



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 5 OF 2013

JENNIPHER ACHIENG ODAWA.....PLAINTIFF

VS

ZAIFA MOHAMED.....DEFENDANT

(Suit by plaintiff seeking to have the defendant evicted from certain land, mesne profits and damages for trespass; Suit land registered in the name of the deceased husband to plaintiff; plaintiff having letters of administration to estate of deceased; defendant not filing any defence or counterclaim; evidence of plaintiff uncontroverted; plaintiff entitled to the suit land; eviction order granted; no proof on mesne profits; nominal award on general damages for trespass)

JUDGEMENT

The plaintiff in this suit has sued the defendants seeking the following orders :-

- (a) An order of eviction against the defendant herself, her servants and/or agents from the land parcel known as Eldoret Municipality/Block 21 (King'ong'o)/1652 coupled with payment of mesne profits and/or damages for trespass.*
- (b) Costs and interest.*

Upon service of summons, the defendant entered appearance through the firm of M/s D.K Korir & Associates Advocates. However, no Statement of Defence was ever filed on behalf of the defendant.

At the hearing of the suit, Mr. J.K. Kirwa advocate, who was holding brief for of the firm of M/s D.K. Korir & Co. Advocates sought an adjournment on the ground that the said firm no longer has any instructions in the matter and that they had filed an application to cease acting. I considered the application for adjournment and disallowed the same. I considered that the matter had been fixed for hearing and that the firm of M/s D.K. Korir is still on record and that they can proceed with the hearing of the suit. Later, Mr. D.K. Korir, on record for the defendant, appeared and the matter proceeded for hearing. The plaintiff testified as the sole witness.

In her evidence, the plaintiff stated that she is widow and the administrator of the estate of Wilber Omolo Onditi (deceased). The deceased died on 11/12/2009. The plaintiff produced the Certificate of Death and a Grant of Letters of Administration as exhibits. She testified that her husband bought the land parcel Eldoret Municipality/ Block 21 (King'ong'o)/1651 in the year 1997. The agreement was produced as an exhibit. The property was later transferred into the names of the deceased and a Certificate of Title issued. A certified copy of the same was produced in evidence as the plaintiff stated that the original was charged with Fina Bank Limited.

In the year 2011, the plaintiff received information that there were auctioneers on her land who intended to auction it. She then proceeded to meet the auctioneer who was accompanied by a surveyor and it then emerged that the defendant was actually in occupation of the suit land although it belonged to the deceased. The plaintiff stated that there may have been some confusion in the occupation on the ground as the defendant was meant to be in occupation of the land parcel No. 1653 and not No.1651 (the suit land). The plot No. 1653 was eventually sold by way of auction. The defendant is still resident on the suit land and she has developed a mud-walled house. The plaintiff testified that she asked the defendant to vacate but the defendant has refused to do so. A demand letter was produced in evidence. It is then that the plaintiff opted to file this suit.

I allowed Mr. Korir to cross-examine the plaintiff. In cross-examination, the plaintiff acknowledged her deceased husband never moved into the suit land but she stated that she did not know of the plans that he had for the plot. She also acknowledged that she has not produced a search of the suit land nor a survey report to show that the defendant is in actual occupation of the suit land.

The plaintiff closed her case on her evidence. The defendant was not present and did not avail any evidence to rebut that of the plaintiff. Even if she were present, I would have declined her adducing evidence as she has no defence on record. The evidence on record is therefore only that of the plaintiff.

I have considered the pleadings and the evidence of the plaintiff. The same is uncontroverted. In his submissions, Mr. Korir for the defendant, argued that the plaintiff has not produced sufficient proof of ownership. In my view, there is no doubt that the suit land is registered in the name of Wilber Omolo Onditi (deceased) of whom the plaintiff is administrator. The copy of the Certificate of Lease for the suit land speaks for itself. Although the plaintiff did not produce a Certificate of Official search, I think, prima facie, that the Certificate of Lease is adequate evidence on a balance of probabilities, especially since the defendant did not produce any evidence in rebuttal. It was also argued that the plaintiff has not produced any survey report to show that the defendant is on the suit land. This may be so, but again the defendant has not filed anything nor called forth any evidence to deny being in occupation of the suit land. In any event, the eviction order is being sought for the land parcel Eldoret Municipality / Block 21 (King'ngon'go)/1651, and the defendant then ought not to worry, if she is not resident on the said parcel of land.

By dint of being administrator of the estate of the deceased, who is the registered proprietor of the suit land, the plaintiff is vested with all proprietary rights over the suit land including the right of exclusive possession. These rights are set out in Section 25 of the Land Registration Act, Act No.3 of 2012 which provides as follows :-

S. 25. (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.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

There is no defence and no counterclaim filed by the defendant to demonstrate that she has any rights over the suit land.

In the circumstances I have no doubt that the plaintiff is entitled to have the defendant evicted from the suit land.

On the prayer for mesne profits and damages for trespass, no evidence whatsoever was led on what amount of mesne profits the plaintiff would be entitled to. The plaintiff is however entitled to general damages for the tort of trespass. The amount of general damages is subject to the discretion of the court in which factors such as the duration of time that the defendant has been in occupation may be considered. The amount to be awarded also ought to take into account any award for mesne profits. In this instance, no evidence was led as to the time that the defendant has been on the suit land. No evidence was also led on the nature of the suit land or economic activity on the same. It is difficult for me to make a good assessment of the general damages that the plaintiff would be entitled to. I therefore award a token in appreciation that the plaintiff is entitled to general damages. I quantify the same at Kshs. 10,000/=.

On the whole, I make the following orders :-

1. That the defendant do vacate the suit land and in any event no later than 30 days upon service of this judgment or decree. In default of so vacating, an eviction order be issued permitting the plaintiff to evict the defendant from the suit land.
2. The prayer for mesne profits is disallowed as the same was not proved.
3. I grant the plaintiff general damages for trespass in the sum of Kshs. 10,000/=.
4. The plaintiff shall have the costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 5TH DAY OF JULY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. M. Wanyonyi holding brief for Mr. Barasa of Ms Wambua Kigamwa & Co for the plaintiff.

N/A for Ms D.K. Korir & Co for defendant.