



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 7 OF 2013

JOHN NDUNGU KAGUIYA PLAINTIFF

-VERSUS-

DANIEL GICHEHA DEFENDANT

JUDGMENT

Background

1. By a plaint dated **14th January, 2013** the plaintiff brought the current suit seeking judgment against the defendant, Daniel Gicheha, for a permanent injunction to restrain the defendant, his agents and/or employees from constructing structures on plot number 5400 within Kagua Farmers Cooperative Society Limited (hereinafter referred to as the suit property).
2. The plaintiff's case is that the defendant without any colour of right in 2012, trespassed into the suit property and began constructing a house thereon.
3. When the matter came up for hearing, the plaintiff informed the court that he bought the suit property from Kagua Farmers Cooperative Society Limited where he was a member.
4. As attested by an affidavit of service of the process server Njoroge Mugo, despite the defendant having been served with summons to enter appearance, he failed to enter appearance within the time stipulated in law and at all. Consequently, the plaintiff applied for and obtained interlocutory judgment against him. The said judgment was entered in favour of the plaintiff on 5th June, 2014. Thereafter the suit was fixed for formal proof.
5. When the matter came up for formal proof, the plaintiff informed the court that in 2012, he noticed that the defendant had trespassed into the suit property and began constructing a house thereon. To prove ownership of the suit property the plaintiff produced the following documents from Kagua Farmers Cooperative Society Limited:-
 - a) ballot number 5400 as Pexbt 1;
 - b) a share certificate as Pexbt 2; and
 - c) a membership card as exhibit 3.

6. The plaintiff also produced a photograph taken in 2012 showing the impugned development in the suit property, as Pexbt 5.

7. He stated that upon learning about the encroachment, through his advocate, he wrote a demand letter to the defendant requiring him to stop the encroachment failing which he would sue him. He confirmed that upon being served with the demand letter, the defendant stopped the construction. He produced a copy of the demand letter and a letter from the society dated 3rd July, 2012 confirming that he is the beneficial owner of the suit property as Pexbt 6 and 7 respectively.

Analysis and determination

Entry of interlocutory judgment:

8. As pointed out above, after the defendant was served with summons to enter appearance, he failed to enter appearance within the time stipulated in law and at all. Consequently, the plaintiff applied for and obtained interlocutory judgment against him. The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment can only be entered in respect of a liquidated claim only. In this regard see **Order 10 Rule 2** of the Civil Procedure rules which provides as follows:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

9. Also see the case of **Serraco Limited v. Attorney General (2009) eKLR** where it was stated:-

“a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages.” Whereas liquidated damages is defined as:- “

The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.”

10. In the circumstances of this case, the plaintiff's case being for permanent injunction to restrain the defendant from trespassing into the suit property, it does not fall under the claims for which interlocutory judgment could have been entered in favour of the plaintiff under **Order 10 Rule 2**.

11. The plaintiff should have straight away proceeded under **Order 10 Rule 9** to have the suit set down for formal proof which provides;

“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

12. It is in the proceedings contemplated under **Order 10 Rule 9** where the plaintiff would prove service of summons and failure to enter appearance as contemplated in law. If the trial court is satisfied that service was effected as by law required, it would proceed and hear the plaintiff's case for purposes of determining whether the plaintiff has made up a case for being granted the orders sought.

13. In the affidavit of service sworn to prove service on the defendant, the deponent Njoroge Mugo, has, *inter lia*, deposed:-

“2. That on 21st March, 2014, I received a copy of plaintiff and summons to Enter Appearance, dated

14th January, 2013, from the firm of MUGO MOSES & COMPANY ADVOCATES, for service upon the Defendant herein;

3. That on the same day, I proceeded to Kenol Township Murang'a County where the defendant resides and served him with the said plaint and summons to enter appearance, he acknowledged receipt by retaining copies but declined to sign on my copies for return of service.

4. That the defendant was pointed to me by the plaintiff herein.

5. That I now return to this honourable Court, my original copies as duly served....”

Law on Service of summons:

14. **Order 5 Rule 7** of the Civil Procedure Rules provides as follows about service:-

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

15. On the other hand **Rule 13** of the same order provides as follows:-

“Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons:

Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served.

16. Upon reading the affidavit of service herein and given the testimony of the plaintiff that the defendant ceased the impugned dealings on the suit land immediately after he was issued with a demand letter requiring him to stop the impugned dealings, I have no reason to doubt that the defendant was served.

17. As there is evidence that the plaintiff is the beneficial owner of the suit property and there being no evidence to show that the defendant has any bona fide claim to the suit property, I find and hold that the plaintiff has established a case for issuance of a permanent injunction to restrain the defendant by himself, his agents, servants and/or employees from trespassing into the suit property and/or effecting developments thereon.

18. On costs, given the plaintiff's testimony to the effect that the defendant heeded the demand from his advocate dated 4th December, 2012, I find and hold that a case has not been made for an order of costs against the defendant.

19. The upshot of the foregoing is that I enter judgment in favour of the plaintiff and against the defendant in terms of prayer (a) of the plaint dated 14th January, 2014 and filed in court on 21st January, 2013.

Dated, Signed and Delivered at Nyeri this 22nd day of October, 2015.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Court assistant - Lydia