Mwangi (Suing in the capacity as the legal representative and administrator of the Estate of the Late Mwangi Kabaiku) v Kiniti & another (Environment & Land Case 283 of 2017) [2024] KEELC 3969 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3969 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 283 OF 2017

JG KEMEI, J

APRIL 25, 2024

FORMERLY NRB ELC NO. 120 OF 2011

BETWEEN

RACHAEL NJANGO MWANGI (SUING IN THE CAPACITY AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE MWANGI KABAIKU) ..... PLAINTIFF

AND

HANNAH WANJIRU KINITI ..... 1ST DEFENDANT

JOHN NJENGA WANJIRU ..... 2ND DEFENDANT

JUDGMENT

1. *Vide* an Amended Plaint dated the 15/6/23 the Plaintiff, being the administrator of the estate of the late Mwangi Kabaiku, sued the Defendants seeking the following orders;

   a. A declaration that the Plaintiff is the legal owner of L.R No. Limuru/Bibirioni/T.355.

   b. An order for eviction of the Defendant from L.R No. Limuru/Bibirioni/T.355 and demolition of any illegal structures erected thereon.

   c. An order of permanent injunction restraining the Defendants either by themselves their agent's employee's servants and or persons claiming under them from remaining on trespassing upon alienating selling occupying leasing charging and or in any way adversely dealing with and or interfering with the Plaintiff's peaceful and quiet occupation and use of her land parcel L.R No. Limuru/Bibirioni/T.355.

   d. Mesne profits from the 6/1/1969 until delivery of vacant possession.

e. General damages for trespass.

f. Costs of the suit and interest thereon at Court rates.

g. Interest in (d), (e) and (f) above.

2. The Defendants on the other hand denied the claim of the Plaintiff through their Amended Statement of Defence dated the 11/9/2023. In their counterclaim the Defendants sought the following orders against the Plaintiff;

a. That the Defendant and his family are lawful absolute and indefeasible proprietors of the suit property.

b. The Kiambu County Land Registrar transfer the suit property in favour of the Defendant and issue him with a new title deed.

c. That the Plaintiffs' claims fail for the Defendant has not proven actual, open, uninterrupted, notorious, exclusive and continuous possession on the suit property for over 50 years.

d. The Plaintiff's claim of trespass and mesne profit fails for the property never passed as between the Defendant's grandfather and the Plaintiff's husband.

e. The Plaintiff's claim fails in its entirety for she has not proven that;

i. A sale indeed took place between the Plaintiff's husband and the Defendant's grandfather and if at all there was,

ii. Any such purported sale was ever completed;

iii. Even if the purported sale was ever completed the said agreement was witnessed by a minor as against the provisions of the *Law of Contract Act* therefore defective *ab initio*.

a. Eviction of the Plaintiff and her family from the suit land

b. Costs of the suit and interest thereon from the time of filing of the suit.

1. The Plaintiff's case was led by two witnesses. PW1 - Racheal Njando Mwangi testified and stated that she is the widow of Mwangi Kabaiko (Mwangi) and the administrator of the estate of the late Mwangi Kabaiku. That she lives in Bahati Nakuru and that she is a farmer. That Mwangi was buried in Bahati, Nakuru County. She adopted her witness statement dated the 6/9/2023 as her evidence in chief. She also produced documents marked as PEX 1-13 in support of her case.

2. She stated that the suit land was purchased by her husband in 1969 from Ndura Kiniti (Ndura) and paid the full purchase price. That Ndura later relocated to Molo where he acquired a parcel of land and settled with his family. That prior to his departure Ndura informed the area chief about the transaction. That Ndura died in 1979 before transferring the land to Mwangi.

3. That Mwangi lodged a caution in 1994 seeking a purchaser's interest. In 1995 he petitioned the Court in Succ. Cause No 203 of 1995 - Kiambu for orders of citation to be allowed to file succession proceedings in the estate of Ndura as a creditor which he subsequently obtained Letters of Grant of Administration in the year 2000. Following the confirmed grant dated the 24/7/2000, Mwangi

became registered as owner of the suit land and a title issued in his name on the 27/7/2000.

4. That following the death of Mwangi in 2009 the Plaintiff obtained Grant of Letters of Administration in the estate of Mwangi and in 2012 the suit land devolved to her.

5. That she knows the 1st and 2nd Defendants who are the daughter and grandson of Ndura respectively, the original land owner. That the Defendants live on half of the land while her two sons Stephen Mbugua Mwangi and John Ngigi Mwangi reside on a portion measuring 50 by 100 feet on the suit land where they have erected permanent residential homes as well as commercial units while the Defendants remain in trespass of the 50 by 100 feet portion of the suit land.

6. PW2 -Stephen Mbugua Mwangi stated that he is the son of the Plaintiff and the late Mwangi. He relied on his witness statement dated the 6/9/2023 as his evidence in chief. That he has lived on a portion of the suit land since birth. That he was not yet born in 1969 and therefore unable to comment on the agreement of sale, the payment of the purchase price and whether or not there is any outstanding balances. He stated that Mwangi filed the succession proceedings because the 1st Defendant refused to petition for succession in the estate of Ndura.

7. DW1 – John Njenga Wanjiru testified and relied on his witness statement dated the 11/9/2023 as his evidence in chief. He produced documents marked as DEX 1-8. That the suit land belonged to his grandfather Ndura who had an arrangement with Mwangi to allow him stay on the land before finding his own land since he had been rejected by his family after his 7 year custodial sentence. He stated that he was born in 1956 and that Mwangi entered the suit land in 1969 and found them on the land. That his grandfather Ndura relocated to Molo in 1969.That he does not know the agreements between Mwangi and Ndura. That his grandfather died in 1979 and his grandmother in 1985 and by then Mwangi was on the portion of the land. That from 1969 to 2011 his mother never raised a claim against Mwangi and his family. That he learned later that Mwangi fraudulently took out citation proceedings in the estate of Ndura leading to the issuance of letters of grant of administration and later caused himself to be registered fraudulently. That the 1st Defendant was not successful in revoking the said grant when she attempted in 2002. That he lives on ½ of the land but the title deed is in the name of the Plaintiff. That he cannot confirm whether or not there was an unpaid balance of the purchase price on the transaction. That in 1969 he was 13 years and the said John Njenga mentioned as a witness to the agreement cannot possibly be him.

8. With respect to the sale of the land, the witness refuted the existence of any such transaction on the basis that; there are no receipts and or evidence of payment has been furnished before the Court; the balance of Kshs. 450/- was never paid; he was only 13 when it is alleged that he witnessed the agreement hence had no legal capacity to witness the same.

9. In cross he stated that Mwangi did not involve them in the succession proceedings. That from 1979 – 1999, no letters of grant of administration were taken out by the 1st Defendant. That equally Mwangi never evicted them from the land in his lifetime. That Mwangi may be entitled to a portion of the suit land but not the whole land.

Plaintiff's submissions

12. On whether the Plaintiff is entitled to the suit land the Plaintiff submitted that her husband purchased the suit land in 1969 from Ndura and paid the full purchase price. That she is the registered owner of the suit property having been issued with a title on the 18/7/2012. That the Defendant failed to table any evidence to demonstrate the presence of any arrangement in which Ndura allowed Mwangi to settle on the land for a limited period as he sought his own land. Likewise, no evidence was tabled to support the allegation that Mwangi was incarcerated for 7 years. That the Defendant failed to challenge the title of the Plaintiff and the Court was urged to grant orders in favour of the Plaintiff.

13. It was submitted that the sale agreement dated the 6/1/1969 confirmed both Ndura and Mwangi executed the same as required by law. It was witnessed by one S Ndungu who was equally charged with the task of drawing the agreement. That 2nd Defendant was faulted for failing to adduce evidence on the alleged illegality with respect to the agreement. On whether the agreement was executed by the 2nd Defendant while a minor the Plaintiff submitted that a perusal of the agreement of sale shows that he never signed the agreement dated the 6/1/1969 but an acknowledgement of further payment in the sum of Kshs 100/- on the 10/8/1969 two months after the execution of the actual agreement.

14. On the question of fraud, the Plaintiff submitted that though the Defendants pleaded fraud in their amended statement of defence there was no evidence led to proof fraud. The Plaintiff relied on the case of *Vijay Morjaria Vs Nansingh Madhusingh Darbar & Anor* [2000]eKLR in support of the proposition that fraud must be pleaded and proved in evidence.

15. That it was incumbent upon the Defendant to prove fraud to the required legal standards that the transfer of the suit property in favour of the Plaintiff was fraudulent which burden he failed to discharge.

16. On whether the Plaintiff is entitled to an order of eviction, the Plaintiff submitted that the Plaintiff having discharged the burden of proof on how she acquired the land, and the Defendant having admitted being in occupation of a portion of the suit land measuring 50 by 100 feet, the Plaintiff is deserving of the orders of eviction. The Court was urged to grant the orders. The Court was also urged to grant the Plaintiff mesne profits as well as general damages for trespass.

The Defendant's submissions

17. On whether the Defendant and his family are the lawful owners of the land, the 2nd Defendant submitted that Mwangi occupied the land with the permission of Ndura until such time that he got his own portion. However, Mwangi transferred the land clandestinely into his name after fraudulently petitioning for the succession of the estate of Ndura without any capacity to do so. That the process of transfer of the land into his name was fraudulent irregular illegal and unprocedural.

18. It was further submitted that there was no valid contract of sale between Ndura and Mwangi as the same was witnessed by a minor devoid of any capacity to so witness and or understand the meaning and import of the transaction. That this act of the 2nd Defendant witnessing the agreement in his infancy vitiated the validity of the contract. Further that the balance of the purchase price remains

unpaid hence the agreement of sale is unenforceable because of breach on the part of the Plaintiff's late husband. That the Plaintiff has failed to demonstrate that the balance of the Purchase price was paid and therefore the agreement stood terminated and thus there was a legal rescission of the contract. See *Francis Wahiu Theuri Vs. Monica Njeri* (2012)eKLR where the Court held that failure of the Defendant to pay the balance of the purchase price was conduct that indicated her intention not to perform her obligations. It was further submitted that the basic rule of the law of contract is that parties must perform their respective obligations in accordance with the terms of the contract that they executed. The case of *William Kazungu Karisa Vs. Cosmas Angore Chanzera* (2006)eKLR was cited where the conclusion drawn by the Court is that the alleged sale agreement was invalid and therefore unenforceable.

19. It was submitted that the suit land was irregularly, unlawfully and unprocedurally transferred in favour of the Plaintiff. That the Plaintiff's husband obtained Grant of Letters of Administration illegally with the sole purpose of dispossessing the Defendants of their property. That he did so without involving the family and beneficiaries of the estate of Ndura. That the Plaintiff was neither a beneficiary nor a family member entitled to petition the estate of Ndura. That based on the fraudulent grant he caused the title to be registered in his name illegally while knowing that Ndura had beneficiaries who had proprietary rights over the suit land. The Plaintiffs husband was also faulted for irregularly transferring the whole land into his name with the knowledge that the Defendants were in occupation of half the land and his family occupied the other half.

20. It was submitted that Ndura and his wife worked in Molo while the Defendants lived on the suit land and that upon the demise of Ndura in 1979 his wife moved back to the suit land and lived therein until her death in 1985. That it is not in dispute that the Defendants and the Plaintiff have each been occupying half of the suit land since 1969 with the Defendants having occupied earlier. That the Defendant's occupation has been for a period of over 50 years uninterrupted and with the knowledge of the Plaintiff.

21. On whether the Plaintiff is entitled to mesne profits, the Defendants submitted that the sale having not been completed, the claim of mesne profits does not lie. That mesne profits cannot be claimed over another person's land and that a good title was never passed to the Plaintiff. Equally it was argued that the law of trespass does not lie on one's land as one cannot trespass on his own land. In addition, that the Plaintiff failed to present any evidence in support of the same.

Analysis and determination

22. Having considered the pleadings, the evidence the written submissions the issues for determination are;

    a. Whether the Plaintiffs title has successfully been assailed

    b. Whether the Defendants are entitled to title by way of adverse possession.

    c. Whether the Plaintiff is entitled to mesne profits and or general damages for trespass.

    d. Costs of the suit

23. It is not in dispute that the suit land belonged to Ndura according to the green card opened on the 23/4/59. It is not in dispute that the Defendants are the daughter and grandson of Ndura. It is not in dispute that both parties are occupying half of the suit land. Unchallenged evidence was led that the Plaintiff found the Defendants on a half of the land upon their entry in 1969.

Whether the Plaintiff's title has successfully been assailed

24. It is the Plaintiff's case that her husband purchased land from Ndura in 1969 vide an agreement of sale dated the 6/1/69. The agreement in part states as follows;

> "Agreement between Kiniti Ndura and Mwangi Kabaiku in respect of plot No T.355. consideration Kshs 1,150/-."

25. Section 3 (3) of the Law of Contract states as follows;

> "No suit shall be brought upon a contract for the disposition of an interest in land unless:-
>
> (a) The contract upon which the suit is found-
>
> (i) Is in writing
>
> (ii) Is signed by all the parties thereto; and
>
> (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

26. With the advent of the new land laws enacted at the dawn of the 2010 Constitution, the above provisions have been replicated under Section 38(1) of the *Land Act* as follows;

> "38. (1) No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) the contract upon which the suit is founded—
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party."

27. The long and short of the agreement is that it is in writing, for the sale of disclosed parcel of land which is parcel T. 355; the consideration is disclosed and the agreement is signed by the parties and witnessed. For all purposes and intents, the agreement is lawful and valid in the eyes of the law.

28. The Defendants have cast doubt on the validity of the agreement on the grounds that the balance of the purchase price in the sum of Kshs. 450/- remains unpaid and that the 2nd Defendant having been a minor executed the agreement. The last entry in the agreement dated the 10/8/69 at the very bottom indicates the balance of the purchase price is Kshs. 450/- . The Plaintiff averred that the purchase price was settled in full while the Defendants hold that the unpaid amount of Kshs. 450/- constitutes breach of contract. It is true despite the averments of the Plaintiff that the full consideration was paid, there was no documentary evidence led in support. That being the case, one would argue that the Plaintiffs having been put in possession in 1969 by Ndura and todate no claim has been raised, there is a high probability that the full purchase price was settled. In any event DW1 led evidence and stated as follows;

> "I do not know the agreements with Ndura and Mwangi. ... the record shows there was a balance of Kshs 450/- but personally I do not know... I was 13 years."

29. On the second issue that the agreement was vitiated by the incapacity of the 2nd Defendant having alleged to have witnessed the agreement at the age of 13 years, I have perused the agreement and note that a John Njenga witnessed the receipt of the payment of an installment and not the agreement. The allegation therefore that he witnessed the agreement does not lie.

30. In the end I find that there was a valid agreement between the parties. I also find that in the absence of evidence that the consideration remains unpaid, the Court is satisfied that each party performed their part of the contract.

31. It was the Defendants' case that Mwangi obtained letters of grant of administration and the title in a fraudulent, irregular and illegal manner. It is the law that fraud must not only be pleaded but also proved. In the case of *Vijay Morjaria Vs. Nansingh, Madhusingh Darbar & Another* [2000]eKLR the Court stated as follows;

> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

32. Equally in the case of *Jephther O. Opanda Vs. Mary Atemo Gathingia* [2019]eKLR the Court of Appeal stated that the standard of burden of proof of fraud is alleged in Civil case is higher than the ordinary standard of balance of probabilities.

33. I have looked at the defense which is couched with an apparent counterclaim and the Court finds that no particulars of fraud were pleaded. The rational of proper pleadings cannot be gainsaid. Pleadings assist the parties to know the case that confronts them in Court so as to respond accordingly. Similarly, pleadings assist the Court to frame the correct issues for determination.

34. Evidence was led by the Plaintiff that Mwangi brought citation proceedings against the estate of Ndura. According to the proceedings of the Succ. Cause No 203 of 1995 - Kiambu the Court received evidence that the 1st Defendant refused to take out to take out succession proceedings in the estate of Ndura and the Court stated as follows;

> "Citation to file or reject the Letters of Administration have been sent to the daughter of the deceased. The said Hannah Wanjiru has refused to take the Grant of Letters of Administration and has fialed to show cause why the creditor should not be granted the letters of administration in respect of LR Limuru/Bibirioni/T.355. He is desirious of being granted the letters of administration because of the refusal of the daughter of the deceased. I ask the Court to allow our application that the said letters be given to my client.
>
> RULING
>
> Upon hearing the Counsel for the Applicant (Creditor) in the absence of the Counsel for the Respondent and upon the perusal of the supporting documents I allow the present application. The creditor herein is allowed to take the Letters of Administration in respect of the estate of the deceased."

35. It therefore follows that Mwangi filed Succession proceedings pursuant to the orders of the Honourable Court. There was no evidence led to show illegality, fraud and or irregularity. This position is further buttressed by the decision of the Honourable Court in Nairobi H. C. Succ. Cause

No. 1198 of 2002 where the application to revoke the grant issued to Ndura in 2000 was dismissed. The Court stated as follows;

> "7. I find that the said Parcel of land does not form part of the estate of the deceased herein as it had already been transferred to the late Mwangi Kabaiku vide Succession Cause No. 149 of 1999.
>
> 8. I therefore dismiss the Summons for Revocation dated 13th October, 2009 for want of merit for reasons that the suit property does not form part of the Estate of the deceased herein."

36. The irresistible conclusion therefore is that the grant issued in the name of Ndura remains valid having not been revoked, set aside and or appealed against. The Court also notes that the 1st Defendant was aware of the citation proceedings as well as the succession proceedings that birthed the grant issued in the name of Ndura.

37. The Court in its Ruling allowed Mwangi to take out letters of grant of administration in the estate of Ndura which grant was issued and confirmed on the 24/7/2000 in which the suit land was awarded to him as a sole proprietor. Following the issuance of the grant, the suit land was transmitted to Mwangi and registered as such on the 27/7/2000. Upon the death of Mwangi in 2009 his wife, the Plaintiff petitioned for letters of grant of administration which were granted and confirmed on the 24/11/2011.

38. With respect to the allegation of the existence of an arrangement between Mwangi and Ndura allowing Mwangi temporary occupation of the land as he finds his own, the Court did not receive any evidence in support of this allegation. In any event DW2 admitted that in 1969 he was only a young boy of 13 years and therefore not in a position to have comprehended any such arrangement. In his evidence he stated that he learned from his mother that there was such an arrangement for which he admitted he could not vouch for. The Court finds that this evidence is hearsay with no probative value.

39. On possession of a portion of the suit land, it was not in dispute that both parties are occupying portions of the land. DW1 led evidence as follows;

> "I do not know about the agreement between Ndura and Mwangi. ...Mwangi lived on the Suitland with his family. I was born in 1956. My parents lived on the land. I was born on the suit land. Mwangi entered the land in 1969 and found us living on one portion of the land. My grandfather Ndura relocated to Molo and settled there with his family in January 1969. I was young so I did not ask. I only saw them on the land."

40. Similarly, PW2 stated as follows;

> "I live on a portion of the land though I have not ascertained the acreage."

41. Section 26 of the *Land Registration Act* provides as follows;

> "26. Certificate of title to be held as conclusive evidence of proprietorship
>
> 1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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-

a) On the ground of fraud or misrepresentation which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

2. A certified copy of registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

42. Applying the above provisions of the law, the Court concludes that no evidence was led by the Defendants to impeach the title of the Plaintiff at all. The allegations of fraud, irregularity and illegality are unsupported and remain unproven.

43. The 1st issue is answered in the negative.

Adverse possession

44. Legal provisions on adverse possession are contained in the *Limitation of Actions Act* Cap 22 Laws of Kenya and relevant to this case are Sections 7, 13, 16, 17 and 38 that;

"7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

13. Right of action not to accrue or continue unless adverse possession

(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

16. Administration dates back to death

For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

17. Title extinguished at end of limitation period

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

38. Registration of title to land or easement acquired under Act

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

45. For the Defendant to raise a claim of adverse possession, first and foremost it means that the Defendants acknowledge the title of the Plaintiff. For a claim in adverse possession to be tenable the claimant must acknowledge the title of the paper owner because it is this title that the claimant is seeking to be awarded by the Court. It is not available for a claimant to claim adverse and in the same breadth challenge the title through fraud or such other attacks for doing so is self-defeating in every sense.

46. In this case, the Defendants have pleaded that they have lived on the land for a period of 50 years. DW1 led unchallenged evidence that Mwangi found them on the land in 1969. It was also admitted by the Plaintiff that the Defendants occupied about 50 by 100 feet of the (a portion) of the suit land.

47. According to the green card on record Ndura was registered as owner of the suit land from 1959–1999. For this period the Defendants could not claim adverse possession from the previous owner for the reason that they occupied the land with the permission and or consent of Ndura who was their father and grandfather respectively. A claim in adverse possession therefore in the circumstances cannot be sustained.

48. According to the green card on record the Plaintiff became registered as owner of the suit land in the year 2000. Section 37 of the *Limitation of Actions Act* states as follows;

" 37. Application of Act to registered land

This Act applies to land registered under the Government Lands Act (Cap. 280), the *Registration of Titles Act* (Cap. 281), the *Land Titles Act* (Cap. 282) or the *Registered Land Act* (Cap. 300), in the same manner and to the same extent as it applies to land not so registered, except that—

a. where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;

b. an easement acquired under section 32 of this Act does not come into being until a copy of the Judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it."

49. From the cited provisions of the law, the period for calculating adverse possession commenced in 2000 when Mwangi became registered as owner of the land. It is the law that the period of calculating

adverse possession in Kenya is 12 years. One must demonstrate that he has occupied the suit land uninterrupted, exclusively and for a period of 12 years. This suit was filed on 23/3/2011 and the paper owner (Mwangi and later the Plaintiff) became registered as owner on the 27/7/2000. The period therefore is 11 years 4 months short of the statutory period. On this reason therefore adverse possession fails.

Mesne Profits

50. Section 2 of the *Civil Procedure Act* makes provisions for a claim in mesne profits. It states 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."

51. Order 21 Rule 13(1) and (2) of the *Civil Procedure Rules* provides as follows;

> " (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 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."

52. Courts in Kenya have time without number held that where a person is wrongfully deprived of his property he is entitled to damages known as mesne profits for the loss suffered as a result of the wrongful period of occupation of his property by another.

53. A registered land owner by law enjoys rights of absolute ownership together with all rights appurtenant thereto as provided for under Section 25 of the *Land Registration Act* which states as follows;

> " 25. Rights of proprietor
>
> 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 interest 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."

54. It is also the law that mesne profits are akin to special damages and the general rule is that they must not only be pleaded but must be proved. A keen perusal of the Defendants pleadings and evidence shows that the Defendants failed to table any evidence in support of this claim. It cannot be sustained.

55. The Plaintiff's claim for mesne profits too faces the same fate. It is not proven and therefore cannot be granted.

General damages on trespass

56. On general damages for trespass the Court having not found any justifiable reason for the continued occupation of the Plaintiffs land by the Defendants, the conclusion is that they are trespassers ab initio.

57. It is the law that trespass is actionable perse meaning that the Plaintiff does not have to show the actual or real damage suffered. The Court has noted that the Defendants have occupied the land for a very long time without the permission of the Plaintiff. For that reason, the Court having taken into consideration the size of the land occupied and the period of such unlawful occupation, the sum of Kshs. 200,000 /- is sufficient award to the Plaintiff.

Final orders for disposal

58. The Plaintiffs case succeeds and I enter Judgement as follows;

a. The Defendants' claim fails. It is dismissed.

b. The Defendants be and are hereby ordered to vacate the suit land on their own volition within a period of 90 days from the date of the Judgment in default eviction orders do issue forthwith.

c. An order of permanent injunction restraining the Defendants either by themselves their agent's employees servants and or persons claiming under them from remaining on trespassing upon alienating selling occupying leasing charging and or in any way adversely dealing with and or interfering with the Plaintiffs peaceful and quiet occupation and use of her land parcel No Limuru/Bibirioni/T.355.

d. Mesne profits is disallowed.

e. General damages for trespass in the sum of Kshs 200,000/- payable by the Defendant's to the Plaintiff.

f. Costs of the suit in favour of the Plaintiff.

59. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25TH DAY OF APRIL, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Oyondi HB Mukira for Plaintiff

Ms. Nyancheza HB Mamboleo for 1st and 2nd Defendants

Court Assistant – Phyllis & Oliver