



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 595 OF 2010

CORNELIUS NYABUTI MOGAKA..... PLAINTIFF

VERSUS

FREDRICK NYAMBUTI MOGAKA.....1ST DEFENDANT

DAVID NYAGAH.....2ND DEFENDANT

KELVIN MUDIGI.....3RD DEFENDANT

JUDGMENT OF THE COURT

The suit herein involves House Number Block F 28 located in Kimathi Estate, Nairobi (hereinafter referred to as the “suit premises”) which was occupied by the Plaintiff’s wife until her demise on 27th March 2010. The 1st Defendant is the son of the Plaintiff and his deceased wife, while the 2nd and 3rd Defendants were the Deceased’s tenants in the suit premises. The Plaintiff who claims to be the owner and registered proprietor of the suit premises alleges that the 1st Defendant took charge of the suit property immediately after the death of the Deceased whereby he allegedly started collecting rent from the 2nd and 3rd Defendants.

The Plaintiff subsequently filed suit against the Defendants in a Plaint dated 3rd December 2010 seeking the following orders:

1. Immediate delivery of vacant possession of the suit premises to the Plaintiff
2. A permanent injunction restraining the Defendants from any further interference with the suit premises.
3. A permanent injunction restraining the Defendants from interfering with the Plaintiff’s quiet possession of the suit premises.
4. A permanent injunction restraining the 1st Defendant from collecting rent from the suit property.
5. Mense profits from October 2010 until and up to the date of vacant possession of the property by the Defendants
6. Costs of the suit.

The Plaintiff on the same date filed an application under Certificate of Urgency seeking a temporary injunction to stop the 1st Defendant from collecting rent from the suit premises or in any way interfering with the said premises. Upon hearing the application, the court on 31st May 2011 granted the prayer for injunction restraining the 1st Defendant from collecting any rents from the 2nd and 3rd Defendants, and further directed that the 1st Defendant render accounts for all the rent collected since the death of the deceased.

Interlocutory judgment was entered against the 1st Defendant on 5th November 2012, who thereupon filed a Notice of Motion dated 30th November 2012, seeking to be allowed to file his Defence out of time. During the hearing of the said Notice of Motion the parties agreed by consent that the said Notice of Motion be withdrawn with no order as to costs, and that the suit proceeds to formal proof. Parties were directed to file their witness statements, documents and submissions.

The Plaintiff's case

The Plaintiff in his witness statement dated and signed on 1st March 2013 reiterated that he is the owner of the suit premises, and that in 1997 he assigned the said property into the joint names of his deceased wife Agnes Kwamboka and himself. Further, that upon his wife's death the 1st Defendant took possession of the house, and after seeking the court's intervention the Plaintiff was given possession of the suit premises.

The Plaintiff's counsel in submissions dated 14th May 2013 conceded that the prayer for delivery of vacant possession had been spent as the 2nd and 3rd Defendants vacated the suit premises at the end of July 2011. Further, that the three prayers for permanent injunction remain unrebutted and should be granted in the Plaintiff's favour to finally rest the matter.

On the prayer for mesne profits the counsel contended that Order 21, Rule 13 of Civil Procedure Act provides that a decree for possession and mesne profits can issue, and that the **Black's Law Dictionary** defines mesne profits as the profits of an estate received by a tenant in wrongful possession between two dates. It was submitted that there can be no doubt that the 1st Defendant was in illegal possession of the house from 27th March 2010 to 30th June 2011 when the tenants vacated the suit property pursuant to the court order. Further, that he was wrongfully drawing income paid as rent by the 2nd and 3rd Defendants for that period.

The counsel relied on the decisions in **Catherine Ndegwa v Hiram Kiragu Kaniu & Another (2012) eKLR** and **Jeremiah O. Samba V. Samson Osano Ochi (2004) eKLR** where the court held that the owners of the suit properties therein were entitled to possession and mesne profits. The counsel also submitted that the 1st Defendant has admitted in his submissions that he was in illegal occupation of the house. Accordingly that the Plaintiff is therefore entitled to judgment for mesne profits of Kshs.382,000.00 being the rental income of the main house in the suit premises between April 2010 to June 2011 at Kshs.18,000.00 per month, and rent for the servant quarters at Kshs.8,000.00 per month from May 2010 to 30th June 2011. He also sought interest at such rate as the court may deem fit from 1st July 2011 until payment in full.

The counsel submitted that the Plaintiff as the successful litigant is entitled to costs of the suit as there was sufficient notice of intention to sue before action and the Defendants refused to comply. Further, that there are no mitigating circumstances that would persuade the court to waive costs.

The 1st Defendant's Case

The 1st Defendant's counsel in submissions dated 18th March 2013 on his part argued that the 1st Defendant has rendered true accounts of all the monies that he collected as rent between May 2010 and May 2011, and he relied on the statement of accounts filed in court on 17th August 2012 by the 1st Defendant. Further, that the 1st Defendant had stated in the statement of accounts that the house rent for the main house as from May 2010 to May 2011 was Kshs.18,000/= while the servant quarter was only occupied between September 2010 and May 2011 and the rent payable was Kshs.8,000/= per month.

The counsel submitted that the assertion by the Plaintiff that the monthly rent was Kshs.40,000/= is not sustainable, as there is evidence in the Lease Agreement between the 2nd Defendant and the deceased which was annexed to the 1st Defendant's statement of accounts dated 5th January 2009 that the monthly

rent payable was Kshs.18,000/=. Further, that the 1st Defendant had explained through his statement of accounts and annexed evidence thereto to show that the monies paid as rent for the suit premises was utilized in payment of various items such as the City Council rates, medical expenses for the deceased, maintenance of the premises and settling other debts for the deceased.

On the issue of costs the 1st Defendant's counsel submitted that this suit is misconceived and the 1st Defendant has demonstrated in his honest belief and in good faith, that he did not expect the Plaintiff who had not lived with him and his mother for over twenty eight years would state a claim on his mother's property. Further, that the 1st Defendant collected the rent paid by the tenants in good faith and utilized the same for the payment of bills left behind by his deceased mother and for the maintenance of the suit premises. Counsel also argued that upon getting orders of the court delivered on 31st of May 2011, in good faith and without any force or compulsion, the 1st Defendant ceased collecting the rent but the Plaintiff still insisted on carrying on with the suit and has unnecessarily escalated a family dispute.

The Determination by the Court.

I have carefully considered the pleadings and evidence by the parties herein. The main issues for determination are whether the Plaintiff is entitled to mesne profits and costs of the suit. The other prayers sought by the Plaintiff have either been spent and/or are not contested.

Order 21, Rule 13 of Civil Procedure Act provides as follows with regard to a decree for possession and mesne profits:

“(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 decree-holder through the court; or**
 - iii. **The expiration of three years from the date of the decree, whichever even first occurs.**

(2) Where an inquiry is directed under sub-rule (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.”

Mesne profits are special damages which not only need to be pleaded, but also proved as shown by the provisions in the foregoing. In this case it is not disputed that the orders to vacate the suit premises were given by the court on 31st May 2011, and the operational dates for calculating mesne profits are therefore after the death of the deceased in April 2010 to May 2011.

It is also not disputed that the main house on the suit premises was occupied by a tenant between April 2010 and May 2011. The 1st Defendant however states that the servants quarters in the suit premises was only occupied as between September 2010 and May 2011, and the Plaintiff did not bring any proof to show otherwise. From their submissions, the parties are in agreement that the amount of rent collected from the premises was Kshs 18,000/= per month for the main house, and Kshs 8,000/= per month for the servants quarters. I therefore find that the amount collected by the 1st Defendant as rent during the operational period from the main house was Kshs 252,000/= and from the servants quarters was 72,000/=, being a total of Kshs 324,000/=.

The 1st Defendant in his statement of account filed in court on pursuant to the orders of the court of 31st May 2011 accounts for Kshs 306,000/=. However, upon perusal of the said statement of accounts I find

that it is only the payment of the City Council of Nairobi rates of Ksh 26,500/= and payment for his deceased's mother's medical expenses of Ksh 88,990/= that are verified by receipts acknowledging payments. The other written acknowledgments of payments cannot be verified. The Plaintiff in his submissions claimed that he did meet the medical costs of his deceased's wife, but did not bring any evidence of the same. I therefore find that this is an allowable cost that can be deducted from the rent collected by the 1st Defendant. The 1st Defendant has therefore been able to account for Kshs 115,490/= out of the Kshs 324,000/= he collected as rent. He is therefore liable to pay the Plaintiff Kshs 208,510/= as mesne profits.

On the issue of costs, although the Plaintiff has been successful in his claim and costs normally follow the event, I note that the dispute herein is essentially a family dispute arising from the death of the 1st Defendant's mother who was also the Plaintiff's wife and who was in possession of the suit premises. I have also taken into account the Defendants' conduct in giving vacant possession of the suit premises and stopping to collect the rent upon being ordered by this court to do so. I accordingly find that for these reasons each party shall bear their own costs of the suit.

I accordingly enter judgment for the Plaintiff as follows:

1. The 1st Defendant shall pay the Plaintiff mesne profits of Kshs 208,510/=.
2. The 1st Defendant be and is hereby restrained from interfering with the Plaintiff's quiet possession of the premises known as House Number Block F 28 located in Kimathi Estate, Nairobi
3. Each party shall bear their own costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of

____December____, 2013.

P. NYAMWEYA

JUDGE