



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C CASE NO. 129 OF 2017

KELLEN MUTHONI NJAGI

PLAINTIFF

VS

THE CHAIRMAN, BOARD OF MANAGEMENT

KAAGA PRIMARY SCHOOL

DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on the 28th July 2016 against the Defendant seeking orders for a permanent injunction restraining the defendant from trespassing encroaching and in any way interfering with quiet possession of Parcel Number Makuyu/Kimorori/Block 3/5275. She also pleaded for mesne profits interalia.
2. The defendant was served with summons to enter appearance together with the plaint on the 26th September 2016. The service was effected on Ms Naomi Kiiru the Head Teacher of the school who accepted the summons and appended her signature on the copy of the return of service filed in Court on the 13th October 2016.
3. The defendant however failed to enter appearance nor file its defence despite being served. The Plaintiff filed a request for judgement on the 13th October 2016 and thereafter listed the matter for hearing by way of formal proof. The plaintiffs case proceeded undefended.
4. The Plaintiffs testimony is that she is registered as a shareholder of 37 shares in Kagaa Framers Cooperative Society Limited having succeeded her late Husband Peter Ngige Kiige (deceased). She presented the death certificate together with letters of grant of administration to the estate of Peter Ngige Kiige (deceased) issued to her and one Joseph Keige Muniu on the 11th May 1998. On the strength of the letters of administration the land buying company Kagaa Farmers Coop Society Limited transferred the ownership of 37 shares in the cooperative to the plaintiff from the deceased name. The plaintiff is currently the registered shareholder of 37 shares vide certificate No. 554 in Kagaa Farmers Coop Society Limited. It is her evidence that the shares in the Cooperative society entitle her to land Makuyu/Kimorori Block 3/5275. The plaintiff avers that the defendant has encroached on her land Block 3/5275 by occupying it as well as constructing structures and undertaking acts of waste on the land and despite efforts to have them desist the same has been unsuccessful hence this suit.
5. The plaintiff further stated that as a result of the defendants acts of trespass, she has been prevented from building a house on her plot hence claims mesne profits from the time of filing suit until the date the defendants vacate the suit premises. That she has been paying rent in the sum of Kenya Shillings Thirty Two Thousand (Kshs.32,000/-) per month which she would have saved were it not for the encroachment.

6. The issues that commend themselves for determination by this Court are;

- a). Whether the plaintiff is the owner of the suit property.
- b). Whether the plaintiff is entitled to the reliefs sought in the plaint.

7. The plaintiff has presented her claim as a successor of her late husband. The letter of grant of administration was presented in Court as part of evidence. The said letters appointed two administrators to manage the estate of the deceased, one of which is the plaintiff. This entitles her to bring an action on the estate of her late husband.

8. The Plaintiff testified that she is the registered allottee of the parcel No Block 3/5275 by virtue of being a being a holder of a share certificate in the cooperative company, the land buying company. Though the plaintiff did not produce a title in her name, she relied on a letter from the land buying company that stated that she is a shareholder of the cooperative society and member No 554. That the society has allocated her plot number 5275 which she occupies. This is the practice with most land buying companies who issue share certificates to its members and the shares entitle them to land in most cases. I find that the plaintiff has proved ownership of the parcel in the absence of any challenge of the same from the defendant.

9. On the issue of mesne profits, It was the plaintiffs case that she is entitled to Kshs. 32,000/- per month from the time of filing suit. The basis of Kshs. 32,000/- is the rent that she alleges to be paying currently for her house in Nairobi. No material was placed before this Court as to the economic activity on the said land nor how the same has been assessed. 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”.

The fact that she claims that she has been incurring expenses in form of rent for the house she resides in Nairobi is not sufficient evidence to prove mesne profits. Mesne profits are the amount payable for the use of land. In any case rent for a house in Nairobi and a plot such as this cannot be said to be the same. No valuation or other form of assessment was tabled before the court. I find that the plaintiff has not proved this claim.

10. I have carefully considered the Plaint, the Witness statements and the written submissions by the Learned Counsel and the material placed before this Court. I find that the Plaintiff has proved her case on a balance of probability and Judgement is entered in her favour as follows;

DELIVERED, DATED AND SIGNED AT NAIROBI, THIS 13TH JULY, 2017.

J. G. KEMEI

JUDGE