



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC CIVIL SUIT NO. 563 OF 2010

PETER KARONG'A KURIA.....PLAINTIFF

VERSUS

MARGARET WAIRIMU KIMANI.....DEFENDANT

JUDGMENT

By a plaint dated **18th November 2010** the plaintiff filed this suit seeking for judgment against the defendants for:-

1. *The defendant's personal representatives, agents and assigns be evicted from land parcel number Ng'enda/ Mutomo/T.41.*
2. *Mesne Profit from 16th February 2006 when she was supposed to give vacant possession.*
3. *Any other reliefs and costs of this suit.*

The Plaintiff states that the defendant was the wife of Kimani Ngoro who is now deceased. Further, that the plaintiff and the defendant's husband entered into a sale agreement on **26th October 2005**, for a piece of land known as **Ng'enda/Mutomo/T.41**, for a price of **Ksh 200,000/=** with the knowledge that they would both participate in filing succession Cause to enable the defendants transfer parcel number **Ng'enda/Motumo/T.41** into the Plaintiff's name. When succession Cause was filed in 2005, the plaintiff was listed as one of the beneficiaries of the **Estate of Kimani Ngoro**, and a subsequent amended grant of **letters of administration** issued to the defendant on 3rd February 2010, showed the plaintiff as purchaser. He avers that having paid all the price of the suit property, the defendant signed all the necessary documents of transfer and the same was transferred to the plaintiff on 23rd August 2010 and a title deed issued in the plaintiff's name on **10th September 2010**. The plaintiff further averred that he had been requesting the defendant to give vacant possession since 16th February 2006 when he paid the balance of the purchase price but the defendant has refused hence this suit adding that since the plaintiff being the proprietor of the suit property prays that the defendant be evicted from the said parcel of land so that he may take possession.

The defendant was served with the plaint and summons to enter appearance on **25th November 2010**, but she did not file a defence and on 31st March 2011, the court having noted the defendant's failure to file defence allowed the defendant to proceed with the hearing of this suit. At the hearing of this case, the plaintiff adopted his written statement filed in court on 3rd December 2013 wherein he

stated that he sued the defendant because she was with her deceased husband when they signed the sale agreement to sell him the suit property. He produced a copy of the sale agreement dated 26th October 2005. He testified that he gave her husband **Ksh 50,000/=** and when her husband died the defendant took out letter of administration and in the grant he was recognized as a beneficiary and he produced a copy of the grant in court. However, the defendant failed to give vacant possession of the suit property even after she signed the transfer forms and a title issued in the name of the defendant. He confirmed that he had paid all the monies to the defendant and that the defendant does not live on the suit property. He further stated that when he served the plaintiff with the pleadings of this suit, she reported her to the police station and when he was summoned by the police he produced the court documents showing that he had a claim against the defendant. He now wants the defendants and her agents evicted from the suit property and *mesne profit* for the reasons that even though he had purchased the land he has not benefited from it. He is also seeking for costs of the suit.

The Plaintiff filed his written submissions on 9th December 2014, wherein he reiterated the contents of his pleadings.

I have considered the plaintiff's pleadings and evidence in court. The issues this court will determine are:-

1. *Whether the plaintiff has proved that he is the owner of the suit property*
2. *Whether the orders of eviction should be granted.*
3. *Whether the plaintiff is entitled to mesne profits.*
4. *Whether he is entitled to costs of this suit.*

Whether the plaintiff has proved that he is the owner of the suit property

The Plaintiff has demonstrated that he is the registered owner of the suit property following the successful purchase of the property from the defendant. He has furnished a copy of the Agreement for sale dated 26th October 2005, Confirmation of grant dated 3rd February 2010, showing that the defendant was the sole beneficiary with purchaser's interest on the suit property and a copy of title deed showing the **Plaint A** as the legal owner of the suit property which title was issued on 10th September 2010. I am therefore satisfied that the Plaintiff regularly and procedurally purchased the suit property and that upon registration of the transfer in his favour, the Plaintiff under the provisions of **Section 24 of the Land Registration Act** became vested with the absolute ownership of the suit property and further under **Section 25** of the Act the rights of ownership acquired by the Plaintiff are indefeasible except as provided under the Act. **Section 25(1)** of the Land Registration Act provides as follows:-

“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”-

1. ***To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***
2. ***To such liabilities, rights and interests as affect the same and are declared by section 28 not to noting on the register unless the controversy is expressed in the register.***

The Plaintiff having been registered as the proprietor and having been issued with title deed over title **No.Ngenda/Mutomo/T.41**, is in terms of **section 26 (1) of the Registration of Lands Act** entitled to the protection of the law.

“The certificate of title issued by the Registrar upon registration or to a purchaser of land

upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge,except”-

- 1. On the grounds of fraud or misrepresentation to which the person is proved to be a party, or***
- 2. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

I find that the plaintiff has proved that he is the legal owner of the suit property. The 2nd issue is whether the orders of eviction sought by the Plaintiff should be granted.

The plaintiff has explained to court that the defendant’s agents are in occupation of the suit property and reside in it. The defendant’s possession on the suit property is invalid. The plaintiff on the other hand never effectively occupied nor took possession of the suit land because he has not been allowed by the defendant to occupy the suit property and having found that the defendant had sold the property to the plaintiff it follows that her occupation is unlawful. The plaintiff having satisfied the court that the defendant is a trespasser on the suit property is therefore entitled to have an order to evict the Defendant from the said property. It is trite that a trespasser or a squatter cannot resist the registered owner from evicting her. The Court of Appeal in ***Wreck Motor Enterprises -vs- The Commissioner of Lands & 3 Others. Civil Appeal No. 71 of 1997, (2005) e KLR*** held that the title of the registered proprietor “takes precedence and is supreme over all other alleged equitable rights of title.” In ***Dr. Joseph N.K. Arap Ng’ok -vs-Justice Moiwo Ole Keiwua & 4 Others, Civil Application No. NAI 60 of 1997*** the court held that,

“Court of Appeal decisions is crystal-clear as to the status of claims by a registered land-owner running against claims by the physical occupant of a suit land. Unless (i) the physical occupant meets the conditions of an adverse possession claim, and he has moved the Court through prescribed procedure for having his claim upheld, and his claim has been upheld; or (ii) the physical claimant proves to the satisfaction of the Court that the registered title-holder attained his proprietorship status by fraud or he was party to a misrepresentation which brought him thither, then the registered land-owner wins the argument hands down; and the physical occupant must yield, quit, or be evicted. It seems to me that this is the current state of the law; and so it forms the doctrinal substratum whereupon any lesser equitable pleas may, in a proper case, be made before the Court.”

It is therefore this court’s finding that the defendant must give vacant possession of the suit property within 30 days failure to which she will be evicted. The third issue to be determined is whether the Plaintiff is entitled to ***mesne profits***. The plaintiff has also prayed for ***mesne profits***. The ***Black’s Law Dictionary 9th Edition*** defines ***mesne profits*** as

“the profits of an estate received by a tenant in wrongful possession between (2) two dates.”

And in the ***Concise Oxford English Dictionary 12th Edition*** ***mesne profits*** has been defined as “***the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.***” ***Mesne profits*** are classified as special damages. The principle is that special damages must be both pleaded and proved. In this case the plaintiff made a claim of ***mesne profit*** as one of his prayers but he did not justify his claim for the reasons that he did not tender any evidence of loss he incurred from the suit property. It is not enough to write particulars and later seek the court to award the damages yet there is no proof for them. To this end I am persuaded by the court of Appeal in ***Peter Mwangi Mbuthia –vs- Samow Edin Osman & Naftali Ruth Kinyua Civil Application No. NAI No.38 of 2004*** held that,

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit 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 at all.”

It is therefore my finding that since the plaintiff did not prove his case on ***mesne profit***, he is not entitled to them as claimed.

The last issue ***is whether the Plaintiff is entitled to costs?***

The prayer for costs is found in **Section 27 (1) of the Civil Procedure Act** which provides that costs largely follow the event, and the court is given discretion to determine which party will meet the costs and to what extent. The court has in this case reached a conclusion that favours that plaintiff and therefore finds that he is entitled to the costs of this suit. Having now considered the evidence in totality and the relevant law, the Court enters Judgement in favour of the plaintiff on the following terms.

- a. *The defendant’s personal representatives, agents, and assigns are given 30 days by this court to move from land parcel No. Ng’enda/ Mutomoto/T.41 failure to which they will be evicted with the supervision of OCPD Kiambu Police Station.*
- b. *Costs of this suit awarded to the plaintiff.*

It is so ordered.

Dated, Signed and delivered this **23rd** day of **March, 2015**

28 days Right of Appeal

L. GACHERU

JUDGE

In the Presence of:-

Mr Njagi holding brief for M/s Kiarie for the Plaintiffs/Respondents

None attendance for the Plaintiff/Applicant

Hilda: Court Clerk

L. GACHERU

JUDGE

23/3/2015

Court:

Judgement Read in open Court in the presence of the above counsel.

L. GACHERU

JUDGE

23/3/2015