



**Muriithi v Kuria (Environment & Land Case 785 of 2007)
[2024] KEELC 5607 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5607 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 785 OF 2007**

AA OMOLLO, J

JULY 18, 2024

BETWEEN

KIBUCI MURIITHI PLAINTIFF

AND

IZAAK MWANGI KURIA DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendant vide plaint dated 11th August 2015, amended on 24th January 2022 and further amended on 19th June 2023 seeking for the following orders;
 - a. Spent
 - b. Mesne Profits amounting to Kshs. 6,471,000/=;
 - c. Special damages amounting to Kshs. 230,000/=;
 - d. General Damages for Trespass;
 - e. Interest on (b), (c) and (d) above at Court rates;
 - f. Costs of this suit;
 - g. Such further or other relief as this Honourable Court may deem fit to grant.
2. The Plaintiff stated that at all materials, the Plaintiff is the legal and registered proprietor of Nairobi/Block 82/4880; Harambee Sacco herein after referred to as the “suit premises”. That the Defendant was a tenant of the previous proprietor of the suit premises, one Loise Nyambura Ngumo and the Plaintiff through his Advocates requested him to handover vacant possession but he declined to do so.
3. The Plaintiff contended that despite several demands and notice of intention to sue being issued to the Defendant, he failed to hand over vacant possession of the suit premises until by a ruling delivered on



- 12th July 2018, this court ordered him to vacate within a period of sixty (60) days from the date of the order. Further, that despite being aware of the court order, the the Defendant continued in forceful and illegal occupation of the suit premises prompting the Plaintiff to apply for eviction orders which were issued on 20th August 2021.
4. The Plaintiff stated that the Defendant was eventually evicted from the suit premises by Auctioneers at a charge of Kshs.230,000 which the Plaintiff claims together with the particularised mesne profits totalling to Kshs.6,471,00/= arising from the illegal occupation.
 5. The Defendant did not file a defence.
 6. In support of his case, the Plaintiff called two witnesses. Philip Macharia Wanjiru a real estate valuer gave evidence as PW1. He stated that he works for Knight Frank who was instructed by the Plaintiff to assess mesne profits for the period August 2013-2021. That he carried out the assessment and prepared a report found at pages 2 – 239 of the supplementary lists of documents. PW1 avers that the assessment found the accrued rent at Kshs.6,471,000.
 7. He continued to state that the market rent for 2013-2016 was assessed at Kshs.35,000 per month; 2017-2019 was assessed at Kshs.40,000 per month and applied a rate of Kshs.35,000 for 2020-2021 because of the covid 2019 pandemic. Further, that the money would have yielded an interest applied at CBK rate of 12.3 % reaching the lumpsum given.
 8. The Plaintiff testified as PW2 and adopted his witness statement 19.6.2023 as evidence in chief. He stated that the defendant refused to move out after he completed the purchase of the suit premises. He also stated that when the Defendant failed to voluntarily move out, he paid Kshs.230,000 for his eviction. He wishes to recover the said amount, together with the mesne profits for the period of August 2013- August 2021 and interest thereof.
 9. The Plaintiff filed submissions dated 22nd March 2024 stating that the Defendant was in illegal occupation of the suit premises, which position was affirmed by this Court in ordering his eviction. That the Defendant was in illegal occupation of the suit premises from the month of August 2013 until his forceful eviction in September 2021, a period in which the Plaintiff suffered loss and damage by way of deprived rental income that he would have otherwise enjoyed from the suit premises.
 10. He submitted that that he engaged the firm of Knight Frank Valuers Limited to assess the accrued mesne profits over the period in question amounting to Kshs.6,471,000/= which report was produced by PW1, Phillip Macharia.
 11. In support of his claim, the Plaintiff relied on Order 21 Rule 13 of the *Civil Procedure Rules* and cited the Court of Appeal in the case of *Attorney General v Halal Meat Products Limited [2016]* eKLR and case of *Kenatco Transport Co. Ltd v Samuel Gikaru Njoroge (Suing on Behalf of the Estate of the late Geoffrey Gikaru Njoroge) & another [2021]* eKLR on what entails mesne profits and its assessment.

Analysis and determination:

12. The issue for determination is whether the Plaintiff is entitled to the reliefs sought. This court differently constituted gave a ruling dated 12th July 2018 which entered summary judgement for the Plaintiff against the Defendant for vacant possession. For mesne profits, the court directed the matter for formal proof. From the pleadings and the evidence rendered, the initial occupation by the Defendant was with the consent of the previous owner.
13. However, the occupation of the suit premises turned illegal when the sale to the Defendant did not fall through and the suit property got sold and transferred to the Plaintiff. The Plaintiff issued the



Defendant with notice to vacate vide a letter dated 3rd December 2014 requiring him to surrender vacant possession by 31st December 2014. In the said letter from Gachanja & Co. Advocates, advised the Defendant that the sum of Kshs 3700000 which he had paid towards the purchase price would be refunded less rent for the period he was in occupation. The rent was calculated in that letter at Kshs 25000 per month.

14. The person who sold the suit premises to the Plaintiff according to this letter of 3rd December 2014 recovered rent upto and including December, 2014. It follows that the Plaintiff is entitled to claim compensation for the said occupation from January, 2015 until 20th August 2021 when it obtained vacant possession. The valuer assessed the rent payable from 2013 but as stated in the advocate's letter of 3rd December, 2014, the calculation should run from 2015. The letter said in part,
 - i. Our client has since sold the property
 - ii. Our instructions are that the new proprietor requires vacant possession of the property on or before 2nd January, 2015
 - iii. refund due Kshs 3700000
less rent August 2011- December 2014 ... Kshs 1,435, 000”
15. Further, the sale agreement between the Plaintiff and Lois Nyambura for the purchase of the suit property was dated 27th May 2014 and the transfer in favour of the Plaintiff registered on 26th June, 2014. He could not claim rent for the period 2013 and until June 2014 when he had not acquired the suit property.
16. The Plaintiff engaged a valuer to assess the rent payable for the suit premises during the period in question and a report was adduced before this court. He assessed at Kshs 35000 per month for the period 2013- 2016 and for the period 2017-2019 he assessed it at Kshs 40000. However, if the previous rent charged until December, 2014 was Kshs 25000, a reasonable market increment would not exceed Kshs 5000.
17. Consequently, for the period January 2015 to January 2019, I assess mesne profits in favour of the Plaintiff at Kshs 30000. On account of the explanation by the Valuer (PW1) that during Covid period of 2020 to 2021 the rent could not be increased because of the covid pandemic, the same rent the person was paid is taken to apply. Hence, I apply the same amount of Kshs 30000 per month.
18. On whether the Plaintiff is entitled to general damages, I find otherwise having been awarded mesne profits. I am guided by the decision of the Court of Appeal in the case of *Christine Nyanbama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020]* eKLR held that,

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved.”
19. Further, the Court of Appeal in the case of *Attorney General v Halal Meat Products Limited [2016]* Eklr considered when mesne profits could be awarded 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, 18thEd. para 34-42.”

20. The Court of Appeal in *Mistry Valji v Janendra Raichand & 2 others [2016]* eKLR stated:

“Measure for mesne profit was described in the Privy Council decision in *Invergue Investments v Hacketh* (1995) 3 All ER 842 cited with approval in the *Kenya Hotel Property Ltd* case (supra) as follows:

“This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land....The question for decision is the appropriate measure of damages.”

The Privy Council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.”

21. Thus, the Plaintiff is also made a claim for special damages of Kshs. 230,000 being the expenditure incurred to evict the Defendant from the suit premises. The law provides that special damages must be specifically pleaded and strictly proved. In his evidence, the Plaintiff said he paid Kshs 230000 for the eviction of the Defendant. I have perused the file note that the Plaintiff relies on the letter from Bealine Kenya Auctioneers who carried out the eviction confirming receipt of payment of the said sum of Kshs 230000. Since the suit is undefended, I have no basis to doubt that the stated sum was paid to the auctioneer. I grant the award to the Plaintiff.

22. In conclusion I enter judgement for the Plaintiff as follows;

- a. Mesne profits for the period January 2015 until August 2021 @ Kshs 30000 per month amounting to Kshs 3,400,000
- b. Special damages @ Kshs 230000
- c. Interest at court rates from from the date of filing this suit until payment is made in full.
- d. Costs of the suit

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH JULY 2024

A. OMOLLO

JUDGE

