



**Nyaga v Nthiga (Environment and Land Appeal E014 of 2022)  
[2024] KEELC 978 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 978 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E014 OF 2022  
A KANIARU, J  
FEBRUARY 20, 2024**

**BETWEEN**

**TARCIANA WEGANDU NYAGA ..... APPELLANT**

**AND**

**PATRICIA NJERI NTHIGA ..... RESPONDENT**

*(Being an appeal from the decision of Senior Principal Magistrate J.W. GICHIMU  
in ELC Case No. 010 of 2020 at Runyenjes Law Courts dated 29.09.2022)*

**JUDGMENT**

1. This appeal arose from the Judgement of the lower court in Runyenjes ELC Case No. E10 of 2020 Patriciah Njeri Nthiga vs Tarciana Wegandu Nyaga by (Hon J.W Gichimu, Senior Principal Magistrate). The Appellant – Tarciana Wegandu Nyaga - was the defendant while the Respondent – Patriciah Njeri Nthiga - was the plaintiff.
2. The Respondent had sued the Appellant for breach of an agreement that they had entered into for the sale of 0.20 Ha out of Land parcel No. Gaturi/Nembure/4856 measuring 2.5 Acres, which belongs to the Appellant. It was said that the agreed purchase price was Kshs 650,000 and that the Respondent had paid the sum of Kshs. 540,000, leaving a balance of Kshs. 110,000 which was to be paid during transfer. It is said that the Appellant, despite receiving the said money, failed to honour the agreement as she did not transfer the suit property to the Respondent. She instead started offering the same for sale to third parties.
3. The Appellant filed a defence and counterclaim where she claimed that the Respondent had breached the agreement by failing to pay the full purchase price. She instead allegedly opted to sue for what she had paid. The appellant further claimed that the Respondent had forcefully entered into the suit land with the aid of policemen and has since been harvesting coffee and miraa. That the Respondent also



- caused her to be arrested together with her daughter and charged vide criminal case no. 672 of 2019, which case is yet to be heard and determined.
4. She claimed that the Respondent had benefited hugely from the coffee and miraa which income from proceeds per year she estimated at Kshs. 300,000. The total benefits in the two and a half years she was cultivating in the land amount to Kshs. 750,000. That through the sale of the coffee and the miraa the Respondent overly repaid herself and in fact owes the appellant her what she has to date earned over and above her alleged claim. She prayed for eviction of the Respondent from the suit land; mesne profits for use of land from the date of filing the counterclaim to the date of vacation. She also prayed for costs of the counterclaim.
  5. The court heard the parties and in its judgement delivered on 29.09.2022 found that the Respondent had proved her case against the Appellant on a balance of probabilities. It awarded the Respondent the sum of Kshs. 540,000 and the costs of the suit. The court also directed the Respondent to vacate the suit land within 3 months from the date of judgement failing which she would be evicted. That is what provoked this appeal.
  6. A memorandum of appeal was filed on 27.10.2022 and amended on 30.03.2023. The substance of the amended memorandum of appeal is as follows;
    1. The honorable learned trial magistrate erred in law and fact by not holistically considering the evidence adduced by the appellant.
    2. The learned trial magistrate rightly dismissed the respondent's suit but proceeded to err in law and fact in awarding the Respondent Kshs. 540,000 which the respondent did not in the least claim in her reliefs as per plaint.
    3. The learned trial magistrate erred in law and fact by not finding that the respondent by utilizing the appellants land for close to 4 years the respondent owed the appellant a total of Kshs. 900,000 in mesne profits a fact the respondent acknowledged.
    4. The learned trial magistrate erred in law and fact in awarding the respondent interest and costs in the (sic) situation where in this case the respondents claim and reliefs sought were dismissed.
  7. The appellant then prayed for;
    - a. Setting aside of Kshs. 540,000 the award by the honourable trial court.
    - b. The award of interest and cost be set aside as unwarranted.
    - c. Costs of this appeal.
    - d. Appellants Counter-claim be upheld.
  8. The appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 22.09.2023. It was submitted that during trial, the Respondent accepted she was in occupation and utilization of the suit land and also derived benefits as per the valuers report for a period of four years at the time. That the trial magistrate disregarded that admission and failed to consider it and then dismissed it against all principles of contract and equity that condemn exploitation and unfairness in situations such as this. That the trial court proceeded to award the refund of Kshs. 540,000 when the Respondent did not seek for it. That the Respondent having admitted occupation and beneficial utilization of the suit land, the court was supposed to grant the mesne profits sought in the counterclaim.



9. The Respondent on the other hand filed submissions on 11.01.2024. It was submitted that the fact that the parties entered into a valid contract has not been contested by either party. That guided by those facts the trial court arrived at the conclusion that the said contract had been breached and found the appellant culpable of the said breach. That all the parties were accorded a hearing where they called witnesses and filed their documents and therefore the Appellant cannot say her evidence was not considered.
10. That the appellant did not produce any evidence to justify the amount she claims the Respondent earned from utilizing the suit land. That she cannot claim mesne profit from the Respondent when she legally gave possession to her as a bona fide purchaser and with her consent obtained from the sale agreement they entered into. It was further submitted that the trial court was within discretion to award costs and interest as the Respondents case was not dismissed.
11. I have considered the appeal as filed, the rival submissions, and the contested judgment. This is a first appeal and as the first appellate court, the task ahead is as spelt out in the case of Mbogo & Another vs Shah [1968] EA that;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
12. In my view the issue for determination herein is whether the Appeal herein has merit.
13. The Appellant complains that the trial court erred in awarding the Respondent a sum of Kshs. 540,000 which she says had not been claimed. She also complains that the trial court failed to award her mesne profits whereas the Respondent has been utilizing the suit land and making gains from the same. She also complained that the court failed to take into consideration her evidence.
14. It is not in dispute that the parties entered into an agreement for the sale of part of the suit land Gaturi/Nembure/4856 for a consideration of Kshs. 650,000. The said agreement is dated 15.01.2019 and is signed by the Appellant and the Respondent and attested to by four witness. The Appellant admits having received the sum of Kshs. 470,000 in part payment of the purchase price but denies having received Kshs. 70,000 as she says she was forced to acknowledge receiving the same. The Respondent on the other testified that she gave the Appellant Kshs. 470,000/- and that after a while the Appellant asked her for more money and she gave her Kshs. 70,000/-.
15. The Appellant produced in evidence the acknowledgement note for the sum of Kshs. 70,000 as Defendants Exhibit No. 1. I have looked at the said acknowledgement. It shows that the Appellant received Kshs. 70,000/= being part payment in respect of land parcel Gaturi/Githimu/4856 pursuant to the agreement dated 15.01.2019. The same is signed by the vendor and the purchaser in the presence of three witnesses being Stella Wambeti, John Paul Mwaniki and Martin Muriithi Jotham. The Appellant during trial called to the stand the 1<sup>st</sup> witness, Stella Wambeti, who happens to be her daughter who testified in her favour that they were forced to acknowledge receiving Kshs. 70,000/- by the Respondents advocate.
16. It is rather interesting that the Appellant only called her daughter to corroborate her allegations despite there having been other witnesses. Of course it would be expected that being related and especially being mother and daughter, she would not give a contradicting statement from that of her mother. I think it would have been more prudent for the Appellant to call the other witnesses to corroborate her



statement to the effect that she was forced to acknowledge receiving the said money. The Appellant did not also report the said illegal transactions to the police, which makes it hard to believe that she was forced into signing the acknowledgement. This court is therefore not persuaded that the Appellant was forced to sign the acknowledgement dated 15.04.2019 acknowledging having received Kshs. 70,000 from the Respondent. I agree with the trial court that the Appellant received a total sum of Kshs. 540,000 from the Respondents as part of the purchase price.

17. Having found that, the Appellants complaint was that the trial court awarded the Respondent the sum of Kshs. 540,000 which she had not claimed for in her reliefs in the plaint. I have looked at the Plaint which is dated 04.03.2020. The Respondent had made the following claims;

- a. Liquidated damages as per clause 11 of the agreement dated 15.01.2019.
- b. The costs and interest of this suit.
- c. Any further relief which the court may deem fit and just to grant.

18. A look at Clause 11 of the Agreement, the same provides;

“In the event the Vendor failing to execute his part of this agreement he shall pay back to the purchaser all the monies the purchaser shall have expended towards the furtherance of this transaction together with interest at the rate of 30% per annum”

19. The wording of this clause is clear that incase of default by the Vendor to perform her part of the agreement then she would refund the purchaser all the money the purchaser would have spent towards their transaction with interest at 30% per annum. The Respondent testified that the Appellant did not transfer the suit property to her which fact the Appellant did not deny. She instead explained that she failed to transfer the suit land to the Respondent because she had her arrested and because she failed to pay the full purchase price. The Agreement provided that the purchaser was to pay Kshs. 470,000 on or before the signing of the agreement which payment in any case is not denied. It also provided that the balance of Kshs. 180,000 was to be paid when the relevant land control board granted consent for the transaction and upon the Appellant executing transfer documents.

20. There is no evidence that the Land Control Board Consent was ever obtained and as has been admitted by the Appellant, she did not transfer the suit land to the Respondent, which means that the transfer documents were never signed to entitle her to claim the full purchase price. Can she be said to have failed to execute her part of the Agreement to entitle the Respondent to invoke the said Clause 11 of the Agreement? YES SHE CAN. That is clear as day. The Respondent as per the agreement was entitled to be paid back the money she would have spent in furtherance of the agreement. The only money she was able to prove to have spent in furtherance of their transaction was the purchase price which the court found to be Kshs. 540,000. This is what she was entitled to and this is what the court awarded. The court therefore does not agree with the Appellants argument that the trial court erred in awarding the Respondent the said sum of Kshs. 540,000. The basis of the award is in clause 11 of the agreement, which appears as prayer (a) in the plaint. Infact as per clause 11 of the agreement, the respondent was also entitled to 30% interest per annum which the lower court didn't award. I will also not award it here as the respondent has not pursued it.



21. The Appellants other complaint was that the court failed to award her mesne profits for the Respondents utilization of her land. Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

Order 21 Rule 13 of the Civil Procedure Rules provides;

- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
  - (a) for the possession of the property;
  - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
  - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until —
    - (i) the delivery of possession to the decree-holder;
    - (ii) the relinquishment of possession by the judgment-debtor with notice to the decreeholder through the court; or
    - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under subrule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

22. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR as cited in Njenga v Kinuthia & another (Environment & Land Case 21 of 2020) [2022] KEELC 3249 (KLR) (6 June 2022) (Judgment) considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.”

23. The court in the case of Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR as cited in Fredrick Korir v Soin United Women Group (Sued through Eunice Towett, Jane Mwolomet, Lucio Chebocho [2018] eKLR had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

“In Bramwell vs. Bramwell, Justice Goddard stated that “... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, Williams & Bradley v Tobiasen it was stated



that these words: "Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.

Halsburys, op. cit, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market valuerent.

The Black's Law Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." The Concise Oxford English Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord."

The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits."

24. It is clear from the above that in order for the Appellant to succeed in the claim for mesne profits they have to demonstrate that the Respondents presence in the suit land was wrongful. I agree with the trial court that the Appellant cannot seek for mesne profit because the Respondent took possession of the suit land lawfully and with the consent of the Appellant. The Appellant willingly sold the suit land to the

Respondent and therefore the Respondent cannot be said to be a trespasser. It is very clear that the appellant only changed her mind regarding the sale later.

25. The appellant also complained that the trial court awarded the Respondent interest and costs when the Respondent's claims were dismissed. I find this to be misleading as the Respondent was found to have proved her case against the Appellant to the required standard. It is therefore not true that the Respondents claims were dismissed. Also from the judgement, the trial court only awarded costs, there was no award for interest. The Appellant also succeeded in her claim in so far as being granted eviction orders should the Respondent not vacate the suit property within the period defined by court. However it is settled that the award of costs and interest is usually at the discretion of the court as provided for under Section 27 of the [Civil Procedure Act](#). The court exercised its discretion in allowing the costs of the suit and it has not been shown that the discretion was exercised improperly to call



for interference by this court. From what is on record, the appellant appears clearly to have been the dishonest party in the whole transaction.

26. The upshot of the above is that I find no merit in the appeal and hereby dismiss the same in its entirety with costs to the respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20<sup>TH</sup> FEBRUARY, 2024**

**A. KANIARU**

**JUDGE – ELC, EMBU**

in the presence of;

Applicant – present

Respondent – present

Mr Nyakeriga for Ms Mureithi for respondent.

Court Assistant - Leadys

