



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 745 OF 2015 (FORMERLY HCCC NO. 183 OF 2011)

DICKSON OPOLA OKUMU.....PLAINTIFF

VERSUS

TOM ODHIAMBO ODARI.....1ST DEFENDANT

JOHN OWINO ODARI.....2ND DEFENDANT

JUDGEMENT

1. Dickson Opola Okumu, the Plaintiff, vide the plaint dated the 25th October 2011 and amended on the 24th May 2012, sued Tom Odhiambo Odari and John Owino Odari, the Defendants, seeking for an order of permanent injunction in respect of Kisumu/Konya/1649, eviction of the Defendants from the said land, general damages for trespass and mesne profits, costs and interests. The Plaintiff avers that he is the registered proprietor of the land parcel Kisumu/Konya/1649, the suit land. That at the beginning of 2011 or thereabout, the Defendants unlawfully, without colour of right or permission trespassed onto the land and commenced cultivation. That the Plaintiff's effort to have the Defendants vacate from the land failed and after serving demand notice, filed this suit.

2. The Defendants denied the Plaintiff's claim through their defence dated the 19th July 2012. They aver that the Plaintiff fraudulently registered himself as the suit land's proprietor. They set out the particulars of fraud as follows;

- **Transferring the land without obtaining letters of administration.**
- **Transferring the land without consent of the Defendants, who are the administrators of the estate of Oindo Ogoro (deceased).**
- **Failing to exhibit consent of the Land Control Board**
- **Colluding with the Chief to steal the land from the defendants.**

The Defendants therefore pray for the Plaintiff's suit to be dismissed with costs.

3. The Plaintiff testified as PW1 and told the court that he had bought the suit land from Peter Kowino. That after attending the land control board and obtaining the consent, he got registered as proprietor in 1998. That the Defendants were on the land when he bought it. That he had set up a semi-permanent house on the land in 2000 which he was using whenever in Kisumu but the Defendants demolished it in 2008. He produced a copy of the title deed and certificate of official search issued on the 5th November 2016, showing that he became the registered proprietor of Kisumu/Konya/1649 on the 26th August 1998.

4. The Plaintiff closed his case on the 30th January 2017 and defence hearing was fixed for the 15th June 2017. The hearing was on application of the defence rescheduled to the 22nd February 2018, and then the 29th May 2018 when the defendants closed their case without tendering any evidence. The court then directed that written submissions be filed within the set timelines. That only Counsel for the Plaintiff filed theirs dated 6th June 2018.

5. The following are the issues for the Court's determinations;

- a) Whether the Plaintiff is the legal registered proprietor of Kisumu/Konya/1649, suit land.**
- b) Whether the Defendants have any legal or beneficial interest over the suit land.**
- c) Whether eviction and injunction order should issue against the Defendants.**
- d) Whether the Plaintiff is entitled to general damages, and if so how much.**

e) Whether the Plaintiff has proved that he is entitled to mesne profits, and if so how much

f) Who pays the costs of the suit.

6. The court has carefully considered the pleadings filed by both sides, the oral and documentary evidence tendered by PW1, written submissions by Counsel for the Plaintiff, the cited authority and come to the following determinations;

a) That though the Defendants filed a statement of defence denying the Plaintiff's claim of ownership of the suit land, and among others, alleging that the land was registered in the name of a deceased person and that the Plaintiff had obtained registration through fraud, they failed to offer proof to support their averments. The provision of **Sections 107 and 112 of the Evidence Act Chapter 80 of Laws of Kenya** are relevant in this instance and states as follows;

“107 (1) Whoever desires any court to give Judgment as to why any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

“112. In Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

That the Defendants had alleged that they were the administrators of the estate of Oindo Ogoro (deceased), who was the suit land's registered proprietor, but did not avail any documentary evidence from the Land Registrar and the Succession court to confirm those alleged facts.

b) That the Defendants' averments that the suit land had been registered in the name of Oindo Ogoro (deceased); that they are the administrators of the said deceased estate; and that the Plaintiff obtained registration of the suit land fraudulently, remain allegations as no evidence aimed at proving those alleged facts has been availed by the Defendants, who had the burden of proof. That Superior Courts have pronounced themselves on similar situations as shown in the following two cases;

- **CMC Aviation Ltd vs Cruisair Ltd (No. 1) [1976-80] IK.LR. 836 at page 837**, when Madan JA, held;

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigations until their truth has been established or otherwise they remain unproven.....”

- **Shaneebal Limited vs County Government of Machakos [2018] eKLR** where Odunga J, cited with approval the following finding in **Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001**;

“Again, in the case of Trust Bank Limitedthe Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

That from the foregoing, and noting that **Section 26 of Registration of Land Act, No. 3 of 2012** obligates the court to take the person named in the certificate issued by the Land Registrar as the absolute and indefeasible owner, subject only to the encumbrances, and further noting that the Plaintiff has availed a copy of the title deed and certificate of official search, confirming that he is the duly registered proprietor, the court therefore find and hold that he has been the legal owner of the suit land since being registered as such on 26th august 1998. That the Plaintiff is therefore entitled to the rights and privileges of a registered proprietor as set out in **Sections 24 and 25** of the said Act.

c) That the Plaintiff conceded during cross-examination that the Defendants were already using the land when he bought it and got registered as proprietor. The court finds that in the absence of evidence that the Defendants had agreed to give vacant possession by a certain date, and that they later declined, then general damages for trespass would not be payable under the circumstances. That general damages would only attach if the Plaintiff had the Defendants to vacate or evicted, and then they re-enter without his permission and or any legal right. That the Court of Appeal in the case of **Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR** held as follows on mesne profits;

“126. This court in Peter Mwangi Mbuthia & Another vs Samow Edin Osman [2014] eKLR expressed that it is upon a party to place evidence before the Court upon which an order of mesne profits could be made. It was stated;

“As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint and it appears to us prima facie, that there was no evidence to support the actual figure awarded....That

being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

“We agree with Counsel for the appellant 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 the amount that was neither substantiated nor established.”

126. In **Karanja Mbugua & Another vs Marybin Holding Co. Ltd [2014] eKLR**; it was correctly stated that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provision of **Order 21 Rule 13 of Civil Procedure Act. In Dr. J. K. Bhakthavasala Rao vs Industial Engineers, Nellore AIR 2005 A.P 438**, it was held that mesne profits by its very nature, involves adjudication of a pure question of fact. The onus of proving what mesne profits might, with due diligence, have been recorded in any year lies upon the party claiming mesne profits.

127. A claim for mesne profits is a claim a kin to special damages. It must be pleaded and proved. [see **Mohammed Amina & Ors vs Vakil Ahmed & Ors [1952] ISCR 1133).....”**

That the Plaintiff herein did not specify the amount of mesne profits he was seeking per year, or for the whole period, in his plaint and amended plaint. That further, the Plaintiff did not offer any evidence that would have guided the court in determining the amount of general damages payable. That the figure of Kshs. 6,000,000/= in the submission was not proved by the Plaintiff through evidence. That the decided case of **Rajabali Kassam – T/A Giraffe Sawack Bar vs Total Kenya Ltd [2009] eKLR**, where Kshs. 3,000,000/= was awarded, dealt with aggravated damages which was not pleaded and or proved in this case, and hence not applicable. That under the circumstances, the prayer for general damages and mesne profits fails.

d) That the Defendants have not offered any evidence to establish the existence of any beneficial interests over the suit land that would entitle them to continue using the land that is registered in the name of the Plaintiff. The court therefore finds that they are trespassers who have declined to give vacant possession despite request being made. That accordingly, the Plaintiff is entitled to have the Defendants evicted if they fail to give vacant possession, and thereafter restrained for interfering with his use and enjoyment of the land.

7. That in the view of the foregoing, the court finds that the Plaintiff has proved his case against the Defendants to the standard required by the law. The Court therefore orders as follows;

a) That the Defendants, jointly and severally do vacate and give the Plaintiff vacant possession of Kisumu/Konya/1649 in ninety (90) days, and in default eviction order to issue.

b) That upon the Defendants giving vacant possession of the said land or being evicted, they by themselves, their agents, servants, employees or any of them whomsoever, remain restrained from trespassing upon, constructing, cultivating or in any other way interfering with the Plaintiff’s quiet enjoyment and possession of the suit land, parcel Kisumu/Konya/1649.

c) That Defendants do pay the Plaintiff’s costs of the suit and interests thereon.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 13TH DAY OF MARCH 2019

In the presence of:

Plaintiffs Present

Defendant Absent

Counsel Mr. Kimanga for Oyuko for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE