



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 20 OF 2019**

**PAUL NGASHEMA KAMAU.....PLAINTIFF**

**VERSUS**

**AMINA ALI.....DEFENDANT**

**JUDGEMENT**

By a Plaint dated 5<sup>th</sup> March, 2019, the Plaintiff prays for Judgement against the Defendant for:

- a) An eviction Order directed to the Defendants ordering them to forthwith vacate the Plaintiff's parcel of land namely LR No. Kajiado/ Kaputiei Central/ 5454.
- b) A permanent injunction restraining the Defendants, their families, kin, agents, employees, servants or anyone claiming under them from trespassing upon, ingressing into, cultivating, selling, disposing off or in any other manner interfering with the Plaintiff's quiet possession and ownership of Land Reference Number Kajiado/ Kaputiei Central/ 5454.
- c) Mesne profit.
- d) Costs of this suit.

The Defendant though served on 12<sup>th</sup> March, 2019 as indicated in the affidavit of service sworn by LUCAS S MAINGI failed to enter appearance nor file a Defence.

The matter proceeded for full hearing on 22<sup>nd</sup> July, 2020 where the Plaintiff called one witness.

**Evidence of the Plaintiff**

The Plaintiff as PW1 stated that he is the registered proprietor of land parcel number Kajiado/ Kaputiei Central/ 5454 hereinafter referred to as the 'suit land'. It was PW1's testimony that the Defendant had encroached on the suit land without any permission nor form of authorization from him and proceeded to cultivate the said land. He claimed the Defendant had continued to till the said land and recently constructed temporary mud including mabati structures thereon. He explained that the Defendant had refused to heed the Chief and Elders' Appeal to vacate the suit land.

He reiterates that the Defendant has continued to destroy the suit land by felling trees, bushes and other vegetation which she uses to burn charcoal for economic purposes. The Plaintiff produced a Copy of the Certificate of Title for land parcel number Kajiado/ Kaputiei Central/ 5454 and copy of the Demand Letter dated the 20<sup>th</sup> August, 2018 addressed to the Defendant as his exhibits.

The Plaintiff thereafter filed his written submissions.

**Analysis and Determination**

Upon consideration of the Plaint, Witness Testimony, Exhibits and Submissions the following are the issues for determination:

- Whether the Plaintiff is entitled to vacant possession of the suit land.

- Whether the Defendant should be permanently restrained from interfering with the suit land.
- Whether the Plaintiff is entitled to mesne profits.
- Who should bear the costs of the suit.

As to whether the Plaintiff is entitled to vacant possession of the suit land. The Plaintiff tendered evidence to prove he is the registered proprietor of the suit land and was issued with a Certificate of Title to that effect, which he produced as an exhibit. He contends that the Defendant has encroached on the suit land and declined to move from it, despite several requests from him including intervention from the elders. I wish to make reference to section 26(1) of the Land Registration Act which provides as follows”

**"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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. '**

Further, Section 24 (a) of the Land Registration Act further stipulates as follows: '**subject to this Act, the registration of a person as a 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 the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.'**

See also the decisions in **Margaret Njeri Wachira V Eliud Waweru Njenga (2018) eKLR** and **Vincent Koskei V Bernard Koskei (2018) eKLR**.

From the legal provisions cited above, as well as associating myself with the quoted decisions, I hold that since the Plaintiff is the absolute proprietor of the suit land and his Certificate of title has not been challenged, he is entitled to all rights and privileges belonging or appurtenant thereto and hence entitled to protection of the law as envisaged in sections 24, 25 and 26 of the Land Registration Act. Further, based on these findings, I hold that the Plaintiff is indeed entitled to vacant possession of the suit land.

As to whether the Defendant should be permanently restrained from interfering with the suit land.

The Plaintiff claims the Defendant has continued to cut down trees on the suit land which she uses to make charcoal. Further, she recently put up a temporary structure thereon and continued to cultivate the suit land. She has declined to move from the suit land despite being asked to do so. Since the Plaintiff is the registered proprietor of the suit land and holds a Certificate of Title to that effect. Further, since the Defendant did not controvert the Plaintiff's averments, I find that she is a trespasser and in line with the principles established in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**, I find that the Plaintiff has established a prima facie case as against the Defendant who should hence be permanently restrained from interfering with the said land.

As to whether the Plaintiff is entitled to mesne profits.

The Plaintiff has sought for mesne profits as against the Defendant who he claims has encroached on his land.

Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:-**"mesne profits", in relation to property, means 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;'**

While Order 21 Rule 13 of the Civil Procedure Rules provides as follows:-**13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree— (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; (c) directing an inquiry as to rent or mesne profits from the institution of such suit until— (i) the delivery of possession to the decree-holder; (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or (iii) the expiration of three years from the date of the decree, whichever event first occurs. (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.**

It is trite that mesne profits should be proved. As per the evidence of the Plaintiff, he did not provide details of when the Defendant entered the suit land nor the extent of her encroachment. I note that the suit land measures 19.16 hectares and the Plaintiff did not clarify whether the Defendant is in actual possession of the whole portion or not.

In the case of **Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR**, the Court of Appeal while dealing with the issue

of mesne profits held as follows:

**“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”**

To my mind, while associating myself with the decision and legal provisions cited above, I find that it was incumbent upon the Plaintiff to place materials before Court to prove his claim for mesne profits. However, based on the evidence before me, insofar as the Plaintiff’s claim against the Defendant remained uncontroverted, he failed to discharge his burden of proof on the claim for mesne profits and I will decline to award him the same.

Who should bear the costs of the suit.

Since the Plaintiff has been inconvenienced with the Defendant’s defiance to move from the suit land, I find that he is entitled to costs.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will proceed to make the following orders:

a) The Defendant be and is hereby directed to give vacant possession of LR. No. KAJIADO/ KAPUTIEI CENTRAL/ 5454 to the Plaintiff within 90 days from the date hereon, failure of which an eviction order will issue.

b) The Costs of the suit is awarded to the Plaintiff

**Dated signed and delivered in open court at Kajiado this 21<sup>st</sup> day of October, 2020**

**CHRISTINE OCHIENG**

**JUDGE**