



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1 OF 2013

JOSHUA SELELO MUTUTUA.....PLAINTIFF

VERSUS

ESTHER KANINI NZIMBI.....1ST DEFENDANT

MUNGORI OMAMBIA.....2ND DEFENDANT

JUDGMENT

The Plaintiff, Joshua Selelo Mututua, filed this suit vide his Plaint dated 18th May 2012 filed in court on the same date in which he sought for judgment to be entered against the Defendants as follows:

1. An eviction order directed to the Defendants ordering them forthwith to vacate the Plaintiff's parcel of land namely KAJIADO/KAPUTIEI CENTRAL/2308 (hereinafter referred to as the "Suit Land");
2. A permanent injunction restraining the Defendants from trespassing upon, ingressing into, cultivating, selling, disposing off or in any other manner interfering with the Plaintiff's quiet possession and ownership of the Suit Land;
3. General damages;
4. Mesne profits from the date of filing this suit;
5. Costs of this suit;
6. Interest on (3), (4) and (5) above until payment in full.

The Defendants were duly served with Summons to Enter Appearance and duly entered appearance through their Advocates Ondabu & Co. Advocates on 3rd July 2012. However, in default of filing defence, interlocutory judgment was entered against the Defendants on 12th August 2013 upon the Plaintiff's request. The suit proceeded for formal proof on 25th February 2014 where the Plaintiff appeared as the only witness and gave his evidence. The Plaintiff stated that he is the registered owner of the Suit Land and produced a copy of his title deed. He further stated that the Defendants entered the Suit Land on or about February 2012 without any colour of right and proceeded to cultivate it while all along being aware that the Suit Land belonged to the Plaintiff. The Plaintiff further stated that the Defendants

had resorted to destroying the Suit Land by felling trees, bushes and other vegetation which they were burning to get charcoal. He further stated that he wrote to the Defendants through his lawyer demanding that they cease their illegal activities on the Suit Land, a demand which was not heeded to thereby necessitating the filing of this suit.

The issue for determination is whether the Plaintiff is entitled to exclusive possession of the Suit Land and therefore entitled to the prayers sought in the Plaint enumerated above.

The law is very clear on the rights of a registered proprietor of a piece of land where they hold a valid title deed thereto and this may be found in section 24(a) of the Land Registration Act which provides as follows:

“Subject to this Act, 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.”

In addition, **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 owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. ***On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- b. ***Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

The Plaintiff is the holder of a valid title deed over the Suit Land. That title has not been challenged by the Defendant. According to the law cited above, the Plaintiff is therefore the absolute and indefeasible owner of the Suit Land and is entitled to enjoy all rights and privileges belonging or appurtenant thereto. One of those rights is the right of exclusive possession to the exclusion of all others including the Defendants. I am convinced that the Plaintiff has proved his ownership of the Suit Land and do hereby grant him the eviction order he seeks as well as the permanent injunction set out as prayer nos. 1 and 2 of the Plaint.

On the issue of mesne profits, these are defined in the Free Dictionary as profits which have accrued while there was a dispute over land ownership. If it is determined that the party using the land did not have legal ownership, the true owner can sue for some or all of the profits made in the interim by the illegal tenant, which are thus called "mesne profits". The Plaintiff has also sought for general damages as well as mesne profits. In the case of **KENYA HOTEL PROPERTIES LIMITED v WILLESSEN INVESTMENTS LIMITED [2009] eKLR**, the Court of Appeal stated as follows:

“Our understanding of the above persuasive authorities is that once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass”, since both mean one and the same thing.”

Clearly, the court cannot award both mesne profits and general damages for trespass as has been sought in the Plaint. In this case, while the Plaintiff did allude to the Defendants activities of felling trees on the Suit Land and selling charcoal, there is no indication given of the magnitude of this activity to enable the court properly determine how much to award as mesne profits. Hence, I am unable to exercise my discretion to award the same to the Plaintiff. I also decline to grant any general damages.

However, I do award the Plaintiff costs of this suit together with interest at court rates from the date of this judgment.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY 2014

MARY M. GITUMBI

JUDGE