



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 67 OF 2007

ISAAC MUNYAO KISINI

(Suing as personal representative/administrator of the Estate of

GIDEON KISINI MUSAU, deceased).....PLAINTIFF

VERSUS

JAMES MUTUA MUSEMBI.....DEFENDANT

JUDGMENT

1. In the Plaint dated 1st August, 2007, the Plaintiff averred that at all material times, the Estate of the deceased, Gideon Kisini Musau, comprised of a parcel of land known as Matungulu/Sengani/1154; that the Defendant has illegally and fraudulently claimed title over a portion of the said land and that orders of eviction, permanent injunction and general damages should issue as against the Defendant.
2. In his Statement of Defence, the Defendant averred that he is the lawful owner of the suit land; that he has been in possession of the suit land since the year 2000 and that the suit is fatally defective for non-joinder of the other personal representatives of the Estate of the deceased.
3. Vide an Application dated 20th December, 2010, the Defendant was allowed by the court to serve on Hellen Muthoki Kiwia a Third Party Notice. The said Third Party filed a Defence in which she denied the Plaintiff's allegations.
4. When this matter came up for hearing on 3rd May, 2018, the Plaintiff's and the Defendant's advocate entered into a consent in the following terms:

“Prayer (b) and (c) in the Plaint to be granted. Prayer (a) and (d) to proceed by way of submissions.”
5. The advocates for the Plaintiff and the Defendant further agreed to argue prayers (a) and (d) of the Plaint by way of written submissions. The Plaintiff's advocate submitted that the Defendant has been wrongfully occupying the suit land since the year 2000; that the Defendant is liable to pay the Plaintiff damages for intermeddling and interfering with the deceased's Estate and that the Defendant should be made to pay Kshs. 200,000 as damages for trespass.
6. The Plaintiff's counsel submitted that the Plaintiff is also entitled to *mesne* profits of Kshs. 5,000,000; that the said amount is on the basis of the long period of eighteen (18) years that the Defendant has been in occupation of the land and that the applicable monthly rent is Kshs. 21,000 per month.
7. On the issue of costs and interest, the Plaintiff's counsel submitted that the Plaintiff being the successful party, he is entitled to the costs of the suit and interest; that costs ought to follow the event; that the consent filed did not compromise on costs and that an order for costs should issue. Counsel relied on numerous authorities which I have considered.
8. The Defendant's counsel submitted that the Plaintiff was to prove all the allegations in the Plaint including the prayer for *mesne* profits; that *mesne* profits is a form of special damages which must be specifically pleaded and proved and that having failed to specifically plead and prove the amount, the claim should fail.
9. On the issue of costs, the Defendant's advocate submitted that the court should consider the following before awarding costs: that the Defendant was an innocent purchaser of the suit land from the Third Party; that the Defendant has withdrawn his interest in the suit land and that having vacated the land that he has already developed, the Defendant should not be punished further by being condemned to pay the costs of the suit. The Defendant's counsel relied on several authorities which I have considered.

10. This suit was compromised by the parties as follows:

“a. Permanent injunction orders do and are hereby issued restraining the Defendant/his agents/servants from intermeddling and interfering with the deceased’s Estate or dealing with it in any manner whatsoever.

b. Orders be and are hereby issued evicting the Defendant from the portion of land. No. Matungulu/Sengani/1154 now occupied by him.

c. That parties file submissions on prayers (a) and (d) of the Plaint for general damages for intermeddling with the deceased’s Estate and mesne profits, costs and interests, respectively, for the court to make a decision thereon.”

11. In a nutshell, the parties compromised the suit in favour of the Plaintiff, save for the issue of general damages, mesne profits, costs and interest.

12. The Defendant admitted to having trespassed on the suit land. It is true, as submitted by the Plaintiff’s advocate, that the court can award damages for trespass in appropriate cases. Indeed, having been on the land for more than eighteen (18) years, the Plaintiff is entitled to damages for trespass. As was held by Odeny J. in the case of **Bhagwani Singh Kalsi vs. National Housing Corporation (2017) eKLR**, it is at the discretion of the court to assess the reasonable damages to be awarded to the Plaintiff. In awarding reasonable damages for trespass, the court ought to take into account, amongst other factors, the length of time of the illegal occupation, the nature of the trespass and whatever the trespasser was doing on the land.

13. It is not clear to this court the nature of the trespass by the Defendant and what the Defendant was doing on the land. Indeed, having compromised the other limbs of the suit, the Plaintiff should have set down the matter for hearing to lead evidence on the issue of the nature and extent of the trespass to enable the court assess the payable damages for trespass. Having not done so, the court will be on a speculative expedition to award reasonable damages for trespass. In the circumstances, the prayer for general damages for trespass fails.

14. Indeed, the failure by the Plaintiff to specifically plead and prove the claim for mesne profits means that the same cannot be allowed by the court. As was held by the Court of Appeal in the case of **Peter Mwangi Mbuthia vs. Samow Edin Osman (2014) eKLR**, it is incumbent upon the Plaintiff to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. The Plaintiff did not lay a basis for the award of Kshs. 5,000,000 as mesne profits, which figure was only raised in the submissions. The court cannot therefore allow the claim of mesne profits.

15. The suit was compromised in favour of the Plaintiff. The general rule is that costs should be awarded to the successful party. As was held in the case of **Morgan Air Cargo Limited vs. Everest Enterprises Limited (2014) eKLR**, it does not necessarily mean that where parties have entered into a consent to settle a matter, no costs should be awarded.

16. The Plaintiff having instructed an advocate to file the suit, and the Defendant having filed a Defence, it follows that the successful party, who is the Plaintiff, should be reimbursed for legal fees and other expenses it incurred in the proceedings. Indeed, it took more than ten (10) years for the Defendant to compromise the suit, by which time the Plaintiff had expended money on the suit. Consequently, the prayer for costs is allowed.

17. In the circumstances, and for the reasons I have given above, the only prayer that is allowed by the court, in addition to the consent Judgment, is as follows:

a. The Defendant to pay the costs of the suit

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE