



REPUBLIC OF KENYA



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Gachoka (Suing as the Administrator of the Estate of the Late Gachoka Kahawa) v Nduta & another (Land Case E003 of 2021) [2023] KEELC 94 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELC 94 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE E003 OF 2021
FM NJOROGE, J
JANUARY 19, 2023

BETWEEN

TERESIAH WANGARI GACHOKA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE GACHOKA KAHAWA) PLAINTIFF

AND

SAMUEL NDUNGU NDUTA 1ST DEFENDANT

WILSON MWATHI NJOROGE 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced the present suit by way of a plaint dated 18/11/2020 filed on January 14, 2021 through Frank Mwangi & Co Advocates seeking an order of eviction of the defendants from parcel number Nakuru Municipality Block 3/1104, mesne profits and a permanent injunction to restrain the defendants' interference with the suit land in any manner.
2. The plaintiff claimed in the plaint that her deceased husband was the registered owner of the suit land; that he acquired the land in 1993; that the defendants have without any colour of right encroached on the suit land and commenced developments and have refused to vacate the land despite her demands; that she has been denied use and income of the suit land by reason of the defendant's and that they ought to be evicted.

Defence

3. The defendants filed their joint defence on March 2, 2021 through Waiganjo & Co advocates in which they denied the claim that the plaintiff's husband ever owned the suit land or that they have encroached thereon. They state that they and their parents occupied the suit land in 1985, developed the property and that they had been in continuous occupation to date; that they continued in occupation after the plaintiff's husband obtained title in 1993 and that the plaintiff's claim is statute barred under the provisions of the *Limitation of Actions Act*; that her title has been extinguished by the law. They aver



the property no longer belongs to the plaintiff and eviction can not therefore issue in her favour against them.

Evidence

4. The plaintiff testified as PW1 on January 26, 2022 and adopted her witness statement dated November 18, 2020. She stated that she resides at Gatundu; she produced the certificate of lease to the suit land as P. Exh 1; a certificate of confirmation of grant as P. Exh 2; she stated that the defendants were at one point asked to vacate the suit land by the then local Council but they did not. She averred that two women had been allocated the land to sell charcoal thereon but they were later ordered to vacate through a Municipal Council letter dated November 11, 1992. She produced copies of rates payments receipts vide which she had met the dues for the property; she further stated that the defendants had constructed mud walled structures and iron sheet structures on the plot and produced photographs showing those structures. She stated that she does not obtain any income from the plot due to the defendant's occupation and that her husband had communicated with the defendants and all attempts to evict them had been in vain.
5. Upon cross examination by Mr Waiganjo the plaintiff stated that her late husband used to live in Eldama Ravine; that he never constructed any house on the suit land; that she does not know when the defendants took possession of the suit land; that by 1993 they were on the suit land hence the writing of the letter demanding that they vacate; that Florence Nduta and Florence Wambui are the 1st and 2nd defendant's mothers respectively; that upon the conduct of succession proceedings the suit land was given to her and one Sammy Mwangi Gachoka who is a son to her co-wife and who represents that other house;
6. The plaintiff was later recalled and she produced the judgment in Nakuru ELC No 22 Of 2014 Teresiah Wangari Gachoka and Sammy Mwangi Gachoka Vs Florence Nduta and Florence Wambui dated May 22, 2019 as well as her late husband's death certificate. She stated that she had obtained a judgment against the defendants in the case cited but the judgment had been set aside as the defendants were deceased. However, she stated that she did not know that the present defendants were sons to the deceased defendants in the former case, but admitted that she had sued them as the legal representatives of their late mothers' estates respectively, but had nothing to show that they held that status.
7. The defendants gave evidence. DW1 testified on September 26, 2022 and adopted his witness statement dated May 4, 2021. His evidence is that the judgment against the defendants in the previous case was vacated as the defendants were deceased; that by 1993 he and his co-defendant were still living on the suit land; that Florence Wambui is his mother while Florence Nduta is the 1st defendant's mother; that the council wrote a letter demanding that they vacate but they never vacated the land; he admitted that they had built structures on the suit land as stated by the plaintiff, which structures are still in use; that he met the plaintiff for the first time in the court; that the defendants have connected power to the premises and that licensed businesses are being conducted on the suit land.
8. Upon cross-examination by Ms Gathecha for the plaintiff DW1 stated that the plot belonged to the defendants' parents and that the defendants got into the land through their parents; that his mother met her demise in 2014; that his business on the suit premises gives him Kshs 6,000 per month; that he rents out the mud walled houses for about Kshs 8,000/= per month; that he never filed any case against the registered owner of the suit land and that the defendants normally pay for water supply to the County government. At that juncture the defendants' case was marked as closed.

SUBMISSIONS



9. The plaintiff filed submissions on November 15, 2022 while the defendants had filed theirs earlier on November 14, 2022.

DETERMINATION

Issues for determination

10. It is common ground that the suit land is registered in the name of the plaintiff's late husband and that the defendants are in occupation thereof; that the suit land was registered in the name of the plaintiff's husband on November 12, 1993. It is also common ground that Florence Wambui and Florence Nduta once occupied the suit property but they later died. The date of the defendants' assumption of possession is however not certain. It is also common ground that there was a former suit against the former occupants of the suit land who it has now come to light that they were the defendant's parents. The issues that arise for determination in the instant suit are as follows:
 - a. Whether the suit is statutorily time barred;
 - b. Whether the defendants have trespassed onto the suit land;
 - c. Who should bear the costs of the suit.
11. The defendants averred in their submissions that they remained in possession of the suit land after the same was registered in the plaintiff's husband's name in 1993. They aver that the plaintiff never filed a reply to defence to counter that allegation. Citing Section 7 of the *Limitation of Actions Act* they state that they and their parents were in possession of the suit land as at 1993 and that there is no evidence available that they ever left the suit land thereafter. They aver that the plaintiff has never been on the suit property at all. The defendants aver that they have been sued in their own individual capacities and that from 1993 no efforts were made by the plaintiff to evict them from the suit land. The defendants cite the cases of *Mehta Vs Shah 1965 EA 321*, *Bosire Ogero Vs Royal Media Services Ltd 2015 eKLR* and *Gathoni Vs Kenya Cooperative Creameries Ltd 1982 KLR 104* as laying down the rationale for limitation of actions. They also cite *Edward Moonge Lengusuranga Vs James Lanaiyara & Another 2019 eKLR* for the proposition that the plaintiff's claim is time barred. However, is the claim time barred?
12. The defendants aver that they have been sued in their individual capacities and not as the legal representatives of their late mothers' estates. The previous suit against their late mothers yielded a judgment that was vacated at the instance of the 2nd defendant. Their defence suffers one major flaw. While the plaintiff's claim does not label them as the sons or legal representatives of the deceased defendants in the former suit, they have not concerned themselves with drawing any nexus between them and the deceased defendants save stating that they were their sons. They do not present themselves as administrators of their deceased mothers' estates. This court perceives their rejoicing in the fact that they have been sued in their individual capacities rather than as legal representatives of their late mothers' estates as their greatest liability, for consequently they must individually establish the real date of their entry into the suit land; they must also establish that they have been in continuous possession thereof in order to seek shelter under the Limitations of Actions Act. However, they have not demonstrated by any evidence that they have been in continuous occupation of the suit land from 1993 while in their individual capacities.
13. It is the correct factual position that the statutory period of 12 years' requisite to bar a land owner from filing a suit for the recovery of land have elapsed since 1993 when the title was issued to the registered owner; however, it is also true that the defendants have not by way of any credible evidence



demonstrated that they have been in occupation of the suit premises since 1993 in their individual capacities. I state this because they have drawn a clear dichotomy between their claim to the land and their late parents' claims to the land.

14. It was upon the defendants who asserted the defence of limitation to establish by way of evidence independent of their mothers' occupation of the land that they had been in occupation on their own accord for a period in excess of 12 years in order to plead limitation. Their parents' occupation of the suit land therefore ceases to be of consequence in their defence only on account of that proposition. It would therefore be unjust to allow the defendants to enjoy the patronage or umbrella of their mother's possession of the suit land while still being of the proposition that the present suit was lodged against them in their individual capacities.
15. I therefore do not think that in the absence of clear evidence from the defendants as to when they as individuals entered into possession of the suit land, which they have not given, this court can address the issue of limitation. Besides, the plaintiff's claim against both defendants is in trespass and that is a continuous tort, with every new day of occupation being deemed a fresh tort. The court in the case of Msa. Civil Suit No. 84 of 2005 Janendra Raichand Shah -vs- Mistry Walji Naran Murji [2014] eKLR stated as follows:

“Nevertheless in fairness to the plaintiffs their argument that their cause of action arose on each day that the defendant was in wrongful occupation may be valid. On this, the court draws an analogy from continuing trespass.

Clerk and Lindsell on Torts 17th Edition at paragraph 17.02 states: -

“Every continuance of a trespass is fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues...”

The defendant was in continuous wrongful possession from 1st January, 1990 (a day after the lease determined) upto after November 24, 2004 when the plaintiffs sold the premises to Vantage yet in respect of the plaintiffs their cause of action first arose in June, 1985 when they became owners of the property. So from June 1985 to November 24, 2004 a new cause of action arose each day the defendant continued to be in wrongful possession. However, for purposes of the *Limitation of Actions Act*, any cause of action that arose three years before the date of filing of the suit would be statute barred. The suit was filed on 12th May, 2005 and so any cause of action that arose prior to 12th May, 2002 is time barred.”

16. The second issue is whether the defendants have indeed trespassed on to the suit land. It is common ground that the defendants though being in possession are not the registered proprietors of the suit land and that it belongs to the estate of the plaintiff's deceased husband. The plaintiff being an administrator of her late husband's estate has demonstrated locus to institute the present suit against them. The defendants have failed to demonstrate that they are in occupation of the suit land by license or permission from the estate of the registered owner or that he gave them such license or permission while he was alive and I must hold them to be in trespass as claimed by the plaintiff.
17. Regarding the issue of costs of the suit, it is observable that it is the defendant's action of trespass that has occasioned the need for the present suit and they having failed to establish their defence must therefore meet the costs
18. As to whether mesne profits should be ordered, I find that the defendant's evidence has established that they earn a minimum of Kshs 14,000/- by virtue of the businesses operated on the premises. On this admission and without more I find that the estate of the late Kahawa Gachoka is entitled to

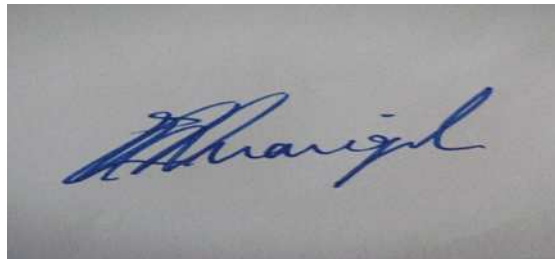


mesne profits. Owing to the observation regarding the time of entry above and considering that the suit was lodged in January 2020, I adopt a multiplier of 36 months for the computation of mesne profits claimed by the plaintiff to bring the total sum awardable under that head to Kshs 504,000/=.

19. The upshot of the foregoing is that the plaintiff's claim has merit. I therefore enter judgment in her favour against the defendants jointly and severally and I issue the following orders:
- a. It is hereby declared that the defendants have trespassed onto LR NO Nakuru Municipality Block 3/1104;
 - b. The defendants shall remove themselves and their belongings from LR NO Nakuru Municipality Block 3/1104 and in default they shall be forcibly evicted therefrom;
 - c. The defendants shall pay to the plaintiff the sum of Kshs 504,000/= being mesne profits
 - d. An order of permanent injunction is hereby issued restraining the defendants or anyone claiming under them from in any manner whatsoever interfering with LR NO Nakuru Municipality Block 3/1104;
 - e. The defendants shall also pay to the plaintiff the costs of this suit.

It is so ordered.

Dated, signed and delivered at Nakuru via electronic mail on this 19th day of January, 2023.



MWANGI NJOROGE
JUDGE, ELC, NAKURU

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