



Shereton Apartments Limited & 5 others v Wahu & 3 others (Environment & Land Case 620 of 2005) [2018] KEELC 4903 (KLR) (4 December 2018) (Judgment)

Shereton Apartments Limited & 5 others v Miriam Wanjiru & 4 others [2018] eKLR

Neutral citation: [2018] KEELC 4903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 620 OF 2005**

**BM EBOSO, J
DECEMBER 4, 2018**

BETWEEN

**SHERETON APARTMENTS LIMITED 1ST PLAINTIFF
ELDAMA RAVINE VIEW POINT ESTATE LTD 2ND PLAINTIFF
ZAHIR ABDUL MANJI 3RD PLAINTIFF
MANSUKHLAL JUTHALA SHAH 4TH PLAINTIFF
MARGARET WAIRIMU MAGUGU (SUING AS THE ADMINISTRATOR OF
THE ESTATE OF THE LATE MARY JACINTA NJERI) 5TH PLAINTIFF
MEHMOOD REHMAT KHAN 6TH PLAINTIFF**

AND

**CECILIA WAHU 1ST DEFENDANT
EVANS ENEKEA 2ND DEFENDANT
JOSEPH MUEMA 3RD DEFENDANT
VIRGINIA NJERI 4TH DEFENDANT**

JUDGMENT

1. Through a plaint dated 23/5/2005 and amended on 15/1/2015, Shereton Apartments Limited (1st plaintiff), Eldma Ravine View Point Estate Limited (2nd plaintiff), Zahir Abdul Manji (3rd plaintiff), Mansukhlal Juthala Shah (4th plaintiff), Mary Jacinta Njeri (5th plaintiff - now deceased), and Mehmood Rehmat Khan (6th plaintiff) brought this suit contending that the defendants had encroached onto and trespassed upon their respective parcels of land and had persisted with the



trespass. They identified the properties as Land Reference Numbers 209/9945, 209/9946, 209/9947, 209/9948, 209/9949 and 209/11975. They sought the following orders against the defendants:

- a) An order declaring that the 1st, 2nd, 3rd, 4th and 5th defendants are in wrongful and unlawful possession of the 1st, 2nd, 3rd, 4th 5th and 6th plaintiffs' parcels of land without any colour of right whatever;
 - b) An order directing that the 1st, 2nd, 3rd , 4th and 5th defendants by themselves, their agents, servants belongings, employees and or otherwise be evicted from the 1st, 2nd, 3rd, 4th 5th and 6th plaintiffs' properties.
 - c) The 1st, 2nd, 3rd, 4th and 5th defendants be ordered to pay mesne profits to the 1st, 2nd, 3rd, 4th, 5th and 6th plaintiffs from the date of the said trespass till the date when the said mesne profits are paid in full after the defendants, eviction therefrom.
 - d) Costs of this suit.
 - e) Interest at courts rates.
 - f) Any other or further relief as this court may deem fit to grant.
2. The 5th plaintiff passed on during the subsistence of this suit and was substituted by her personal representative, Margaret Wairimu Magugu. Hearing proceeded ex-parte because, though duly served, the defendants did not attend the hearing.
 3. Through a statement of defence dated 26/9/2007 and filed on the same date, the defendants denied the plaintiffs' claims and contended that they were strangers to the claims. They further contended that they had lived on the suit properties from as long as late 1970s and they had always enjoyed quiet possession of the suit properties. They urged the court to dismiss the plaintiffs' claims.
 4. At the hearing, the 1st plaintiff called Nazir Manji – PW 1. He adopted his witness statement dated 18/11/2015 in which he stated that the 1st plaintiff was the registered proprietor of Land Reference Number 209/9945, having purchased the same in 1995 and taken possession of the property in 1995. In 2005, the defendants trespassed onto the said property, triggering the present suit. He produced 9 exhibits, among them copy of Grant Number IR 43063 registered on 11/9/1987 in which Land Reference Number 209/9945 is comprised. He urged the court to grant the orders sought in the plaint.
 5. The 2nd plaintiff called Manmohan Singh Chawla. PW 2. He stated that he was a director of Ravine View Point Estate Ltd, the 2nd plaintiff herein. He added that the 2nd plaintiff was the registered proprietor of Land Reference Number 209/9947. He adopted his witness statement dated 18/11/2015 and produced 10 exhibits, among them, Grant Number IR 40068 in which Land Reference Number 209/9947 is comprised. He testified that in 2005, the defendants trespassed onto the said land. He urged the court to grant the prayers sought in the suit.
 6. The 3rd plaintiff, Zahir Abdul Manji testified as PW 5. He adopted his witness statement dated 18/11/2015. His testimony was that he was the registered proprietor of Land Reference Number 209/9946. He stated that in 2005, the defendants trespassed onto his land prompting the him bring this suit. He produced 9 exhibits, among them, Grant Number IR 38591 in which Land Reference Number 209/9946 is comprised. He urged the court to grant the orders sought in the plaint.
 7. The 4th plaintiff, Mansukhlal Juthala Shah testified as PW3. He stated that he was the registered proprietor of Land Reference Number 209/9948 comprised in Grant Number IR 45590. He testified that in 2005, the defendants trespassed onto his said land. This prompted him to seek to be enjoined in this suit as the 4th plaintiff. He urged the court to grant the orders sought in the Amended Plaint.



8. Margaret Wairimu Magugu testified as PW6. She stated that she was the personal representative of the late Mary Jacinta Njeri who was her deceased sister. She further testified that Mary Jacinta Njeri died in 2016. She adopted her witness statement dated 5/10/2018 as her sworn evidence in chief. She stated that the defendant had encroached onto her late sister's property in 2005, prompting her deceased sister to apply to be joined in this suit as a co-plaintiff. She produced 5 exhibits, among them, Grant Number IR 44986 in which Land Reference Number 209/9949 is comprised and a grant of letters of administration. She urged the court to grant the prayers sought in the plaint.

Mehmood Rahmat Khan testified as PW 4. He adopted his witness statement dated 18/11/2015 and produced 9 documents, 9. among them, Grant Number IR 60557 in which Land Reference Number 209/11975 is comprised. He testified that he was the registered proprietor of the said land and added that in 2005, the defendant trespassed on his property prompting him to apply to be joined as a party to this suit.

10. The defendants did not lead any evidence to support their statement of defence.
11. In written submissions dated 24/11/2017, Mr AGN Kamau, counsel for the plaintiffs, submitted that all the plaintiffs had titles to their respective parcels of land. He added that under Section 23(1) of the repealed Registration of Titles Act, a certificate of title was conclusive evidence of proprietorship. He further submitted that the said provision had been reproduced in Section 26(1) of the [Land Registration Act](#). Mr Kamau further submitted that under Sections 24, 25 and 26 of the [Land Registration Act](#), registration of the plaintiffs as proprietors of their respective parcels of land vested in them absolute ownership of the parcels.
12. Counsel further submitted that under Section 3(1) of the [Trespass Act](#), trespass is an offence. Relying on *Charles Ogejo Ochieng v Geoffrey Okumu (1995)*, counsel argued that trespass is an injury to a possessory right, and that the defendants have and continue to jointly and severally injure the plaintiffs' possessory rights in respect of their respective parcels of land. He added that to redress the trespass, issuance of an eviction order is necessary.
13. On mesne profits, counsel submitted that a claim for mesne profits is a claim for general damages for trespass. He added that the suit properties are situated in a prime area of Nairobi City County and the trespass has been on since 2005. He urged the court to consider the locality of the suit properties and the period of trespass when assessing mesne profits.
14. I have considered the parties' respective pleadings. I have also considered the evidence and submissions placed before the court by the plaintiffs. There is no dispute that the 1st, 2nd, 3rd, 4th and 6th plaintiffs are the registered proprietors of Land Reference Numbers 209/9945 (measuring approximately 0.2915 ha), 209/9947 (measuring approximately 0.2474 ha), 209/9946 0.3019 ha), 209/9948 (measuring approximately 0.2259 ha) and 209/11975 (measuring approximately 0.4900 ha) respectively. There is also no dispute that the late Mary Jacinta Njeri is the registered proprietor of Land Reference Number 209/9949 measuring approximately 0.2277 ha.
15. In their statement of defence dated 26/9/2007, the defendants contended that they occupied the suit properties with the actual and/or constructive knowledge of the head lessor (the President of the Republic of Kenya) and they had always enjoyed quiet possession of the suit properties. They did not however have any document of title conferring upon them the right to occupy the said parcels of land. Secondly, they did not deem it necessary to attend the hearing and lead any evidence.
16. The six parcels of land were registered under the Registration of Titles Act which was repealed in 2012. The cause of action was alleged to have first accrued in 2005. The present suit was similarly initiated in



2005 when the Registration of Titles Act was still in force. It is contended that the trespass continues to date. Therefore both the Registration of Titles Act and the [Land Registration Act](#) apply to this dispute.

17. Section 23 of the repealed Registration of Titles Act contained the following legal framework on the sanctity of title.

23.

(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

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

18. Upon repeal of the Registration of Titles Act in 2012, the legal framework was replicated in Sections 24, 25 and 26 of the [Land Registration Act](#) No. 3 of 2012. The said Sections provide as follows:

Interest conferred by registration

24. Subject to this Act –

a) The registration of a person as the proprietor of land shall vest in the 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.

25. Rights of proprietor

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 interest 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.

26. Certificate of title to be held as conclusive evidence of proprietorship

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 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 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.
19. In light of the above provisions of the repealed Registration of Titles Act and the existing framework in Sections 24, 25 and 26 of the [Land Registration Act](#), and in the absence of any controverting evidence from the defendants, it is the finding of this court that the titles held by the plaintiffs are conclusive evidence of ownership of the suit properties. The defendants have no right to encroach on or trespass upon the said properties. The court is therefore satisfied that the plaintiffs have proved their respective claims of trespass on the suit properties by the defendants.
20. On the plea for mesne profits, it is settled law that a claim for mesne profits is a claim for compensation by the land owner against the trespassers for having been deprived of the use and occupation of land. Ordinarily, mesne profits are assessed according to the current open market letting value of the property, and the land owner is entitled to the open market letting value for the period of trespass, whether or not he can show that he would have let the property to anybody else and whether or not he would have used the property himself.
21. It is similarly an accepted principle in Kenya's land jurisprudence that where trespass is proved, a party need not prove that he suffered any specific damage or loss in order to be awarded damages. In circumstances, where no specific loss is demonstrated but trespass is nonetheless proved, the court is under duty to assess and award reasonable damages depending on the unique circumstances of each case (see *Park Towers Limited v John Mithamo Njika & 7 others* (2014) eKLR).
22. In the present suit, the suit properties are situated in Parklands area of the City of Nairobi. The six suit properties measure 0.2915 ha, 0.2474 ha, 0.3019, 0.2259 ha, 0.2277 ha and 0.4900 ha respectively. They are not developed. The trespass has been ongoing since 2005. This translates to a period of 13 years. Taking into account the above factors, I will award each of the 1st, 2nd, 4th and 5th plaintiffs mesne profits of Kshs 15,000,000 against the defendants jointly and severally. I would award the 3rd plaintiff mesne profits of Kshs 17,000,000 against the defendants jointly and severally. Lastly, I will award the 6th plaintiff mesne profits of Kshs 20,000,000 against the defendants jointly and severally.
23. In summary, the court is satisfied that the plaintiffs have proved their respective claims against the defendants jointly and severally on a balance of probabilities. Consequently, judgment is entered in favour of the plaintiffs against the defendants jointly and severally in terms of prayers (a) and (b) of the Amended Plaint. Awards of mesne profits are made in favour of the plaintiffs against the defendants jointly and severally as follows:
- a) 1st Plaintiff - Kshs 15,000,000
 - b) 2nd Plaintiff - Kshs 15,000,000
 - c) 3rd Plaintiff - Kshs 17,000,000
 - d) 4th Plaintiff - Kshs 15,000,000



e) Estate of the Late Mary Jacinta Njeri Kshs 15,000,000

f) 6th Plaintiff - Kshs 20,000,000

24. In addition, the above sums shall attract interest at court rate from the date of this judgment. Lastly, the plaintiffs shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF DECEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Nyabuto holding brief for A G N Kamau the plaintiff

June Nafula - Court Clerk

