



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 385 OF 2015

FRANSISCA MORAA OMETE..... PLAINTIFF

VERSUS

JOSHUA SIELE..... DEFENDANT

JUDGEMENT

INTRODUCTION

By a plaint dated 24th March 2015 the plaintiff herein sued the defendant seeking for orders for:

- a) A Temporary injunction barring the Defendant and or his agents servants and or employees from interfering and or ploughing, planting encroachment upon eviction against the defendant to vacate and leave vacant possession of L R NO. UASIN GISHU/ KIMUMU SCHEME/6568.
- b) Mesne profits and or damages incurred.
- c) Costs and interest of the suit.
- d) Any other relief that this Honorable Court may deem fit to grant in the circumstances.

Upon service of summons, the defendant entered appearance on 5th November 2015 through the firm of M/s Keter Nyolei & Co. Advocates but failed to file a statement of Defence. The plaintiff therefore requested for judgement in default of defence which was granted and the matter set down for formal proof.

Plaintiff's Case

It was the plaintiff's case that she is the registered owner of all that parcel of land known as LR.NO.UASIN GISHU/KIMUMU SCHEME/6568 measuring 0.65Ha (1.625 Acres). The plaintiff produced a copy of the title and official search certificate which were marked as exhibit 1a and 1b respectively to prove ownership. She stated that she entered into a verbal agreement whereby she sold $\frac{1}{4}$ of an acre to the defendant for a consideration of 1.3 Million and the defendant paid a deposit of four hundred and forty-five thousand Kshs. 445,000/) only leaving a balance of Ksh. 855,000/ unpaid. The plaintiff stated that the defendant was to clear the balance on or before April 2015 which he never did.

The plaintiff further stated that she trusted the defendant and allowed him to take possession on the understanding that he would clear the outstanding balance as agreed but this was not to happen necessitating the current suit. She stated that the defendant has been staying on the suit land for more

than two years.

It was the plaintiff's case that she wrote a demand letter to the defendant to either pay the balance or she would revoke the agreement and that she has never received any response from the defendant. She produced the demand letter as exhibit No. 2. In closing her case, the plaintiff urged the court to grant an order for eviction against the defendant, mesne profits and cost for the suit.

The plaintiff closed her case on her evidence and the court ordered that Counsel files written submissions. The same were filed in court and a judgement date given.

Analysis and Determination

I have considered the pleadings, the evidence and submissions by Counsel for the plaintiff which are uncontroverted as the defendant only filed a memorandum of appearance and failed to file a defence within the stipulated period by law. The defendant was served with a hearing notice of the case but chose not to appear in court. The plaintiff produced a copy of a title deed and certificate of official search as evidence to prove that she is the registered owner of the suit which I consider as sufficient proof of ownership. There is no evidence on record to controvert the plaintiff's assertion that the defendant is in illegal occupation of the plaintiff's land after failing to pay the balance of the purchase price as agreed.

Having said that, I find that the plaintiff has a right to have the defendant evicted from the suit land.

On the prayer for mesne profits and damages incurred, no evidence was tendered on what amount of mesne profits the plaintiff would be entitled to. The plaintiff stated that the defendant has been in occupation for a period of more than two years. The amount of general damages is subject to the discretion of the court in which factors such as the duration of time that the defendant has been in occupation may be considered. The amount to be awarded also ought to take into account any award for mesne profits. The plaintiff did not adduce any evidence on the nature of the suit land or economic activity on the same. With no evidence on the above on record, it would be difficult for the court to come up with figures from the blues and expect an appropriate assessment.

Mesne profits are special damages which not only need to be pleaded, but also proved. In the case of *Njeri Kimani vs Joseph Njoroge Murigi and others HCCC. 819 of 2009*. It was held;

"A claim for mesne profits is in the nature of special damages, which require to be pleaded and strictly proved".

A claim for mesne profits is one of special damages which this court finds that the Plaintiff did not prove. It is upon litigants to articulate their issues and present their cases well to enable the courts arrive at a just decision.

I therefore make the following orders:-

1. That the defendant do vacate the suit land within 30 days upon service of this judgment or decree. In default of so vacating, an eviction order be issued permitting the plaintiff to evict the defendant from the suit land.
2. The prayers for mesne profits and damages are disallowed as the same were not proved.
3. The costs of this suit shall be to the plaintiff.

Dated and delivered at Eldoret this 15th day of May, 2017

M.A ODENY

JUDGE