



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

E.L.C. NO 143'B' OF 2014

JOHN MITHAMO NJIKA.....PLAINTIFF

VERSUS

KELLEN NDAGALA NGUUMIRI.....DEFENDANT

JUDGEMENT

Introduction

In this case, I am required to write a judgement based on the evidence of the plaintiff taken by Lady Justice Ong'udi. She had taken the evidence of the plaintiff following the entry of an interlocutory judgment in favour of the plaintiff. The plaintiff seeks the following orders from this court:

1. An order of eviction.
2. An award of mesne profits.
3. General damages for trespass.
4. Costs of the suit.

The defendant was served and failed to enter appearance. He also failed to file a defence to the claim. As a result, the case was set down for formal proof and the only evidence tendered was that of the plaintiff.

The Case for the Plaintiff

In his evidence, the plaintiff has stated that he is the registered owner of land parcel number Embu/Mavuria/1267, in regard to which he produced a title deed as P. Ex 1. The title deed shows that the land is 3.2 hectares. The plaintiff's further evidence is that the defendant entered on the suit land illegally in 2002.

He therefore claims mesne profits, general damages and costs. In respect of mesne profits and general damages, he stated in his evidence as follows: ***“I would wish to be given Shs 100,000/= as mesne profits. Even for damages, I would ask for Shs 100,000/.”***

The Applicable Law

In the light of the evidence which was produced by the plaintiff in the absence of the defendant, I am required by law to consider the evidence as to whether or not it is credible. I am also required to

consider whether the claim in respect of both the claim for mesne profits as well as for general damages is proper in law. According to Court of Appeal in **Kenya Hotel Properties Limited v Willesden Investments Ltd (2009) KLR 126**, in a claim for mesne profits, there has to be evidence that the plaintiff is the owner of the property upon which the claim is based.

In this regard, the plaintiff has to show either that he is the registered owner of the suit land or he is in lawful occupation. That case also stands for the proposition that mesne profits is another term for damages for trespass. In other words, mesne profits mean one and the same thing as general damages for trespass. The meaning of mesne profits was described by the Court of Appeal in the above case as follows:

“This is in form of an ordinary claim for mesne profits, that is to say a claim for damages for trespass to land..... The trespass thus lasted for a continuous period of 15½ years. The question for decision is the appropriate measure of damages. Mr Mowbray QC. made clear to the Board, as he had already made clear in the court below that Mr Hackett was claiming a reasonable rent for the apartments throughout the period of the trespass. This is the basis on which damages for mesne profits are awarded everyday in the County Courts.”

And to lend credence to this Stroud's Judicial Dictionary 4th Edition Volume 3 describes *mesne* profits as:-

“Another term for damages for trespass arising from particular relationship of landlord and tenant.”

Issues for Determination

In the light of the foregoing evidence, the following are the issues for determination:

1. Whether or not the plaintiff is the owner of the suit land.
2. Whether or not he is entitled to an order of eviction.
3. Whether or not he is entitled to be awarded both the *mesne* profits in the sum of Shs100,000/= and general damages in the sum of Shs 100,000 shillings.
4. The costs of the suit.

Evaluation of the Evidence Findings and the Law

I have considered the evidence and I find that the plaintiff was the registered owner of the suit land. I also find that the defendant has been in illegal occupation of the suit land since 2008. She is therefore a trespasser. The only issue in terms of damages to be awarded is whether the plaintiff has laid the foundation for the two claims of the damages suffered. In this regard, I find that the plaintiff has not laid any foundation for the damages he claims.

There is no evidence to show the use to which this land was put and how much money he got from the suit land. The evidence does not show that it was being used as agricultural land either for subsistence or commercial farming. The plaintiff has not laid the foundation as to how he arrived at the figure of Shs 100,000/- as *mesne* profits.

Furthermore, he has also not produced evidence to show how he arrived at the figure Shs100,000 as general damages. Both claims for *mesne* profits and general damages are not proper in law. *Mesne* profits mean one and the same thing as general damages for trespass. As neither of these claims was proved by evidence, I am unable to assess the amount of damages awardable as *mesne* profits.

Verdict and Disposal Orders:

In the light of the above findings, I make the following orders:

1. An order of eviction is hereby granted against the defendant.
2. The claim for *mesne* profits is hereby dismissed.
3. The claim for general damages is also dismissed.
4. Costs and interests are awarded to the plaintiff .

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **5th** day of **FEBRUARY, 2015**

In the presence of Mr Andande holding Mr Momanyi and in the absence of the defendant.

Court clerk Mr. Muriithi.

Right of appeal under Section 66 Civil Procedure Rules.

J.M. BWONWONGA

JUDGE