



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 628 OF 2016**

**HENRY NJUGUNA MUITA [*Suing on behalf of Ndundu***

***Welfare Men & Women Group (also known as Ndungu***

***Welfare Men & Women Group) ..... PLAINTIFF***

**VERSUS**

**MESHAK MUREITHI WAMBUGU ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit in his capacity as ***Trustee of Ndundu Welfare Men & Women Group***. It is contended that Ndundu Welfare Men & Women Group is also known as ***Ndungu Welfare Men & Women Group***. Through an amended plaint dated 16/8/2016, the plaintiff prays for an eviction order against the defendant. He also seeks mesne profits.

2. The plaintiff's case is that ***LAND TITLE NO. RUIRU/KIU BLOCK 6/998 [hereinafter referred to as "the suit property"]*** belongs to Ndundu Welfare Men & Women Group, a welfare group registered under the Department of Culture & Social Services [*hereinafter referred to as "the Group"*]. In the year 2015, the Group discovered that the defendant had encroached on the suit property. Despite several demands and notice of intention to sue, the defendant refused to vacate the suit property. This is what triggered the present suit.

3. On 28/9/2016, the defendant filed a statement of defence in which he stated that he has lived on the suit property since the year 1987 and he has enjoyed quiet possession of the suit property since then. The defendant further averred that he purchased the suit property on 28/9/1987 from one Samuel Njoroge Kiburu and he took possession after paying purchase price in full. The defendant further pleaded that the Group is the proprietor of Land Parcel Number Ruiru/KIU Block 6/997 and not Parcel Number Ruiru/KIU Block 6/998. He contended that the two parcels are adjacent. The defendant urged the court to dismiss the plaintiff's suit.

4. From the pleadings, there are three issues to be determined. The first key issue to be determined is whether Ndundu Welfare Men & Women Group [also known as Ndungu Welfare Men & Women Group] is the proprietor of Land Parcel Number Ruiru/KIU Block 6/998. The second issue is whether the defendant is a trespasser on Land Parcel Number Ruiru/KIU Block 6/998. The third issue is whether the Group's claim for mesne profits against the defendant satisfies the criteria for assessment of mesne profits.

5. This suit was listed for hearing on 25/9/2017. On that day, Wanyoike appeared for the plaintiff. There was no appearance on part of the defendant. On court record was an affidavit of service sworn by Julius

Thiongo on 21/4/2017. Annexed to the affidavit was a hearing notice dated 11/4/2017, indicating that the hearing notice was received by the firm of Thuku & Associates Advocates on 12/4/2017. Satisfied that there was adequate evidence of service of hearing notice, I allowed the hearing to proceed *ex parte*.

6. PW1, Henry Njuguna Muita, testified that he is a farmer *cum* businessman residing in Gatundu Sub-County. He adopted his written witness statement dated 20/5/2016 as his sworn evidence in chief. He produced as plaintiff exhibits No. 1 to 6 the six documents contained in the plaintiff's list and bundle of documents dated 20/5/2016 and filed in court on 10/6/2016. The exhibits produced were: [i] certificate of lease in respect of Parcel Number Ruiru/KIU Block 6/998; [ii] Map for Ruiru/KIU Block 6 in which Parcel Number 998 is indexed; [iii] the Official Search from Thika Land Registry in respect of Title Number Ruiru/KIU Block 6/998; [iv] receipt in respect of the Official Search, [v] Certificate of Registration for Ndundu Welfare Men & Women Group and [vi] demand letter dated 6/1/2016.

7. PW1 testified that the Group purchased the suit property from one Peter Mbiyu Waronja in 1995. Upon purchase, the Group was issued with requisite documents to facilitate processing of title by the Ministry of Land. He asserted that the suit property is registered in the names of Henry Njuguna Muita, Joseph Mwangi Gicango and Francis Mburu Migwi as Trustees of Ndundu Welfare Men & Women Group.

8. The defendant did not lead any evidence to support his defence to the effect that Parcel No. 998 is his property and that the Group's land is Parcel No. 997. The plaintiff's evidence is uncontroverted.

9. I have carefully gone through the documents presented by the plaintiff in support of the Group's case. The exhibited official search is in respect of Parcel Number Ruiru/KIU Block 6/998 and confirms that this particular parcel is registered in the names of Henry Njuguna Muita, Joseph Mwangi Gicango and Francis Mburu Migwi as Trustees for Ndungu Welfare Men & Women Group. Secondly the Certificate of Lease [Exh No. 1] dated 25/9/2016 bears the above proprietorship details.

10. Based on the above uncontroverted evidence, the answer to the question as to whether Ndundu Welfare Men & Women Group [also known as Ndungu Welfare Men & Women Group] is the proprietor of Land Parcel Number Ruiru/KIU Block 6/998 is in the affirmative. And I accordingly so find. The answer to the question as to whether the defendant is a trespasser on the suit property is similarly in the affirmative. And I similarly so find.

11. I now turn to the question as to whether the plaintiff's claim for mesne profits has been satisfactorily established. A claim for mesne profits is a claim for damages for trespass to land. The Rt Hon Sir Robert Megarry and Sir William Wade in their Work, "*The Law of Real Property*" have outlined the following two approaches to be applied in assessing mesne profits:

**i. Usually the owner will claim compensation for having been deprived of the use and occupation of the land. This is assessed according to the current open market value of the land, normally the ordinary letting value. The land owner is entitled to this sum '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.'**

*Although this claim is distinct from the claim for compensation for use and occupation which lies where there is some kind of tenancy between the parties, ... there may be no practical distinction between the two.*

**ii. A land owner may seek restitution for the benefit received by the defendant where he cannot claim the ordinary letting value, eg because the property is not available for letting in the open market."**

12. Either of the above two approaches require that evidence be led by the land owner to assist the court come up with a figure that satisfies the criteria for assessment of mesne profits. Such evidence would include rent valuation reports and comparables. The plaintiff in the present suit did not lead any iota of

evidence to support the prayer for mesne profits. In my view, if I were to award any sum in mesne profits, I would be acting arbitrarily because no indicative materials have been placed before the court to assist the court come to an informed assessment. Consequently, I find that although the Group would ordinarily have been entitled to mesne profits, this limb of the claim cannot be awarded in the absence of supporting evidence.

13. The upshot of this Judgment is that judgment is entered against the defendant in the following terms:

**a. The Plaintiff shall vacate the suit property, Land Title Number Ruiru/KIU Block 6/998 within thirty [30] days from today. In default, an eviction order shall issue for execution under the general directions of the police officer in charge of the sub county where the suit property is situated.**

***b. The plaintiff shall have costs of the suit.***

**Dated, signed and delivered at Nairobi on this 27th day of November, 2017.**

**B M EBOSO**

**JUDGE**

**In the presence of:**

N/A: for the Plaintiff

N/A: for the Defendant

Halima Abdi: Court Assistant