



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ONYANGO OTIENO, VISRAM & NAMBUYE, JJ.A)

CIVIL APPEAL NO. 202 OF 2008

BETWEEN

ROBERT MWANIKI GUKEMBA..... APPELLANT

AND

MWANIKI NGIRI..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu(Khaminwa, J.)

dated 5th May, 2008

in

H.C.C.C NO. 82 OF 2006)

JUDGMENT OF THE COURT

1. By a Plaint filed in the High Court, Mwaniki Ngiri, the respondent herein sought *inter alia* an order of eviction of the appellant from the parcel described as Baragwi/Raimu/824 (suit property); discharge of the caution registered by the appellant over the suit property and mesne profits.
2. The respondent is the registered proprietor of the suit property. The respondent took a loan from Barclays Bank and secured the said loan with the title of the suit property. In 1990, he was unable to repay the loan which had then escalated to Kshs. 36,000/= and the suit property was at risk of being sold. The respondent approached the appellant and offered to sell to him an acre of the suit property.
3. The actual purchase price that was agreed upon by the parties is disputed. The respondent claimed that the purchase price was Kshs. 150,000/=. The appellant on the other hand, claimed that as per the sale agreement dated 19th February, 1990 which was prepared by the District Officer of Kirinyaga, the purchase price was Kshs. 48,000/= .The respondent maintained that being unable to read and write, he was not aware of the contents of the said sale agreement. The respondent was paid Kshs. 48,000/= by the appellant in the presence of the District Officer and other witnesses. He used the said amount to clear the loan.
4. According to the respondent, when the title over the suit property was released by the bank, he

- requested the appellant to clear the balance of the purchase price which was Kshs. 102,000/=. The appellant refused to clear the same and as a result the respondent never obtained consent from the Land Control Board to transfer the said acre to the appellant. Subsequently, the appellant unlawfully entered into the suit property and caused the same to be subdivided by a surveyor without the consent of the Land Control Board and the respondent. The respondent further contended that the appellant forcefully took his title document over the suit property. Thereafter, the appellant continued to trespass and commit acts of waste over the suit property by cultivating the same without the authority of the respondent. The above facts instigated the respondent to file the above mentioned suit in the High Court.
5. The appellant in response filed a statement of Defence and Counterclaim. The appellant averred that after he paid Kshs. 48,000/= to the respondent, being the full purchase price of an acre of the suit property, he took possession of the said portion of the suit property and has developed the same. He averred that the respondent had misrepresented to him that the suit land was free from encumbrances when he offered to sell the same to him. The said encumbrance had prevented the Land Control Board from giving its consent for the transfer of the same to the appellant. Consequently, the appellant counterclaimed for refund of Kshs. 48,000/= with interest on the same at the rate of 30% from the date of the sale agreement until payment in full; the compensation of the developments made on the suit property; and in the alternative, transfer of an acre of the suit property to him.
 6. The trial court, in its judgment dated 5th May, 2008 dismissed the appellant's counterclaim and entered judgment in favour of the respondent. The trial court ordered *inter alia* the eviction of the appellant from the suit property; and the appellant to pay Kshs. 160,000/= as mesne profits to the respondent. Aggrieved by the said decision, the appellant has filed this appeal based on the following grounds:
 - ***The learned Judge erred in holding that the appellant's claim was time barred, when the appellant had sought and obtained leave to file his claim out of time.***
 - ***The learned Judge erred in holding that the appellant's occupation of the suit premises was illegal.***
 - ***The learned Judge erred in holding that the appellant's claim for refund of the purchase price and interest was time barred, in view of the leave granted to recover the same.***
 - ***The learned Judge erred in awarding mesne profits at the rate of Kshs. 100,000/= per year, when the said sum was not supported by any evidence. The learned Judge erred in holding that the appellant entered the respondent's land without the respondent's consent.***
 - ***The learned Judge erred and misdirected her mind as to what hindered the respondent from transferring the suit premises to the appellant.***
 7. At the hearing of this appeal, M/S Lucy Mwai, learned counsel for the appellant, in conceding that the learned Judge was correct in ordering the eviction of the appellant from the suit property abandoned the grounds of appeal in relation to the appellant's Counter-claim. She submitted that the learned Judge erred in granting the respondent mesne profits of Kshs. 10,000 per annum for the period between 1990 to 2006. According to M/s Mwai, the respondent admitted in his evidence that the appellant was in occupation of the suit land with his consent from 1990 up to 2004. She maintained that the learned Judge erred in calculating mesne profits from the period between 1990 to 2004. She further submitted that there was no evidence tendered in the trial court to justify the Kshs. 10,000/= the learned Judge had adopted as the annual mesne profits over the suit property. She urged us to allow the appeal.
 8. Mr. Kennedy Otieno Arum, learned counsel for the respondent, in opposing the appeal submitted that the learned Judge in granting Kshs. 10,000/= as mesne profits over the suit property took into consideration that the same was agricultural land. He further submitted that the appellant's occupation of the suit property was illegal since 1990 up to the date he was evicted. According to Mr. Otieno, the award of Kshs. 160,000/= as mesne profits was reasonable.

9. This being a first appeal, We are tasked with the duty to analyse and re-evaluate the evidence tendered by the parties in the trial court as decided in the case of **Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126**, where the Court of Appeal held,

“..... this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect...” See **Jivanji vs. Sanyo Electrical Company Ltd. (2003) KLR 425**.

10. The respondent having claimed for mesne profits, it was incumbent on the trial court to establish the correct period that the appellant occupied the suit property as a trespasser and the rate of profits the appellant received as a result of the said trespass. See **Kenya Hotel Properties -vs- Willesden Investments Ltd- Civil Appeal 149 of 2007**. We agree with the submissions of M/S Lucy Mwai that the learned Judge erred in granting mesne profits for the period between 1990 and 2004. This is because the respondent admitted in his evidence that the appellant occupied and utilized the suit property between 1990 and 2004 with his consent. Therefore, mesne profits should only have been calculated for the period which the appellant occupied the suit property without the consent of the respondent. We find that the appellant trespassed onto the suit property for a period of five years that is from 2004 to 2008 when he was evicted. We cannot help but note that the valuation report produced by the appellant in the trial court clearly indicated that the appellant had planted subsistence crops and rice on the portion of the suit property he occupied. Having regard to the foregoing we are of the considered view that the amount of Kshs. 10,000/= that the learned Judge adopted as the annual mesne profits over the said suit property was reasonable. Accordingly, mesne profits ought to have been calculated for five years at the rate of Kshs. 10,000/= per annum (Kshs. 10,000/= x 5= 50,000).

11. The upshot of the foregoing is that we allow the appeal to the extent that the order issued by the High Court granting Kshs. 160,000/= as mesne profits to the respondent is hereby set aside and substituted with a sum of Kshs. 50,000/= as mesne profits. The appellant shall have half of the costs of this appeal and interest at court rates from the date of the High Court judgment.

Dated and delivered at Nyeri this 25th day of July, 2013.

ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

ROSLYNE NAMBUYE

.....

JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

DEPUTY REGISTRAR