



Hexmead Investments Ltd v Mariga & 2 others (Environment & Land Case 552 of 2010) [2016] KEELC 1307 (KLR) (4 November 2016) (Judgment)

Hexmead Investments Ltd v Mcdonald Mariga & 2 others [2016] eKLR

Neutral citation: [2016] KEELC 1307 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 552 OF 2010
SO OKONG'O, J
NOVEMBER 4, 2016**

BETWEEN

HEXMEAD INVESTMENTS LTD PLAINTIFF

AND

MCDONALD MARIGA 1ST DEFENDANT

NOAH WANYAMA 2ND DEFENDANT

MILDRED WANYAMA 3RD DEFENDANT

JUDGMENT

1. The plaintiff was and still is the registered owner of all that parcel of land known as LR No. 209/10908(Grant No. I.R. 65230) (hereinafter referred to as “the suit property”). The plaintiff brought this suit against the defendants on 15th November 2010 seeking the following reliefs:-
 - a) A declaration that the plaintiff is the bonafide registered proprietor and entitled to the possession of all that parcel of land known as LR No.LR No. 209/10908(Grant No. I.R. 65230) (“the suit property”).
 - b) An order of eviction of the defendants from the suit property or alternatively an order compelling the defendants to remove the structures erected on the suit property at their cost within such time as the court may deem fit and in default, the plaintiff be at liberty to remove the same at the defendants’ cost.
 - c) A permanent injunction to restrain the defendants by themselves, their agents, servants or otherwise howsoever from remaining on or continuing in occupation of the suit property.
 - d) Damages for trespass.



- e) Costs of and incidental to the suit.
 - f) Any other or further relief that court may deem fit to grant.
2. In its plaint dated 10th November 2010, the plaintiff averred that at all material times it was and still is the registered owner and entitled to possession of the suit property. The plaintiff averred that in the month of April 2007, the defendants wrongfully entered the suit property, took possession of a portion thereof and started erecting a structure thereon. The plaintiff averred further that on 25th June 2008, a demand was made upon the defendants to vacate the suit property, remove the structures they have put up thereon and give possession of the property to the plaintiff following which demand, the defendants stopped construction and abandoned the structure they were putting up. The plaintiff averred that in the months of September and October 2010, the defendants returned to the suit property and threatened to proceed with the construction of the said structure that they had abandoned. The plaintiff averred that the defendants' entry onto the suit property is wrongful and that the defendants have failed to stop the trespass despite the repeated requests made by the plaintiff for them to do so.
 3. The defendants were served with summons but neither entered appearance nor filed a statement of defence. On 7th June 2011, interlocutory judgment was entered in favour of the plaintiff against the defendants in default of appearance. When the suit came up for formal proof on 14th March 2016, the plaintiff called one witness, Lawrence Kirauni Karuri(PW1). PW1 testified that he was the plaintiff's property manager. He adopted his witness statement dated 28th February 2012 as his evidence in chief. In the said statement, PW1 stated as follows. The plaintiff is the registered owner of the suit property. The suit property is held by the plaintiff on a lease from the Government of Kenya for a term of 99 years with effect from 1st January 1994. When the plaintiff was granted a lease by the Government of Kenya over the suit property, the plaintiff was known as Kiburine Progressive Enterprises Limited. Kiburine Progressive Enterprises Limited changed its name to Hexmead Investments Limited on 1st December 1995. As the owner of the suit property, the plaintiff is entitled to possession of the same. On or about April 2007, the defendants wrongfully entered the suit property and erected structures thereon. The plaintiff got to know the personal details of the defendants through private investigators. After the defendants were identified and located, a demand was made upon them in June 2008 to stop trespassing on the suit property. Upon receipt of the demand letter, they halted their activities on the suit property. The defendants have however refused to demolish and remove the structures that they have put up on the suit property. The defendants have stationed a guard at the entrance of the suit property with instructions that nobody should be allowed to enter the premises. The plaintiff has been denied the use and enjoyment of the suit property as a result of the defendants' activities aforesaid. PW1 urged the court to grant the reliefs sought by the plaintiff in the plaint.
 4. PW1 produced as exhibits, a copy of the Grant Number I.R. 65230 in respect of the suit property, a copy of the certificate of change of name of Kiburine Progressive Enterprises Limited to Maxmead Investments Limited, the plaintiff herein, photographs of the incomplete building which the defendants have put up on the suit property, a copy of the report by Inter-Scope Loss Assessors dated 17th June 2008 and a copy of demand letter dated 25th June 2008 addressed to the defendants by the plaintiff's advocates on record.
 5. On examination by the court, PW1 told the court that the defendants are members of the same family and that they were the ones who were carrying out construction on the suit property. He told the court further that the building which the defendants were putting up on the suit property is incomplete and that the defendants are not residing thereon. He told the court that he was not aware of the claim if any which the defendants have over the suit property. After the close of the plaintiff's case, the plaintiff's advocate Mr. Ombati chose to make closing submissions in writing.



6. The plaintiff's claim against the defendants is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page, 923, paragraph, 18-01. What I need to determine in this case is whether the plaintiff has proved that it is the owner of the suit property and that the defendants have entered and occupied the same without any justifiable cause. The plaintiff has demonstrated that he is the registered owner of the suit property by producing in evidence a copy of the Grant of lease that was issued in its favour by the Government of Kenya in respect of the suit property on 18th January 1995. The said Grant was registered on 3rd February 1995. Under section 24 of the [Land Registration Act, 2012](#), the registration of the plaintiff as the proprietor of the suit property vests upon the plaintiff absolute ownership thereof together with all rights and privileges associated with such ownership. Under section 25 of the said Act, the plaintiff's rights over the suit property are indefeasible except as provided under the said Act. Section 25 (1) of the [Land Registration Act, 2012](#) provides as follows:-
 1. The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:
 - a. To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and
 - b. To such liabilities rights and interests as affect the same and are declared by section 28 not to require noting on the register unless the contrary is expressed in the register.
7. This suit was not defended by the defendants. The evidence that was adduced by the plaintiff was not controverted by the defendants. The plaintiff's title to the suit property is therefore not contested. PW1's testimony that the defendants have entered onto and erected a structure on the suit property without the plaintiff's consent or authority is also not challenged. The plaintiff having proved his ownership of the suit property and the defendants' entry and occupation thereof, the onus was upon the defendant to justify their occupation of the property.
8. In the absence of any evidence from the defendants, the only conclusion this court can make is that the defendants have no justifiable cause for entering and putting up a structure on the suit property and as such they are trespassers thereon. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendants and that he is entitled to the prayers sought in the plaint.
9. I therefore enter judgment for the plaintiff against the defendants jointly and severally in terms of prayers (a), (b) and (c) in the plaint dated November 10, 2010. I have declined to grant prayer (d) because no evidence was led in respect thereof. The defendants shall demolish the structure that they have put up on the suit property, vacate and handover possession of the suit property to the plaintiff within sixty (60) days from the date of service of a copy of this judgment and the decree extracted therefrom upon their failure to which the plaintiff shall be at liberty to apply for their forceful eviction at their own cost. The plaintiff shall file in court an affidavit of service of copies of the said judgment and decree upon the defendants. The filing of the said affidavit of service shall be a condition precedent to any further proceedings herein at the instance of the plaintiff. The plaintiff shall have the costs of the suit.

DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2016.

S.OKONG'O

JUDGE



In the presence of

Mr. Kariuki h/b for Ombuti for the Plaintiff

N/A for the Defendants

Kajuju Court Assistant

