



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 18 OF 2019

MUKUNYA MUGO A - 1ST PLAINTIFF

WINNIE WAMBUI - 2ND PLAINTIFF

VS

ELIZABETH MUGURE MUKUNYA - DEFENDANT

JUDGMENT

1. On the 4/6/19 the Plaintiffs filed suit against the Defendant seeking the following orders;

a) A declaration that the Plaintiffs as joint trustees are the owners and proprietors jointly of the property described as LOC.1/KIUNYU/172(suit land) measuring approximately 3.41 Hectares the same being held in trust for Mukunya Mugo "B" and that the Defendant's occupation of the same is illegal and unlawful and therefore amounts to trespass.

b) An eviction order to issue against Elizabeth Mugure Mukunya, the Defendant herein requiring her to unconditionally and forthwith vacate the suit premises at her own cost and in the alternative the OCS Kirwara Police Station to conduct the said eviction.

c) A Permanent Injunction to issue against Elizabeth Mugure Mukunya the Defendant herein whether by herself, her servants, agents, representative, employees and/or any other person deriving authority under her restraining her from entering, cultivating, occupying or interfering in any manner whatsoever with the property described as LOC.1/KIUNYU/172 situated at Kiunyu within Murang'a County.

d) An order for the payment of mesne profits from the sales of the coffee beans.

e) Costs of the suit and interests thereon.

2. The Plaintiffs aver that they are the registered owners of the suit land, holding the said land in trust for Mukunya Mugo B. The land was transferred to them by Livingstone Mukunya Mugo, the family patriarch to hold in trust for Mukunya Mugo B, who was then a minor.

3. That the Defendant was allowed by Livingstone Mukunya Muriu, the previous registered owner of the suit land and their grandfather to reside on the suit land temporarily in 2004 as she looked for alternative accommodation. They aver this was after the Defendant had sold all the lands that were given to her by her father the said Livingstone Mukunya Mugo. The Defendant's son was given 2 acres as a gift by his grandfather but he and his mother rejected it.

4. The Defendant was served but failed to enter appearance and or file defence in the suit.

5. At the hearing the Plaintiffs evidence was led by the 2nd Plaintiff who testified and relied on her witness statement filed on the 4/6/19.

6. That Livingstone Mukunya Mugo gave his children and grandsons named after him land as gifts. The Defendant and her son rejected two acres that was given to her son. She was given 4 acres at Kandenderu which she sold to finance her personal travel. That the old man gifted the suit land to her son Mukunya Mugo B who was then a minor. He then appointed the Plaintiffs to hold the land in trust for the minor. That their Livingstone Mukunya Mugo obtained Land Control Board consent in the names of the Plaintiffs as joint trustees of the land but ordered them to hold the registration of the land until after his death so as to continue to enable him continue harvesting coffee and keeping the proceeds for his upkeep until his death.

7. It was her testimony that the said grandfather handed over the original title and the transfer documents and the Land Control Board consent for safekeeping until after his death. He died on the 31/7/2004

8. That the said transfer of the land was effected on the 7/2/2005.
9. That the Defendant has continued to trespass on the suit land despite demands for her to vacate.
10. She produced the list of documents marked PEX No 1-3
11. The Plaintiff filed written submissions which I have read and considered.
12. It is not in dispute that the suit land was originally registered in the name of Livingstone Mukunya Mugo in 1962. It became registered in the names of the Plaintiffs in 2005. A Land Control Board consent issued in 1999 was adduced in evidence.
13. It is the Plaintiffs' case that they are holding the suit land in trust for a beneficiary namely Mukunya Mugo B. This fact is captured in the copy of the green card and the title on part B – proprietorship section.

14. **Section 24 of Land Registration Act provides that;**

“(a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease”.

15. **Section 25**

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

16. **Section 26**

“(1) 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

17. Going by the above sections of the law, and given the evidence adduced including the documentary evidence it is the finding of the Court that the Plaintiffs are registered as joint trustees of the suit land.

18. Section 3 (1) of the Trespass Act, provided that any person who without reasonable excuse entered, was or remained upon or erected any structure on, or cultivated or tilled or grazed stock or permitted stock to be on, private land without the consent of the occupier thereof would be guilty of an offence.

19. Is the Defendant a trespasser? In the case of **Charles Ogejo Ochieng - v- Geoffrey Okumu, (1995) eKLR** the Court of Appeal held that trespass is an injury to a possessory right and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it or a person who is deemed to have been in possession at the time of trespass.

20. In the case of **Entick Vs Carrington (1765)** Lord Camden CJ had this to say:-

“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave.”

21. **Black's Law Dictionary, 9th Edition at page 1642** defines trespass as the unlawful act committed against the person or property of another.

22. The Defendant was served but failed to controvert the Plaintiffs claim. It is the Plaintiffs' case that the Defendant is in illegal trespass and occupation of the suit land since 2005. That despite demand having been given to vacate the Defendant has been adamant. It is on record that the Defendant was served twice but elected not to defend the claim.

23. I concur with the Plaintiffs submissions that continuing trespass is the type that occurs from day to day. In the absence of evidence to the contrary I find no justiciable reason for the continued occupation of the Defendant on the suit land.

24. Further in the absence of evidence to the contrary, the Court finds that the Defendant is in trespass of the suit land. I shall make the appropriate orders in the end.

25. In respect to the issue of mesne profits, it is trite law that mesne profits must be pleaded and proved as it is part of special damages.

26. The Court in the case of **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 profit, we think the Applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit 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 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.”

27. In the case of **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 provisions of **Order 21, Rule 13** of Civil Procedure Act. In **Dr. J K Bhakthavasala Rao –v - Industrial Engineers, Nellore AIR 2005 AP 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 received in any year lies upon the party claiming mesne profits.

28. The Privy Council in the case of **Horsford vs. Bird [2006] UKPC, Privy Council Appeal No. 43 of 2004** held that the formula for calculating mesne profits for trespass to land or for loss of user is assessed on a yearly basis as a percentage of the capital value of the piece of land in question. In the instant case, the valuation report by the 1st to 4th Respondents did not realistically apply the formula enunciated by the Privy Council.

29. The Plaintiffs have not proved that they are entitled to mesne profits. I decline to grant the prayer.

30. It is the finding of the Court that the Plaintiffs have established a prima facie case on account of being the registered owners of the suit land in trust and therefore are entitled to a permanent injunction against the Defendant.

31. In the upshot the Plaintiffs claim succeeds and I grant the orders as follows;

a. A declaration that the Plaintiffs as joint trustees are the owners and proprietors jointly of the property described as LOC.1/KIUNYU/172(suit land) measuring approximately 3.41 Hectares the same being held in trust for Mukunya Mugo “B” and that the Defendant's occupation of the same is illegal and unlawful and therefore amounts to trespass.

b. An eviction order do issue against Elizabeth Mugure Mukunya, the Defendant herein requiring her to unconditionally and forthwith vacate the suit premises at her own cost within a period of 90 days from the date of this judgement.

c. In default eviction to ensue.

d. The OCS Kirwara Police Station to supervise the said eviction to ensure maintenance of law and order.

e. A Permanent Injunction do issue against Elizabeth Mugure Mukunya the Defendant herein whether by herself, her servants, agents, representative, employees and/or any other person deriving authority under her restraining her from entering, cultivating, occupying or interfering in any manner whatsoever with the property described as LOC.1/KIUNYU/172 situated at Kiunyu within Murang'a County.

f. An order for the payment of mesne profits from the sales of the coffee beans is declined.

g. No orders as to costs.

32. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF DECEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Wainaina for the 1st & 2nd Plaintiffs

Defendant: Absent

Irene and Njeri, Court Assistants