly filed. The court record does not also have an endorsement from the registry by way of a stamp (as is the practice) indicating that the said memorandum of appearance and any defence to this claim was ever filed. I also note that from the final submissions filed by M/s Wanyonyi & Muhia Advocates for the plaintiff and M/s Akoto & Akoto advocates on record for the defendant, they make no reference to any defence filed in this suit. There is also no reply to defence on record. This is a very old matter where the record will show that the defendant herein was also litigating against Fidelity Commercial Bank Limited in the High Court over the same suit property. Could the defendant have failed to file a defence to this suit?*

*5. A party's pleadings assist the court to appreciate the nature of their claim or defence. Parties are also bound by their pleadings. It is difficult to conclude that any defence was filed in view of the issues highlighted above.*

*6. Be that as it may, none of the parties ever noticed or raised the issue of defendant's defence hence I will leave the matter there. I will only rely on her witness statement filed on 11th March 2019”*

16. The cardinal role of pleadings in a civil trial cannot be gainsaid. Pleadings constitute the foundation upon which parties' respective cases are tried and determined. Secondly, pleadings are the foundation upon which evidence is built. Without pleadings, there is no basis for leading evidence. Underscoring the key role of pleadings in a civil trial, the Supreme Court of Kenya stated as follows in **Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR**.

*“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....”*

17. It is not disputed that the appellant filed and served a statement of defence. The Trial Magistrate did not, however, trace the court copy of the defence in the court file. Without inviting the parties in the suit to address her on the issue of the missing statement of defence, she proceeded to draw a statement of issues and rendered a determination from the premise that the defendant did not file a defence. In my view, this was a grave error. Without due regard to the parties' respective pleadings, the trial court had no basis upon which she framed the issues she rendered herself on. No proper trial could be conducted, and no proper determination could be rendered without reference to the duly filed and served pleadings of the appellant.

18. Without saying much, this was a fundamental error to the extent that the entire trial, together with the resultant judgment, can only be described as a mistrial. Consequently, I will allow the appeal on that ground.

19. Having made a finding that there was a mistrial warranting a fresh trial, I will not render myself on the first three grounds of appeal because they revolve around issues that will come up for determination during the fresh trial. A pronouncement on them might prejudice the

parties to this appeal during the fresh trial. I now turn to the cross-appeal.

20. The respondent's cross-appeal focused on the trial court's failure to grant *mesne profits* and the reasons advanced for the refusal. The Trial Magistrate rendered herself as follows in relation to *mesne profits*.

*“From the definition of mesne profits, it is clear that it is particularly recoverable where the tenant remains in wrongful possession of premises beyond the tenancy period. It is also noteworthy that this is a special damages claim. The plaintiff claimed mesne profits but did not specifically plead the sum claimed. Moreover, the circumstances between the parties before me was not a landlord-tenant relationship. I am therefore not persuaded that the plaintiff is entitled to mesne profits.”*

21. Section 2 of the Civil Procedure Act defines mesne profits in relation to property as:

*“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”*

22. The **Right Hon Sir Robert Megarry and Sir William Wade** in the Eighth Edition of their Book **“The Law of Real Property”** make the following exposition on *mesne profits*:

*”(2) MESNE PROFITS. As against a trespasser, the owner, or a person in possession or having a contractual or statutory right to possession, may claim damages for the trespass. In making such a claim for “mesne profits” as it is traditionally called, the owner may elect to seek either restitution or the benefit which the defendant has received or damages for the loss he has suffered*

*i. Usually the owner will claim compensation for having been deprived of the use and occupation of the land. This is assessed according to the current open market value of the land, normally the ordinary letting value. The landowner is entitled to this sum “whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself”. Although this claim is distinct from the claim for compensation for use and occupation which lies where there is some kind of tenancy between the parties, as explained later, there may be no practical distinction between the two.*

*ii. A landowner may seek restitution for the benefit received by the defendant where he cannot claim the ordinary letting value, because, e.g the property is not available for letting on the open market.”*

23. **Black's Law Dictionary, Tenth Edition**, defines an action for *mesne profits* as:

*“a law suit seeking damages suffered by a landowner who has succeeded in a common law action of ejectment whereby the plaintiff may recover for both the use of the land during the wrongful occupation and the costs of ejectment.”*

24. The Court of Appeal in **Mistry Valji v Janendra Rainchard & 2 others [2016] eKLR** adopted with approval the definition of *mesne profits* by the Privy Council in **Invergue Investments v Hacketh [1995] 3 ALL ER 842** in the following words:

*“This is a form of an ordinary claim for mesne profits, that is to say, a claim for damages for trespass to land.”*

25. It is clear from the above exposition and jurisprudence that *mesne profits* are not restricted to landlord-tenant relationships. As a common law concept, *mesne profits* are damages which accrue to a property owner against a person in wrongful possession of the property. It is not a mandatory requirement that the property owner proves a previous tenancy relationship before an award of *mesne profits* is made. The trial magistrate therefore erred in her finding that *mesne profits* are limited to landlord-tenant relationships. In light of this error, I will similarly allow the cross-appeal.

26. Both the main appeal and the cross-appeal have succeeded. The errors giving rise to the appeal and to the cross-appeal were committed by the trial court. In the circumstances, each party will bear their respective costs of the appeal and the cross-appeal. Costs of the impugned trial shall be in the discretion of the trial court upon conclusion of the fresh trial.

#### **Disposal Orders**

27. In light of the above findings, I make the following disposal orders in relation to both the appeal and the cross-appeal herein:

*a) Both the appeal and the cross-appeal are allowed in terms of order (b) below.*

*b) The Judgment of Hon A M Obura, Senior Principal Magistrate, rendered on 10/6/2019 in Nairobi CMCCC No 6427 of 2002, is set aside.*

*c) Nairobi CMCCC 6427 of 2002 is remitted back to the Chief Magistrate Court for fresh hearing before a magistrate other than Hon A M Obura.*

*d) Costs of the impugned trial shall be in the discretion of the trial court upon conclusion of the fresh trial.*

*e) Parties shall bear their respective costs of the appeal and the cross-appeal herein.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JULY 2020**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Mr Ataka for the Appellant

Ms Wanyonyi for the Respondent

Court Clerk - June Nafula