



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO.522 OF 2013

KIMUTAI TONUI ROBERT LEONARD.....PLAINTIFF

VERSUS

SAMUEL CHEBOI.....DEFENDANT

JUDGMENT

By a plaint dated 21st November 2013 the plaintiff herein sued the defendant seeking orders for:

- a) Eviction against the defendant from parcel of land No. UASIN GISHU/KIMUMU SCHEME/3419.**
- b) A permanent injunction against the defendant restraining him and his agents, employees or servants from trespassing upon land parcel No. UASIN GISHU/KIMUMU SCHEME/3419.**
- c) General damages for trespass,**
- d) Mesne profits, and**
- e) Costs**

This matter came up for hearing on 29th May 2017 when the plaintiff herein testified. The plaintiff urged the court to adopt his statement dated 21/11/2013 as evidence before the court which was subsequently adopted. It was the plaintiff's evidence that he was looking for a property to buy when he met one Edwin Tirop Mutai who agreed to sell him the suit land. He stated that he went to see the land which had a bar and a restaurant. The said Mr. Tirop informed him that the lease was expiring in two months' time. He stated that he went to his Advocate who carried out a search and established that there was no lease registered. He thereafter entered into a sale agreement dated 10th September 2012 with EDWIN TIROP MUTAI for the sale of all that parcel of land known as UASIN GISHU/KIMUMU SCHEME/3419 for a consideration of Kenya shillings Two million one hundred and twenty thousand only (Kshs. 2,120,000/) The plaintiff further testified that clause 6 of the agreement stated that there was a tenant whom the vendor had leased the property to known as JOSEPH KIPCHIRCHIR whose lease was expiring in two months' time.

The plaintiff stated that he paid the purchase price and the suit property was transferred and registered in his name. He produced the sale agreement and a copy of the title deed as exhibits Nos. 1 & 2 respectively. He further testified that he did not take possession because the defendant who is a trespasser refused to vacate the premises or pay rent. He also stated that the defendant is not the one mentioned in the agreement as the tenant.

It was the plaintiff's evidence that he wrote a demand letter to the defendant through his Advocates to vacate the premises but the defendant responded that he would not vacate as he had leased the premises from one Willy Kirui and had paid kshs. 574,000/-. He produced the said letter dated 23/5/13 as exhibit No.3. The plaintiff also stated that he has never been shown any tenancy agreement and the defendant has never paid him any rent for more than 4 years. He stated that the defendant has added a structure which he uses as a butchery.

The plaintiff gave evidence that he took a loan which he intended to develop the property with and has continued to repay the loan plus interest as he has been denied access to his property. He urged the court to grant his prayers in the plaint. The plaintiff closed his case.

On cross- examination by the defence Counsel Mr. Kagunza, he stated that he needs to compute the figure for mesne profits as it has not been put in the plaint. The plaintiff also stated that he did not have the loan agreement in court. He further stated that he was not aware that the defendant was paying a monthly rent of Kshs. 25,000/ until he got a response of the demand letter. The plaintiff told the court that it was the vendor who was to negotiate with the tenant Joseph Kipchirchir to vacate the suit premises. He also stated that he allowed the tenant to stay for two remaining months of the lease on humanitarian grounds.

This case proceeded for defence hearing on 11th July 2017 when the defendant testified. The defendant stated that he is a banker and a businessman and does not know the plaintiff herein. He testified that he is not aware of the transaction between the plaintiff and one Edwin Tirop. He stated that he has a lease agreement with one Willy Kiptoo Kirui who is the owner. He urged the court to adopt his statement dated 4/8/14 as evidence before the court which was adopted.

It was the defendant's evidence that he entered into the first lease agreement with Willy Kirui in 2012 which expired in 2016 and subsequently renewed the lease which is still subsisting. He stated that the property had changed hands through the current case. He produced a bundle of documents marked 1 a – g. He urged the court to dismiss the plaintiff's case with costs.

On cross – examination the by Miss Chesio, the plaintiff's Counsel, the defendant admitted that he did not know the details of the suit land and that he did not produce the lease agreement. The defendant also admitted that the lease was not registered at the lands office. And there was no land control board consent. He also stated that the said Willy Kirui had not filed a witness statement in court and did not produce any document that he had been paying rent as alleged. He further stated that he has not been paying rent to the plaintiff or to the Business Premises Tribunal or to court. He stated that his lease ran from 2012 to 2015.

On re-examination, the defendant stated that the suit land is not agricultural land to require land control board consent. He confirmed that the suit land is registered in the plaintiff's name. He also stated that he has not been served with any order of the court to deposit money in court or the Tribunal.

The defence Counsel thereafter applied for an adjournment and for leave to file witness statements for additional witnesses but the same was vehemently opposed by the plaintiff's counsel as the same would be prejudicial to the plaintiff's case. The matter was filed in 2013 and the parties had all the time to comply with the pre – trial procedures not waiting until the parties have testified to try and introduce new witnesses to fill in the gaps.

The court disallowed the adjournment as it was not merited at that stage and ordered the defence to close their case.

The parties agreed to file written submissions within fourteen days. The plaintiff's counsel filed her submissions but the defendant did not file any submissions.

Plaintiff's Counsel's Submissions.

The Plaintiff's Counsel filed her written submissions on 25th July 2017. She gave a background to the

case and enumerated the issues for determination as follows:

- a) Whether the registration of the plaintiff as proprietor of land parcel was lawful, regular and procedural.
- b) Whether the defendant's continued occupation of the suit premises is adverse to the plaintiff's title.

The plaintiff had filed a list of issues on 27/2/14 as follows:

1. Whether the plaintiff is the registered owner of all that parcel of land known as UASIN GISHU/KIMUMU SCHEME/3419.
2. Whether the defendant is the lawful tenant on the suit property.
3. Whether or not the defendant's occupation of the suit property amounts to trespass.
4. Whether the plaintiff is entitled to damages for trespass and mesne profits against the defendant.
5. If the answer to 4 above is in the affirmative, what is the quantum of damages payable.
6. Whether the plaintiff is entitled to a permanent injunction against the defendant restraining him from trespassing on the suit property.
7. Whether the plaintiff is entitled to costs of the suit.

Counsel submitted that the suit land was registered in the name of Edwin Tirop Mutai in 2012 who sold it to the plaintiff on 10th September 2012 vide a sale agreement for a consideration of Kshs. 2,120,000/-. She submitted that the parties followed the requisite procedures and the land was subsequently registered in the plaintiff's name. The plaintiff confirmed this during examination in chief and during cross - examination. Counsel submitted that any alleged fraud during cross examination did not have any probative value as it was neither pleaded nor was there a counter claim filed attacking the validity of the title.

Counsel therefore submitted that the plaintiff's title to the suit land known as UASIN GISHU/KIMUMU SCHEME/3419 was lawful, regular and procedurally acquired and the same is protected under section 24 of the Land Registration Act 2012. She also quoted sections 25 and 26 of the land Registration Act which vests absolute ownership of land to the person in whose name the property is registered together with all rights and privileges appurtenant thereto and that the rights of a proprietor should be protected as evidenced by the certificate of title unless acquired fraudulently or illegally. Counsel further cited the case of KIBUSIA ARAP KONGA VS EVANS OBONYO OBIERO & ANOTHER (2017) e KLR where Ombwayo J. granted an order of a permanent injunction as the plaintiff had proved that he was the registered owner.

In response to the second issue as to whether the defendant's continued occupation of the suit premises is adverse to the plaintiff's title, Counsel submitted that upon purchasing the suit land the plaintiff served a notice to vacate upon the defendant who responded in the negative vide a letter dated 23rd May 2013 which was produced as an exhibit before the court. She submitted that the defendant ignored the notice to vacate and continued with the illegal and unlawful occupation of the suit premises. She stated that this evidence was uncontroverted.

Miss Chesio further submitted that the defendant admitted that he had leased the suit property from one Willy Kirui but did not produce any copy of the said lease agreement. The said Willy Kirui mentioned by the defendant is a stranger to the suit property as he has no beneficial interest in the suit property as submitted by the Counsel for the plaintiff.

Counsel referred the court to section 56 and 66 of the Land Act 2012 in respect of leases and the requirement of land board consent as the land in question is agricultural land. If the defendant had any lease then the same was not registered as required by law therefore null and void. Miss Chesio further submitted that there was never a lease between the parties capable of being registered thus rendering the defendant a trespasser on the suit property and the plaintiff is rightly entitled to the remedies sought in the plaint.

On the prayer for mesne profits Counsel defined it as per the Black's Law Dictionary 2nd edition, and stated that the plaintiff is entitled to mesne profits from December 2012 to date at the rate of Kshs. 23,000/-. This amount was deduced from the defendant's evidence that he had been paying the same to one Willy Kirui who had leased the suit premises to him.

On damages, it was submitted by the plaintiff's counsel that the plaintiff is entitled to aggravated damages. She relied on the case on **Invergie Investment Ltd v Hackett (1995) 1 WLR 713 at page 718** that one need not prove loss in a claim of aggravated damages in the event the court finds the defendant guilty of trespass. She also further relied on the case of **Scott v Brown (1892)** to emphasize the point that the court ought not enforce an illegality.

Lastly Counsel submitted on the issue of eviction and costs. She relied on various authorities where courts gave orders for eviction as the defendants were found to be trespassers on the suit parcels of land. Miss Chesio finally submitted that costs follow event and therefore the defendant should be condemned to pay the costs as the plaintiff has proved his case against him.

Analysis and Determination

The Plaintiff had filed 7 Issues for determination as enumerated earlier but I will condense the issues to three for analysis and determination. The first issue for determination would be **whether the plaintiff is the registered owner of the suit land.**

From the evidence on record and the exhibits produced, it is not in dispute that the plaintiff is the registered owner of the suit land. This was admitted by the defendant during examination in chief and on cross – examination. The plaintiff produced a copy of a title of the suit land registered in his name. The law is very clear under section 24, 25, and 26 of the Registration of Lands Act 2012 on the issue of indefeasibility of title upon registration unless the same is tainted with fraud or misrepresentation. The defendant did not file any pleadings to allege that the plaintiff's title was acquired irregularly or was tainted by fraud or misrepresentation. A party alleging fraud must specifically plead the particulars of such fraud either in the plaint or in a counter claim. This was not the case in this matter.

The defendant did not produce any document or lead evidence that he has any recognizable interest known in law on the suit land. He has no beneficial interest which the court can consider in this case. He just alleged that he had leased the land from one Willy Kirui who has never been the registered owner of the suit land at any time. The defendant did not produce the alleged lease agreement which was never registered at the lands office.

I therefore find that the plaintiff having produced a copy of title of the suit land registered in his name that this is prima facie evidence of absolute proprietorship and hence his right is protected under the law. This finding also tackles the issue as to whether the defendant's continued occupation of suit land amounts to trespass. The defendant admitted that the plaintiff was the registered owner of the suit land. He did not convince the court on why he continued to occupy the plaintiff's land. He even wrote a letter indicating that he would not move out of the plaintiff's land. Having said that I find that the defendant is a trespasser on the plaintiff's land and should be evicted to enable the plaintiff enjoy his land.

On the issue, as to whether the plaintiff is entitled to mesne profits, I have always stated in my previous renditions that it is settled law that mesne profits are special damages which must not only be specifically pleaded but also proved. The plaintiff pleaded for mesne profits but did not indicate the amount that he would be entitled to. When cross -examined by Mr. Kagunza Counsel for the defendant the plaintiff

stated that he would have to compute mesne profits later. I will rely on the case of **PETER MWANGI MBUTHIA VS SAMOW EDIN OSMAN & NAFTALI RUTH KINYUA C.A CIVIL APPLICATION No. 38 of 2004 (2014 e K.L.R)**, where 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”

When a party is suing for mesne profits he/she should have in mind what amount he is considering as mesne profits as it is a special damage. The plaintiff further did not lead any tangible evidence on this limb of mesne profits. I therefore find that the plaintiff is not entitled to this prayer and it accordingly fails.

The plaintiff prayed for general damages for trespass as the defendant unlawfully denied him access to his property. Having determined that the defendant is a trespasser, it follows that he should pay damages. 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. It is incumbent upon the Court to assess the reasonable damages to be awarded to the plaintiff. The court can take into account amongst other factors the length of time of illegal occupation, the nature of the trespass and whatever the trespasser was doing on the land. It should also be noted that the award of general damages is at the discretion of the court which must be exercised judiciously.

The defendant was running a restaurant business in the name and style of “Shades Hotel and Restaurant’ and a butchery on the suit land. He also stated that he had paid money to one Willy Kirui who had leased the land to him. The plaintiff had also testified that he had taken a loan which he was still servicing. The defendant further responded to the plaintiff’s letter demanding that he vacates the land vide a letter dated 23rd May 2013 by stating that he would not vacate the same. The plaintiff’s counsel did give a figure of Kshs. 23,000/ per month from the date of trespass as mesne profits which was denied.

Considering that the defendant has been carrying on business on the suit land to the detriment of the plaintiff. I will award the plaintiff Kshs 1,200,000 million as general damages which I find reasonable.

I further find that the plaintiff is entitled to the costs of this suit.

Having considered the pleadings, evidence, submissions and the authorities thereof, I therefore enter judgement for the plaintiff against the defendant in the following terms:

- a) That the defendant do give the plaintiff vacate possession of the suit land within 30 days upon service of this judgment or decree, in default of so vacating, an order of eviction be issued against the defendant from parcel of land No. UASIN GISHU/KIMUMU SCHEME/3419.
- b) That a permanent injunction is hereby issued against the defendant restraining him and his agents, employees or servants from trespassing upon land parcel No. UASIN GISHU/KIMUMU SCHEME/3419.
- c) An order that the defendant do pay to the plaintiff general damages for trespass assessed at Kshs. 1,200,000/.
- d) The defendant to pay costs of this suit to the plaintiff.

Dated and delivered at Eldoret on this 20th day of September, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Kimani holding brief for Mwinamo for Plaintiff

Miss Nasiloli for Mr. Kamau for Plaintiff

CC: Koech