



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 34 OF 2012

(FORMERLY NAIROBI HIGH COURT PETITION NO. 250 OF 2012)

MILKAH MUTHONI WAGOCO (Suing as the

Administrator of the Estate

of the late WAGOCO KABINGA.....PETITIONER

VERSUS

THE COUNTY COUNCIL OF KIRINYAGA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

PETER MBWE KIBIRITI.....3RD RESPONDENT

JUDGMENT

By her petition dated 8th June 2012 and originally filed at the High Court in Nairobi before being transferred to this Court on 23rd October 2012, the Petitioner seeks judgment against the Respondents in the following terms:

(a) It be declared that the Respondents have contravened the Petitioner's right to property under Sections 75 and 82 of the former Constitution and Article 40 (1) and (3) of the current Constitution.

(b) It be declared that the 1st and 2nd Respondents have contravened the Petitioner's rights under Article 47 of the Constitution to an expeditious, efficacious, lawful, reasonable and procedurally fair administrative action.

(c) An order that the 2nd Respondent do remove the caution lodged against land parcel No. KIRINYAGA/GATHIGIRIRI/151 which subsists as entry No. 2 on the Land Register.

(d) An order that the 1st and 3rd Respondents do give to the Petitioner vacant possession of the suit property forthwith.

(e) An order that the Respondents do pay to the Petitioner general damages.

(f) An order that the Respondents do pay to the Petitioner exemplary damages.

(g) Mesne profits.

(h) An order that the costs of this petition be provided for.

The petition is supported by the affidavit of **MILKA MUTHONI WAGOCO** dated 8th June 2012 and who has filed it as administratrix of the Estate of her late husband **WAGOCO KABINGA** and two other affidavits by her son **JOSPHAT KABINGA WAGOCO** one dated 8th June 2012 and the other dated 7th June 2016. The Petitioner's case as can be summarized from the above affidavits is that her late husband was until the time of his death, the registered proprietor of land parcel No. KIRINYAGA/GATHIGIRIRI/151 (the suit property) since 1979 as per the abstract of title and that until the time he died in 1996, her late husband had been endeavouring to retrieve from the 1st and 3rd Respondents the suit property on which a caution has been lodged since 1995 by the 1st Respondent and from which the 3rd Respondent has refused to vacate which is a violation of **Article 40 of the Constitution**.

The Petitioner's son **JOSPHAT KABINGA WAGOCO** supported those averments and adds that in 1980, his late father informed him that the 3rd Respondent had entered the suit property. He accompanied his father and found that indeed the 3rd Respondent was growing maize thereon and requested him to leave but even upto the time his late father died, the 3rd Respondent refused to vacate and endeavours by their family to have him vacate have not been successful and so he (**JOSPHAT KABINGA WAGOCO**) filed at the **KERUGOYA PRINCIPAL MAGISTRATE'S COURT** Civil Case No. 276 of 2005 against the 1st Respondent and obtained judgment against it. In his further supporting affidavit dated 7th June 2016, **JOSPHAT KABINGA WAGOCO** deponed, inter alia, that the suit property was registered in the names of his late father at the time of land adjudication and he never alienated it to anybody by way of exchange or sale during his life time and it was the 1st and 2nd Respondents who imposed the 3rd Respondent thereon. That the suit property was neither compulsorily acquired nor exchanged with any other parcel of land and the 3rd Respondent has colluded with 1st Respondent to take away the suit land under the guise of compulsory acquisition which never happened.

The 1st and 3rd Respondents did not file any affidavits in opposition to the petition notwithstanding the fact that this Court granted them more than sufficient time to do so. Indeed, on 28th April 2016, counsel for the 3rd Respondent **MR. NDEGWA** sought and was granted 14 days to file a response to the petition adding that in default, he will have waived his right to do so. By 15th March 2017 when the petition was heard by way of viva voce evidence, neither the 1st or 3rd Respondents had filed any responses to the petition nor did they attend Court though duly served.

My record does not show that the 2nd Respondent filed any response to the petition. As indicated earlier, this petition was originally filed in Nairobi on 8th June 2012 and perhaps due to wear and tear, any response by the 2nd Respondent may have fallen out and I will therefore be guided by the submissions filed by the Petitioner's counsel on 5th April 2017 in which it is submitted that the 2nd Respondent did file grounds of opposition on 19th July 2012 contending that the Petitioner is engaged in forum shopping by filing multiple suits over the same suit property and that the 2nd Respondent through the District Land Registrar is ready to adhere to any orders issued in respect of the caution lodged on the suit property. The record also shows that on 13th May 2015, the 3rd Respondent filed a Notice of Preliminary Objection on the main ground that this petition is instituted in contravention of **Section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya**. That Preliminary Objection was never prosecuted and was infact withdrawn on 8th February 2016. As directed on 27th October 2015, this petition was canvassed through viva voce evidence.

The hearing proceeded on 15th March 2017 when, though served with hearing notices, none of the Respondents nor their counsel appeared. The Petitioner (PW1) and her son (PW2) simply adopted their respective affidavits and also produced the documents annexed to the petition as their documentary evidence after which their counsel **MS MUHORO** filed written submissions.

I have considered the petition, the supporting affidavits and annexures thereto as well as the submissions by counsel. As no responses were filed by the Respondents herein, this Court is entitled to make a

finding, which I hereby do, that the petition is not contested and what is contained in the Petitioner's supporting affidavit together with that of her son represent the factual position with regard to this petition and, in particular, the suit property. It is also clear from the record herein that there was really no intention on the part of the Respondents to challenge this petition as is evidenced by the latitude granted to them to file responses and which was not utilized. I have nonetheless considered the evidence put forth by the Petitioner in support of her claim.

It is not in dispute that the Petitioner's late husband was, until the time of his death, the registered proprietor of the suit land. The abstract of title which is annexed to the petition (annexture **MMW 2**) leaves no doubt on that and shows that the late **WAGOCO KABINGA** has since 20th June 1975 been the registered proprietor of the suit property until a caution was lodged thereon by the then **KIRINYAGA COUNTY COUNCIL**. It is also clear from grant of letters of administration dated 17th April 1996 that the Petitioner is the administratrix of the Estate of the late **WAGOCO KABINGA**. Indeed following a confirmation of grant in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 283 of 1990**, the suit property was among those devolved to the Petitioner. I shall now consider whether the Petitioner is entitled to the orders sought in this petition.

(a) A DECLARATION THAT THE RESPONDENTS HAVE CONTRAVENED THE PETITIONER'S RIGHT TO PROPERTY:

Article 40 (1) of the Constitution provides that:

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

(a) of any description; and

(b) in any part of Kenya”.

Article 40 (3) on the other hand provides that:

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter five; or

(b) is for a public purposes or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over that property a right of access to a Court of law”.

Article 65 of the Constitution refers to land holding by non-citizens and there is no evidence to suggest that the Petitioner or her late husband are non citizens of Kenya. As the registered proprietor of the suit property, both the Petitioner's late husband and his successors in title are entitled to the protection afforded to them by **Sections 24 and 25 of the Land Registration Act** which are similar to **Sections 27 and 28 of the repealed Registered Land Act**. Therefore the lodging of the caution on the suit property and the 3rd Respondent's refusal to vacate therefrom amount to an un-warranted infringement of the Petitioner's right to the enjoyment of the same and calls for this Court's intervention by granting the declaration sought. This prayer is therefore well merited and I allow it.

(b) A DECLARATION THAT THE 1ST AND 2ND RESPONDENTS HAVE CONTRAVENED THE PETITIONER'S RIGHTS UNDER ARTICLE 47 OF THE CONSTITUTION TO AN

EXPEDITIOUS, EFFICIENT, LAWFUL, REASONABLE AND PROCEDURALLY FAIR ADMINISTRATIVE ACTION:

Article 47 of the Constitution is worded as follows:

(1) *“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”*

(2) *“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”*

(3) - ”

Prayers No. (b) and (c) of the petition can be considered together. Prayer No. (c) seeks the following order:

(c) AN ORDER THAT THE 2ND RESPONDENT DO REMOVE THE CAUTION LODGED ON LAND PARCEL NO. KIRINYAGA/GATHIGIRIRI/151:

It is clear from the correspondences annexed to this petition that several letters have been addressed to the 1st Respondent requesting it to remove the caution lodged on the suit property as far back as 2006. Under **Section 73 (1) of the Land Registration Act**, a caution may be removed by the cautioner or by the Registrar or by the Court. There is no evidence that having been requested to remove the caution, the 1st Respondent either complied or gave its reasons for not doing so. The 1st Respondent, as is now clear, neither removed the caution nor gave any reasons for its failure to do so. Instead, the 1st Respondent has maintained a studious silence as demonstrated by the lack of any response to that request. That was also in violation of **Section 9 (2) (d) of the Public Service (Values and Principles) Act 2015** which provides that:

“A Public Institution or an authorized officer shall ensure the accountability of a public officer by – establishing a mechanism to address complaints arising out of the administrative acts of a public officer”

The same Act under **Section 5** thereof requires every public officer to maintain high standards of professional ethics by being honest, transparent, accountable, respectful etc. I take the view that the Petitioner’s rights under **Article 47 of the Constitution** and also **Sections 5 and 9 (2)(d) of the Public Service (Values and Principles) Act 2015** have been violated by both the 1st and 2nd Respondents which are Public Institutions. Further, a caution can only be lodged and maintained on a parcel of land by a party who can demonstrate a right or interest in the land, lease or charge. The 1st Respondent has not advanced any interest in the suit property or any reason why the caution lodged thereon should remain on the register. I would therefore make a finding that the 1st and 2nd Respondents have violated the Petitioner’s rights under **Article 47 of the Constitution** and further order the removal of the caution lodged on the suit property.

(d) AN ORDER THAT THE 1ST AND 3RD RESPONDENTS DO GIVE TO THE PETITIONER VACANT POSSESSION OF THE SUIT PROPERTY FORTHWITH:

The Petitioner, as the party with the legal title over the suit property, is entitled to possession thereof in addition to all the rights and privileges protected by **Sections 24 and 25 of the Land Registration Act**. Such rights and privileges include the right to eject trespassers from the suit property. By lodging an unlawful caution on the suit property and by remaining in possession thereof, both the 1st and 3rd Respondents respectively are violating the Petitioner’s right to the enjoyment of the same. It has been stated that the 3rd Respondent is growing a crop on the suit land and has refused to vacate. Letters asking him to vacate are part of the annexures to this petition and no reasons have been advanced for his continued occupation of the suit property which clearly amounts to a trespass thereon for which damages are available to the Petitioner. I therefore order that the 1st and 3rd Respondents do give the Petitioner

vacant possession of the suit property forthwith.

(e) AN ORDER THAT THE RESPONDENTS DO PAY TO THE PETITIONER GENERAL DAMAGES:

I have already found that the 1st Respondent has unlawfully lodged a caution on the suit property and that the 3rd Respondent is trespassing thereon. **Section 75 of the Land Registration Act** provides as follows:

“Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person”.

It is trite law that trespass to land is actionable per se and therefore once it is proved, the plaintiff is under no duty to prove that he suffered any specific damage or loss. The Court will, once trespass is proved, be obliged to assess the reasonable damages to be awarded to the plaintiff and in doing so, it will take into account the nature of the trespass, the location of the land and the length of time the intruder has been on the land, among other factors. There is no mathematical formula for such assessment and no two cases can ever be the same. Each case must therefore be considered on its own peculiar circumstances. General damages for trespass to land, as indeed for any violation of a party’s rights are in the discretion of the Court. Counsel for the Petitioner has submitted that the sum of Ksh. 10,000,000 would be adequate to compensate the Petitioner for the violation of her Constitutional rights and trespass. I consider that figure to be excessive in the circumstances of this case and I award the Petitioner Ksh. 2,000,000 which I find reasonable under that head.

(f) AN ORDER THAT THE RESPONDENTS DO PAY TO THE PETITIONER EXEMPLARY DAMAGES:

Exemplary damages are punitive damages awarded to the plaintiff by the Court to express its disapproval of the defendant’s conduct. They may be awarded in cases where the actions of servants of the Government are arbitrary, oppressive or un-Constitutional and also to punish the defendant and vindicate the strength of the law. The Petitioner in this case is entitled to such damage which counsel has submitted be at Ksh. 5,000,000. In the circumstances of this case, I find that a sum of Ksh. 500,000 will suffice under this head.

(g) MESNE PROFITS:

Counsel for the Petitioner has also submitted that I award her a further Ksh. 5,000,000 under the head of mesne profits. It is settled law that mesne profits are special damages which must not only be specifically pleaded but also proved. In **PETER MWANGI MBUTHIA VS SAMOW EDIN OSMAN & NAFTALI RUTH KINYUA C.A CIVIL APPLICATION No. 38 of 2004 (2014 e K.L.R)**, the Court of Appeal held thus:

“As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profits 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”

The same situation arises in this petition. Not only was the claim for mesne profits not pleaded but also, no evidence was led by the Petitioner in that regard. Besides, having made an award for general damages, this Court cannot in the same vein make another award for mesne profits. In **KENYA HOTEL PROPERTIES LTD VS WILLESDEN INVESTMENTS LTD C.A CIVIL APPEAL No. 149 of 2007 (2009 e K.L.R)**, the Court of Appeal citing **INVERUGIE INVESTMENTS VS HACKETT (LORD LLOYD) 1995 3 ALL E.R 842** and also referring to the definition of “***mesne profits***” as appearing in **STROUD’S JUDICIAL DICTIONARY 4th Edition** held that once an award is made under the sub-head “***mesne profits***”, there would be no justification in making another award for trespass. As I have already

made an award for trespass, I cannot make a further award for mesne profits and I must therefore reject any submission to do so.

On costs, this is at the discretion of the Court and under ***Section 27 of the Civil Procedure Act***, the costs follow the event “***unless the Court or Judge shall for good reason otherwise order***”. As was held by the Supreme Court of Kenya in ***JASBIR SINGH RAI & OTHERS VS TARLOCHAN SINGH RAI & OTHERS 2014 e K.L.R.***, an award of costs is not meant to punish the losing party but to compensate the successful party for the trouble taken in prosecuting or defending the suit. The Petitioner in this case is entitled to costs.

There will therefore be judgment for the Petitioner against the Respondents in the following terms:

(a) A declaration that the Respondents have contravened the Petitioner’s right to property under Section 75 and 82 of the former Constitution and Article 40 (1) and (3) of the current Constitution.

(b) A declaration that the 1st and 2nd Respondents have contravened the Petitioner’s right under Article 47 of the Constitution to an expeditious, efficacious, lawful, reasonable and procedurally fair administrative action.

(c) An order that the 2nd Respondent do remove the caution lodged on land parcel No. KIRINYAGA/GATHIGIRIRI/151 which subsists as entry No. 2 on the land register.

(d) An order that the 1st and 3rd Respondents do give the Petitioner vacant possession of land parcel No. KIRINYAGA/GATHIGIRIRI/151 forthwith.

(e) An order that the Respondents do pay to the Petitioner general damages assessed at Ksh. 2,000,000.

(f) An order that the Respondents do pay the Petitioner exemplary damages assessed at Ksh. 500,000.

(g) The Respondents shall meet the Petitioner’s costs of this petition.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Judgment delivered, dated and signed in open Court this 16th day of June 2017

Ms Muhoro for Petitioner present

No appearance by the Respondents

Right of appeal explained.

B.N. OLAO

JUDGE

16TH JUNE, 2017