



Wangunyu v A/Chief, Komarock North Sub-Location & 4 others (Environment & Land Case E189 of 2020) [2024] KEELC 4737 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4737 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E189 OF 2020**

**AA OMOLLO, J
JUNE 13, 2024**

BETWEEN

PETER NJUGUNA WANGUNYU PLAINTIFF

AND

THE A/CHIEF, KOMAROCK NORTH SUB-LOCATION 1ST DEFENDANT

THE CHIEF, KOMAROCK LOCATION 2ND DEFENDANT

THE A/COUNTY COMMISSIONER KAYOLE DIV 3RD DEFENDANT

THE DEPUTY COUNTY COM. EMBAKASI SUB COUNTY ... 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the 1st -5th Defendants vide his plaint dated 8th October 2020 seeking for the following reliefs;
 - a) A permanent order of injunction restraining the Defendants by themselves, their servants, agents, assigns or any other person from alienating, transferring, selling, disposing off, charging, mortgaging and/ or in any other manner interfering or dealing with Plot No A-166 (Komarock Youth Jua Kali Artisan Site and Service Scheme).
 - b) An eviction order do issue against the Defendants by themselves, their servants agents, assigns or any other person claiming title from Plot No A-166 (Komarock Youth Jua Kali Artisan Site and Service Scheme).
 - c) The Plaintiff be issued with a title deed as per the current presidential decree.
 - d) Mesne profit amounting to Ksh. 380,000/- upto December, 2020



- e) General damages.
 - f) Cost of this suit with interest at court rates.
 - g) Any other order or relief this Honourable Court deems fit.
2. The Plaintiff pleaded that at all material times he is the bona fide original owner of Plot No. A-166 (Komarock Youth Jua Kali Artisan Site & Service Scheme) which was allocated to him by Komarock Youth Jua Kali Association in the year 2010 and which Association he is member and an official. He avers that in the year 2011, he caused the said plot to be registered in the name of his sister Mary Wanjiku Wangunyu and the said changes were effected at the Nairobi City County records.
 3. He pleaded further that his sister, Mary Wanjiku Wangunyu who works in Finland donated a Power of Attorney in his favor to generally oversee all her interests in the said plot. Therefore, he proceeded to construct a two roomed stone house for rental purposes. The Plaintiff posited that in the year 2012, he allowed Komarock Youth Jua Kali Artisan Association to temporarily set up office on the premises to facilitate a joint verification exercise with the Nairobi City Council when the settlement scheme was being finalized. That the exercise ended in September, 2012 and the demised premises was returned to Mary Wanjiku Wangunyu.
 4. That on 27th March, 2013 the area Chief of Komarock location, Mr David Omedo visited the Plaintiff in his offices and requested for an office space in the demised premises as he was being evicted from where he was operating temporarily at the District Headquarters. That the Plaintiff offered one space of the two offices he was occupying and on 1st April, 2013 the chief moved in. Later, both parties agreed to a lease of the whole building at a monthly rent of KSH. 3,000/= and construction of a flag post. The Chief paid Ksh. 6,000/= being one month's rent and deposit.
 5. The Plaintiff averred that on 14th October, 2013 he presented the Chief with a written Lease Agreement through the firm of M/S Wamaitha & Co. Advocates but he declined to sign seeking for time to consult with his superiors. That on the same day in the company of his sister, they were informed by the 1st Defendant's superior one D.O PL Ondachi that the chief had authority to sign the Lease Agreement or enter into official arrangements with the host community without his intervention.
 6. The Plaintiff further averred that the chief was transferred to another location and was replaced by the current Chief of Komarock Madam Salome who established her office to another place but the Assistant chief one Madam Faith Waweru converted the suit building into her office.
 7. The Plaintiff states that he sued Madam Faith personally and by an order of the Honorable Business Premises Rent Tribunal dated 13th September, 2017 the Chief was directed to pay a total sum of Ksh. 153,000 being rent arrears up to September, 2017. He was also given liberty to levy distress for rent and hand over vacant possession on or before 1st October, 2017 and the costs of the reference was assessed a Ksh. 10,000/. He added that the Chief defied the order and the office of National Security and Co-ordination has also been unable to give effect to the court orders aforesaid necessitating the filing of this case.
 8. The Attorney General filed a statement of defence dated 14th March 2023 on behalf of the Defendants and admitted the description of the parties as pleaded in the plaint. The Defendants asserted that the Plaintiff has to provide any concrete evidence to show that they are in occupation of the suit property and put him to strict proof. The Defendants contended that the mentioned government offices are all located on public land and the plaintiff has failed to provide evidence to the contrary. They urged the Court to dismiss the suit with costs.



Evidence.

9. The Plaintiff testified in support of his case and adopted his written witness statement dated 8/10/2020 as evidence in chief and produced as evidence the documents contained in the list dated 8/10/2020. These included; allotment letter, rates payment receipts, power of attorney, photographs showing the National Administration colours of the Ministry of Security and National Co-ordination, lease agreement, Court orders dated 12th July 2017, 2nd August 2017 and 13th September 2017, various letters, list of Juakali Association members stating their allotted plots as confirmed and approved by the defunct Nairobi City Council and map of the proposed formalization of the Komarock Youth Juakali Artisan Association project.
10. The witness also produced a supplementary list of documents which list contained inter alia; letters by the Plaintiff addressed to the County Commissioner, Nairobi City County, the Assistant County Commissioner, Embakasi Sub County and to the Cabinet Secretary Ministry of Interior Security & National Government Co-ordination. The Plaintiff attempted to execute the order from the Rent Restriction Tribunal as evidenced by letter from the County Police Commander dated 10th January 2018 and addressed to the OCPD Kayole seeking to verify the authenticity of the order. The Plaintiff also produced a letter dated 9th July 2019 from Kayole Sub County Police advising him to sue the superiors of the assistant Chief who he had sued in her personal capacity. He also produced a notice of intent to sue dated 16th December 2019 addressed to the Hon. Attorney General.
11. He stated that he is claiming loss of rent based on the oral agreement of Kshs.3000 per month as he has never received any rent beside the initial rent and deposit paid. That he is also asking for eviction if the rent is not paid. It is his further testimony that he has a power of attorney issued by her sister who is the allottee and also has a certificate of ownership from the Nairobi City County. That he bought all the construction materials for the building and built the office for the association.
12. The witness continued in evidence saying that Chief David Omedo came to him seeking for any building within the area to rent and he opted to rent out his building. He stated that since then there has been four chiefs who have been in occupation and he has made several complaints including obtaining a judgement in its favour from the Business Premises Rent Tribunal.
13. The Defendants did not file any documents nor call any witness to support the issues pleaded in their statement of defence.

Submissions.

14. The Plaintiff filed submissions dated 1st March 2024 in support of his case and in opposition, the Attorney General filed submissions date 27th February 2024.
15. The Plaintiff submitted that his case has not been challenged or rebutted and that failure to adduce any evidence by the Defendants means that the evidence adduced by the Plaintiff remains uncontroverted. In support of his argument he cited the case of *Interchemie EA Limited v Nakuru Veterinary Centre Limited* as quoted in *Kamal Jam Mursal and Another v Everlyn Nthangu (suing as the legal administrator of Dalphine Kanini Manese)* (Civil Appeal E20 of 2021) (2022) KEHC 282 (KLR) and *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*.
16. The Defendants submitted that the issues for determination in this suit are whether the Plaintiff is the registered proprietor of the suit property, whether there is a binding lease agreement between the parties, whether the Plaintiff is entitled to the specific damages and mesne profits claimed in the Plaintiff and whether the electronic evidence produced by the Plaintiff is admissible.



17. They stated that the Plaintiff presented a plot card as evidence of allocation of the suit property by the Nairobi City County Government which does not confer any proprietary rights upon the holder. That the plot card holder is required to obtain a letter of allotment from the allocating body upon which he is required to tender an acceptance letter and make payment of the amount highlighted in the letter of allotment.
18. Further, that once the allottee complies with the conditions highlighted in the allotment letter, a licensed surveyor is required to carry out survey and submit the survey plan to the survey's office in Nairobi County for approval. Based on these documents, the survey office prepares a deed plan and submits the two plans to the land's office for a title deed to be issued upon payment of stamp duty. They argued that none of these procedures were followed thus clear that the Plaintiff does not possess a title deed for the suit property.
19. The Defendants submitted that the lease agreement presented by the Plaintiff does not meet the threshold for a binding contract for the disposition of an interest in land as outlined in section 3(3) of the *Law of Contract Act* Chapter 23, Laws of Kenya. That the said lease agreement is not signed by the alleged lessee nor is it attested as required by law thus the Plaintiff has failed to meet his evidentiary burden that he entered into a lease agreement with the 2nd Defendant.
20. They also stated that special damages must not only be specifically pleaded but also proved and that the Plaintiff did not produce any evidence to show receipt of any deposit or rent received. That the Plaintiff has not specifically demonstrated that he incurred the alleged loss, to warrant an order for special damages. On the claim for mesne profits of Kenya Shillings Three Hundred and Eighty Thousand (Kshs 380,000/), the Defendants submit it is not supported with any evidence. They relied on the case of *Paul Ngashbema Kamau v Halima Said* [2020] eKLR.
21. Further, they stated that Plaintiff produced photographs of the chief's offices which he alleges are in the suit property and to rely on such evidence, he must comply with the law regarding admissibility of electronic evidence as provided in Section 106B of the *Evidence Act*, Cap 80 which conditions were not met. Thus the document should be struck out of record and in support cited the case of *Samwel Kazungu Kambi v Nelly Ilongo & 2 Others* [2017] eKLR.

Analysis and determination:

22. There is no statement of defence on record filed by the Defendants but in their submissions, they stated that the Plaintiff has not proved that he is the owner of the suit property, that there was no a lease agreement and no evidence of how the mesne profits claimed was arrived at. They also contended that the photographs produced showing the offices are in use by the 1st Defendant should be struck out.

Issues for determination

- a. Whether the Plaintiff is the owner of the suit property
 - b. Whether an eviction order should issue
 - c. Whether the Plaintiff should be awarded mense profit and general damages
 - d. Cost of the suit
23. The Plaintiff has produced a plot card showing the suit plot was allotted to her sister as well as a Power of Attorney donated to him by the said Mary Wanjiku Wangunyuu. Sections 109 and 112 of the same *Act* provides for evidential burden of proof as follows:



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.
24. The Plaintiff has presented an allotment agreement form between Mary Wanjiku Wangunyu and Komarock Youth Jua Kali Artisan Association Management Committee dated 15/2/2013 for Plot A-166 and a certificate of ownership for Plot No. A-166. Further, he produced a list showing how the plots were allocated in the area which list includes the name of Mary Wanjiku Wangunyu. Even the city council of Nairobi Housing and Development issued the said Mary with a plot formalization card and land rent payment receipt.
25. Although the Defendants in their defence alleged the suit plot was public land, no evidence was led to confirm the same. This is taking into consideration that public land can be alienated to private citizens and the documents presented by the Plaintiff points to the initial process of such allocation. Section 35(1) of the *Evidence Act*, provides as follows:
- “In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact.”
26. In the absence of contrary evidence challenging the documents produced by the Plaintiff claiming rights of ownership of the suit property, I hold that the plot and the developments therein belong to Mary Wanjiku Wangunyu and by extension the Plaintiff who is her donee. What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited v. Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of *Autar Singh Babra and Another v. Raju Govindji*, HCCC No. 548 of 1998 appreciated that:
- “Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.
27. In answer to the issues of facts raised in the submissions filed on behalf of the Defendants, I cite the decision of the Court of Appeal in *Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Another* [2014] eKLR thus:
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
28. The Plaintiff posited that there was an agreement to lease with the 2nd Defendant although he only produced a lease that was not executed. He alleged that they had first orally agreed on the tenancy before having it written down and received Kshs 6000 as deposit and the first month rent of Kshs.3,000.



Although there was no receipt to confirm this payment, the Defendants did not refute the said allegations by virtue of not calling any witness.

29. Further, before filing this suit, the Plaintiff had sued the Defendants for failure to pay the monthly rent at the Business Premises Rent Tribunal. The Tribunal issued him with an order in his favour dated 13th September, 2017 ordering the then Area Assistant Chief to pay a total sum of Ksh. 153,000 being rent arrears up to September, 2017 or the Plaintiff levy distress for rent and hand over vacant possession on or before 1st October, 2017. Again, the Defendants did not deny that Faith Waweru (the Respondent before the Tribunal) was not a public servant nor produce any evidence that this order had been varied or set aside.

30. In case the Defendants are denying the existence of a landlord-tenant relationship, the Plaintiff pleaded for mesne profit amounting to Ksh. 380,000/ upto December, 2020 and general damages. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits 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.

31. The Court of Appeal in the case of *Attorney General v Halal Meat Products Limited* [2016] eKLR considered when mesne profits could be awarded by stating as follows:

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages, 18th Ed. para 34-42.*”

32. The court in the case of *Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah* [2016] eKLR in considering an issue of whether the Plaintiff had established a case for mesne profits held:-

“In *Bramwell v. Bramwell*, Justice Goddard stated that

“... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not



become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes...”

33. The BPRT in the order dated 13th September 2017, directed thus;
- “The Tenant shall vacate and hand over vacant possession of the suit property on or before 1st October 2017. In default, the Landlord shall evict him with assistance of the OCS Kayole Police Station.”
34. Thus, the order translated into termination of the landlord/tenancy relationship between the parties and since the Defendants have not denied the occupation. It follows that their occupation of the premises without the consent of the Plaintiff and not paying any rent generated the right to the Plaintiff to claim mesne profits.
35. In the High Court of Kenya at Nairobi Civil Suit No. 600 of 2010, *Paul Muiyoro Njuguna T/A Spotted Zebra v Bulent Gulbahar & ano.*, Justice R. E. Ougo stated,
- “....general damages are those that have occurred from the wrong complained of for the reason that they are its immediate, direct and proximate result or such as did in fact result from the wrong directly and approximately and without reference to the special character, condition or circumstances of the plaintiff.”
36. The Plaintiff has shown that he suffered loss of expected income of the agreed amount with the 2nd Defendant, which is a direct result of the failure to pay rent. Consequently, I hold that the Plaintiff has proved his claim against the Defendants jointly for mesne profits amounting to the accrued rent to date calculable at Kshs 3000 per month until hand-over of vacant possession of the suit premises to the plaintiff. For the prayer of issuance of a title deed, the Plaintiff shall follow due process set out in the *Land Act* for processing allotment letter and attendant documents as this court cannot usurp the powers of the institutional bodies mandated to do so.
37. The rule of the thumb is that cost follows event, and in this case, there is nothing that would persuade this court to hold otherwise. As a result, the Plaintiff is awarded cost of the suit.
38. Consequently, judgement is entered for the Plaintiff in the following terms;
1. The 1st and 2nd Defendants do within 90 days from the date of this judgement surrender vacant possession of the suit premises to the Plaintiff. In default, an eviction order do issue against the Defendants by themselves, their servants agents, assigns or any other person claiming through them from the Plot No A-166 (Komarock Youth Jua Kali Artisan Site and Service Scheme).
 2. After compliance with order (1) above, an order of permanent injunction does issue restraining the Defendants by themselves, their servants, agents, assigns or any other person from



alienating, transferring, selling, disposing off, charging, mortgaging and/ or in any other manner interfering or dealing with Plot No A-166 (Komarock Youth Jua Kali Artisan Site and Service Scheme).

3. The Plaintiff is awarded mean profits of Kshs 380000 upto December 2020 and thereafter Kshs 3000 per month from January 2021 until vacant possession is surrendered.
4. Costs of the suit to the Plaintiff

JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH JUNE, 2024

A. OMOLLO

JUDGE

