REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 513 OF 2017

MAINA KABUCHWA.....PLAINTIFF

VERSUS

GACHUMA GACHERU.....DEFENDANT

JUDGMENT

1. The Plaintiff filed a suit against the Defendant on the 18/12/2017 seeking the following orders;

a) Judgment for Kshs. 450,000/= as prayed in Paragraph 5 (i)-(iv) inclusive of the Plaint, together with the interest at Court Rates, from 27th May 2016, until payment in full, together with interest at Court rates.

b) An order for eviction and/or ejectment of the Defendant by himself, his family members and/or relatives, agents and/or servants and/or anybody else claiming under him from the suit land parcel No.L.R. "LOC.8/MATHARITE/KIAHEHO/592," and demolition of any or any erections constructed onto the suit land parcel by the Defendant, together with interest at Court rates.

c) General damages for Trespass to land and/or illegal occupation of the Plaintiff's Land Parcel LOC.8/MATHARITE/KIAHEHO/592, together with interest at Court rates.

d) Mesne profits for user of the Plaintiff's land including full value of the proceeds of sale of green tea leaves and coffee beans, harvested by the Defendant from the coffee trees and tea bushes on the suit land parcel 'LOC.8/MATHARITE/KIAHEHO/592," from 27th May 2016 until the final determination of this suit, together with interest at Court rates.

e) Costs of this suit together with interest at Court rates.

f) Such further and/or other relief that this Honourable Court may deem fit and just to grant in the circumstances of this case.

2. The Plaintiff avers that at all material times to the suit he is the registered owner of LOC8/MATHARITE/KIAHEHO/592 (suit land). That by an agreement entered in writing between him and the Defendant he allowed the Defendant grazing rights over the suit land for an annual fee which the Defendant breached and instead claimed title under adverse possession. The Defendant filed an originating summons in HCCC No 168 of 198, which case the Defendant lost. Unrelenting the Defendant filed an appeal vide CA 164 of 2011 which appeal was dismissed with costs vide a judgement rendered on 27/5/2016. The Plaintiff wrote a demand to the Defendant through his then Advocates Messrs Gacheru & Company, as well as the area chief demanding that he vacates the suit land but since 2016, he has refused hence this suit. The Plaintiff avers that the Defendant whilst in unlawful trespass of the suit land committed wanton destruction of trees for which he has pleaded and particularized loss in the sum of Khs 450,000/=.

3. The Defendant on the other hand filed a Statement of Defence on the 22/1/18 in which he denied any trespass and reiterated the decision of the superior Courts that held that the Defendant was on the suit land with permission. He averred that the purported demand by the Plaintiff was never served on him. That the letters were served on third parties other than himself. It is his case that had he been served with the demand he would have left the suit land. He stated that he is in fact ready and willing to move out of the suit land and that the suit was unnecessary in that regard and urged the Court to deny the Plaintiff any costs. He stated that he planted the indigenous trees and the teas and coffee on the suit land and therefore belong to him to the exclusion of the Plaintiff. In particular he denied cutting down trees and denied the claim of Kshs 450,000/=.

4. On the 5/3/2018, the Plaintiff filed a Notice of Motion seeking, *inter-alia,* eviction of the Defendant from the suit land. In response to the said application, the Defendant filed a replying affidavit on the 15/3/18 where he intimated his willingness to vacate the land voluntarily. He however disputed the claim on special damages, mesne profits and costs of the suit.

5. On the 2/5/2018 the parties recorded a consent order in respect to the suit in the following terms:-

a. Prayer B in the plaint be and is hereby granted as prayed except for the deletion of the words “together with interest @ Court rates”.

b. The Defendant be and is hereby granted 60 days from today to give vacant possession of the suit land parcel LOC.8/MATHARITE/KIAHEHO/592 to the Plaintiff.

c. Prayers a,b,c & e of the plaint to go for trial.

d. The Notice of Motion filed on 3/3/18 and dated 2/3/18 be and is hereby marked settled.

6. At the trial, the Plaintiff gave evidence and reiterated the contents of his Plaint. He accused the Defendant of refusing to heed the demand letter sent to him through his then Advocates on record to vacate the suit land. That instead he has continued using the land, cutting down trees, and picking tea and coffee. That the value of the cut trees is Kshs 150,000/- and the tea bushes is Kshs 100,000/-. That he lost money from being prevented from using the land and has claimed Kshs 200,000/- making a total claim for loss of trees, tea and use in the sum of Kshs 450,000/-.

7. On whether the Defendant received the demand letter, he stated that he did not have any evidence to support any receipt of the demand letter by the Defendant other than to state that the letter was sent through the area chief. He averred that they later met at the chief’s office with the Defendant where the delivery of the letter to the Defendant was confirmed.

8. During cross examination he stated that he did not produce any valuation report to ascertain the number of trees and tea cut and their values. He neither produced an assessment report from the agricultural office on the production of tea made by the Defendant during the period as well as the profits that he derived from the same.

9. Further, he stated that he allowed the Defendant to occupy the land and plant trees. He confirmed that though he had left the farm he did cut the trees that he had planted which belonged to the Plaintiff. He stated that the Court of Appeal determined that the land and the trees and teas thereon belonged to him.

10. The Defendant while resisting the Plaintiffs’ claims gave evidence and stated that he has vacated the suit land and the Plaintiff sold the land afterwards. He denied any destruction of trees and teas on the suit land and insisted that the said trees are still on the land. He stated that he filed suit seeking title by way of adverse possession and the two superior Courts upheld that he was in occupation with the permission of the Plaintiff. He had a licence to deliver tea leaves to the local factory. He denied receiving any demand letter from the Plaintiff to vacate the suit land either from the Chief or attended any meeting at the Chief’s office. He stated that he continued harvesting tea and coffee from 27/5/16 to May 2018 but was cagey on the amount of money earned during the period. That the reason why he did not move out was because he was waiting for a demand letter instructing him to vacate. He stated that the Plaintiff did not request him to care for the farm. However, as an occupier of the land he stated that he took good care of the suit land.

11. Parties filed written submissions I have carefully read and considered.

12. The key issues for determination are;

a. Whether there was any trespass by the Defendant on the Plaintiff’s land

b. Whether the Plaintiff is entitled to general damages for trespass and or illegal occupation of the Plaintiff’s land.

c. Whether the Plaintiff is entitled to special damages in the sum of Kshs 450,000/-

d. Whether the Plaintiff is entitled to mesne profits for the use of the land including full value of the sale of green tea and coffee beans harvested by the Defendant from the 27/5/2016 till the determination of the suit.

e. Who meets the cost of the suit?

A. Was there trespass by the Defendant on the Plaintiffs land?

13. It is the Plaintiffs case that upon the delivery of the judgement of the Court of Appeal in his favour he caused a demand letter to be issued to the Defendant to vacate the suit land. I have seen the two demand letters dated the 27/5/16 addressed to Gacheru & Company, Advocates requesting him to advise his client, the Defendant, to vacate the suit land within 7 days from the date of the letter failing which he would be forcefully evicted. The same letter noted that the Defendant had embarked on wanton destruction of trees and selling them for his own use. He was to cease immediately from picking any tea or coffee and further that he should not touch even a twig of any tree on the land. Additionally, a similar letter was sent to the Chief, Matharite Location enclosing the said judgement and urging the Chief to evict the Defendant within 24 hours in view of the judgment. There is an affidavit of service sworn by one Boniface Nganga Ngaara on the 4/7/2016 deponing how he served the Chief who declined to sign on the Return of Service.

14. In response, the Defendant has argued that he is not a trespasser as both the superior Courts held that he occupied the land with the permission of the Plaintiff and therefore he cannot have trespassed. He referred to the Judgement where the Court had held that the trees and crops the Plaintiff did not deny that the Defendant planted them and even the Defendant was registered at the factory as the owner of the tea bushes. He concluded that the Plaintiff did not plant anything on the suit land. The Defendant disputed that he was served with a notice to vacate and referring to the letter addressed to the Chief on the 27/6/16, he stated that the same was not served on him but the Chief. That when the Plaintiff filed this case, he immediately acceded in his defense that he was ready to vacate the suit land and indeed did that in the

month of May 2018. Quoting order 3 rule 2 of the Civil Procedure Rules the Defendant faulted the Plaintiff for not complying with the said rule, which would have made filing this suit unnecessary, as he would have vacated the suit land anyway. He also faulted the Plaintiff for not filing a counterclaim seeking eviction orders in his suit at the High Court, which would have entitled him to evict him.

15. It is commonly accepted that the Plaintiff triumphed in the suits both at the High Court and the Court of Appeal. It is on record that the judgment of the Court of Appeal and the demand letter was sent to the Defendant on the same day asking him to vacate within 7 days. Two demand letters were sent by the Plaintiff to the Defendant through his then Advocates on record and the area Chief. No evidence has been laid by the Defendant to deny that his then Advocates had ceased acting for him, at least not on the date the judgment was delivered. There is an acknowledgement of receipt of the said letter by the said Advocates. It is also illogical that once a judgment had been rendered he still wants a demand letter to vacate the suit land. On the balance of probability, the Court finds that the Defendant was served with the notice to vacate dated the 27/6/16. This has been corroborated by Plaintiff who stated in evidence that he met with the Defendant at the Chief's Office.

16. It is the finding of this Court that the Defendant was in trespass from the 27.6.16 to the month of May 2018 when he vacated the suit land.

B. Whether the Plaintiff is entitled to general damages for trespass and or illegal occupation of the Plaintiff's land.

17. 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".

Trespass is the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant.

In this case, upon the delivery of the judgement of the Court of Appeal decreeing that the Defendant had failed to prove adverse possession in the suit land, the permission with which he had earlier held the land was extinguished and any continuous occupation of the suit land became unlawful, unauthorized and indeed amounted to a trespass. The Defendant has not shown the Court the justification for his continued occupation of the Plaintiffs land after the Judgment was brought to his notice. It is rather obvious that the Plaintiff has been deprived the possession of his land for the period that the Defendant was squatting on his land.

18. Granted that Trespass is actionable perse, the Court has noted that the Plaintiff has not given any sums to guide the Court in assessing general damages for trespass. The Court would have expected the Plaintiff to obtain the total kilos of tea and coffee that the Defendant would have harvested from the suit land for the duration of the trespass. That would have represented the opportunity cost of the deprivation of the use of land by the Defendant continued occupation. None was provided. That notwithstanding taking that into consideration and noting the duration of the trespass and the size of the land, the Court awards a figure in the sum of Kshs 50,000/- being a nominal award of general damages in this instant case.

19. In answer to c, the Court notes that the Plaintiff did not lead any evidence to support the claim of special damages in the sum of Kshs 450,000/-. It is trite law that special damages must be pleaded and proved. Such proof would have been in form a Valuation Report accompanied by an assessment report showing the type, number of trees and tea bushes destroyed and the values thereof. None was produced before this Court.

20. In respect to issue no. (d), it is trite law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. Mesne Profits, which is defined as the profit of an estate received by a tenant in wrongful possession between the dates (see Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case **Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) e KLR**, the Court of Appeal held as follows:

> "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..."

In the case of **Inverugie Investment Vs Hackett (Lord Lloyds (1995) 3 ALL ER 842** it was held as follows:

> "Our understanding of the above persuasive authority 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....."**

The above decision was followed by the Court of Appeal in the case of **Kenya Hotel Proprietors Ltd Vs Willesden Investments Ltd (2009) KLR 126.**

21. It follows therefore that no evidence has been led to support the claim of special damages and none shall be given by this Court in a vacuum. Special damages are accordingly declined.

22. **Final orders**;

a. The prayer for special damages in the sum of Kshs 450,000/- is declined

b. Spent

c. General damages for trespass in the sum of Kshs 50,000/- is ordered in favour of the Plaintiff by the Defendant.

d. Mesne profits are declined.

e. Costs of the suit shall be met by the Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22ND DAY OF NOVEMBER, 2018

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff – Absent

Defendant – Absent

Irene and Njeri, Court Assistants