



REPUBLIC OF KENYA



**Evans v Kiswii (Environment & Land Case 42 of 2016)
[2022] KEELC 102 (KLR) (4 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 102 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 42 OF 2016**

A NYUKURI, J

MAY 4, 2022

BETWEEN

MUNGAI MBUGUA EVANS PLAINTIFF

AND

GEDION MAINGI KISWII DEFENDANT

JUDGMENT

1. Vide a Complaint dated 10th June 2016, the Plaintiff averred that he was the registered proprietor of plot No. Mlolongo/Ngwata Phase II A (suit property) which he purchased from Mavoko Land Development Company and was thereafter given a letter of allotment. He further stated that he has been in occupation of the suit property since the time of purchase and dutifully paid land rent and rates thereof. He however contended that in 2009, the Defendant entered the suit property and erected illegal structures thereon.
2. He further asserted that the Defendant had made a statement to the C.I.D Mlolongo vide OB No. 36/8/3/2012 that his plot No. 458 "B" Mlolongo Ngwata Phase II A did not exist in Mavoko Land Development Company's 1st and 2nd Registers, the map and on the ground and that he had been defrauded of his money. Ultimately, the Plaintiff sought the following orders;
 - a. A Declaration that the Plaintiff is the duly registered owner of property known as Title Number Plot No. 460 Mlolongo/Ngwata Phase II A.
 - b. A Declaration that the Defendant whether by herself or her servants or agents or otherwise howsoever is wrongfully in occupation of the suit property and are accordingly, trespassers on the same and should be ordered to vacate immediately.
 - c. A permanent injunction restraining the defendants from trespassing, interfering, alienating, occupying and/or in any way dealing with the Plaintiff's quiet possession and/or interest of the said property known as Title Number Plot No. 460 Mlolongo/Ngwata Phase II A.



- d. Vacant possession of the suit property.
 - e. General damages for trespass and mesne profits.
 - f. Cost of the suit together with interest thereon at court rate and for such period of time as this Honourable court may deem fit to grant.
 - g. Any other relief the court may deem fit to grant
3. The Defendant filed a statement of Defence on 27th June, 2016 in which he denied the Plaintiff's claim and averred that he purchased the suit property from Mavoko Land Development Company Limited and paid the entire purchase price.
 4. Vide an application dated 19th April 2018, the defendant sought to issue third party Notice to one Julius Nzioka Mutua whom he alleged to have bought the suit property from. He also sought for leave to amend his defence in terms of the draft defence that was attached to the application. Though the orders sought therein were granted on 2nd March 2021, the record does not show that he filed a third-party Notice or an amended defence.
 5. The matter was scheduled for hearing on 27th January 2022. Although the defence counsel was served, he failed to attend court hence the matter proceeded exparte.

Plaintiff's Case

6. At the hearing, the Plaintiff (PW-1), Mungai Mbugua Evans adopted his witness statement recorded on 9th June 2016 and filed in court on 10th June 2016 as his evidence in chief. He testified that he was the lawful and registered owner of property known as Title No. 460 Mlolongo/Ngwata Phase II A, which he purchased from Mavoko Land Development Company. He further testified that before he was given the allotment letter, he paid all the requisite fees to facilitate registration, including payment of land rent and rates and obtained the necessary consents. It was also his evidence that sometime in the year 2009, the defendant with his servants and or agents trespassed on the suit property. That as he followed up his case with the police, he learnt that the defendant had recorded a statement alleging that his plot No. 458 "B" Mlolongo/Ngwata Phase II A did not exist in Mavoko Land Development Company's 1st and 2nd Registers, the map and on the ground, and hence he had been defrauded of his money. He concluded by seeking the orders stated in the plaint.
7. The Plaintiff produced a bundle of documents being a demand Notice from the Plaintiff's advocate to the Defendant dated 2nd March 2016 as P-Exhibit 1, copies of certificate of posting dated 16th April 2012 and 4th March 2016 as P-Exhibit 2, copies of letters dated 28th December 2009 and 22nd April 2010 as P-Exhibit 3, a copy of allotment letter dated 12th August 2003 as P-Exhibit 4, a copy of receipt of payment of rent fees dated 16th March 2007 as P-Exhibit 5, copies of receipts from Mavoko Quarry Site dated 31st July 2003 as P-Exhibit 6, a copy of Register with page showing Plaintiff as owner of the suit property as P-Exhibit 7, a map of the suit property as P-Exhibit 8, Defendant's handwritten statement dated 9th March 2012 as P-Exhibit 9, a copy of rent payment receipt dated 20th April 2016 as P-Exhibit 10 and a confirmation letter dated 29th April 2016 from Mavoko Land Development Company as P-Exhibit 11. With that, the Plaintiff closed his case.
8. As the defendant did not attend court, the matter was scheduled for submissions on 10th February 2022. The plaintiff filed his submissions on 10th February 2022. No submissions were filed by the defendant.



Submissions

9. Counsel for the plaintiff submitted that the Plaintiff was the registered owner of the suit property and that the Defendant did not produce any evidence of ownership. Counsel argued that being the registered proprietor of the suit land, the plaintiff deserved the protection of the law as provided for under Article 40 of *the Constitution*. It was his contention that the Defendant's contention in the defence contradicted what he stated in a statement recorded at the Police that his land was Plot 458 "B" Mlolongo/Ngwata Phase IIA. Counsel further argued that the defendant had trespassed on the suit property and that injunction and eviction orders should be issued against him since he had failed to comply upon issuance of a demand notice. They cited the case of *Kariuki Mathu vs Registered Trustees of Shiloh Tabernacle Church & Another* (2018) eKLR where the court issued an eviction order in similar circumstances. Counsel further argued that the Plaintiff had suffered loss and damage due to the defendant's trespass and was entitled to mesne profits. Reliance was placed on the case of *Mistry Valji v Janendra Raichand & 2 Others* [2016] eKLR for the proposition that grant of mesne profits is discretionary.

Analysis and determination

10. I have carefully considered the parties' pleadings, the testimony of the Plaintiff and the Plaintiff's submissions. The issues for determination are:
- Whether the Plaintiff is the owner of Plot No.460 Mlolongo Ngwata Phase 11 A.
 - Whether the Plaintiff is entitled to the orders sought in the plaint.
11. As regards ownership of the suit property, the Plaintiff stated that he purchased the suit property from Mavoko Land Development Company. He has produced a copy of the register of the said company to show that indeed his name is indicated as owner of Plot No. 460 Mlolongo/Ngwata Phase II A.
12. The Plaintiff did produce a letter of allotment dated 12th august 2003 from Mavoko Municipal Council allotting Plot No.460 Phase IIA to him. This was however a temporary allotment with conditions attached, being payment of annual rents and development within two years. The Plaintiff did also produce receipts for payments of rent. He also did produce letters from the said Mavoko Land Development Company confirming him to be the owner of the Plot No.460 Phase IIA. None of the parties produced a title document in respect of the suit land. However, as the Defendant did not give any evidence to rebut the Plaintiff's testimony, the evidence that the Plaintiff is the owner of the suit property by virtue of allotment from Mavoko Land Development Company, remains unchallenged.
13. In the case of *John Muchiri Mbutia v Rebecca Were Mutanda & Another* [2015] eKLR, the court cited with approval the holding in the case of *Rukaya Ali Mohamed v David Gikonyo Nambacha & Another* (Kisumu HCCA No. 9 of 2004, where the court stated as follows: -
- Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment, since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was outrightly illegal or it was against the public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.
14. From the evidence on record, I am satisfied that the Plaintiff has proved his case on a balance of probability that he is the owner of the suit property and that the defendant's occupation thereof is unlawful and amounts to trespass. The evidence of the Defendant's handwritten statement to the



C.I.D confirming that his alleged plot Mlolongo No.458 did not exist is a clear demonstration that his occupation of the suit property is unlawful, as the same does not belong to him.

15. The *Black's Law Dictionary, 8th Edition* defines trespass as;-

An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable to his real property.

16. Having found the Plaintiff to be the rightful owner of the suit property, it is only proper that he is granted quiet and exclusive possession of his land. For this reason, this court is inclined to grant the Plaintiff's prayer for injunction as prayed in the plaint.

17. The plaintiff also sought for eviction orders. The Defendant has not denied the Plaintiff's allegations of illegally constructing on the suit property. As the Defendant did not establish his claim over the suit land, it is only reasonable that the Plaintiff having proved ownership should be granted quiet possession thereof and therefore the prayer for eviction is granted.

18. On the Plaintiff's claim for general damages for trespass and mesne profits, I am guided by the general legal principle that in circumstances where a party claims for both damages for trespass and mesne profits, the court cannot grant both; it can only grant one. This position was reiterated in the Court of Appeal decision in the case of *Christine Nyanchama Oanda v Catholic Diocese of Homabay Registered Trustees* [2020] eKLR, where it was held as follows;

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.

19. The Black's Law Dictionary defines mesne profits as "profits of an estate received by a tenant in wrongful possession between (2) two dates." The Halsbury's Laws of England define mesne profits as an action by a land owner against another person trespassing on the owner's land, depriving the owner of the income he/she would have obtained if they used that land.

20. Order 21 Rule 13 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 sub rule (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.



21. In the case of *Attorney General v Halal Meat Products Limited* [2016] eKLR, the Court of Appeal held 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 wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. Para 34-42.

22. It is clear that mesne profits are damages recoverable by a land owner from a trespasser for profits/rent the trespasser has or might have obtained during his unlawful occupation of another's land. To succeed in a claim for mesne profits, it behooves the party claiming mesne profits to place evidence before court to demonstrate that there is trespass, specify the period of trespass and the income the trespasser has or might have received from their occupation of the land. In the case of *Peter Mwangi Mbutia & Another v Samow Edin Osman* [2014] eKLR, the Court of Appeal stated as follows;

We agree with counsel for the appellants that it was incumbent upon the Respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.

23. A claim for mesne profits is a claim for special damages which must not only be pleaded but also proved. For this view, I am persuaded by the decision of the court in *Karanja Mbugua & Another v Marybin Holding Company Limited* [2014] eKLR, where it was observed as follows;

This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded, but also proved, as shown by the provisions of Order 21 Rule 13 of the *Civil Procedure Rules*.

24. In the instant suit, the plaintiff has shown that the defendant trespassed on his property. As mesne profits are specific damages, it is trite law that the same need not just be pleaded, they must also be proved. The Plaintiff did not lead any evidence on the amount of mesne profits to be granted, or what the defendant has or might have received in the course of his unlawful occupation. He only stated that the trespass by the Defendant entitled him to mesne profits. It is my considered view that merely mentioning that he is entitled to mesne profits by virtue of the defendant's trespass on the suit land, was not sufficient to warrant the court to exercise its discretion in favour of the Plaintiff. He was obligated to state why he was entitled to mesne profits; how much was the amount for mesne profits and the basis for arriving at such an amount. As that was not done, the Plaintiff's claim for mesne profits must fail.

25. In conclusion, I enter judgment for the Plaintiff against the Defendant in the following terms;

- a. A Declaration be and is hereby made that the Plaintiff is the owner of property known as Plot No. 460 Mlolongo/Ngwata Phase II A.
- b. A Declaration be and is hereby made that the Defendant whether by himself, or his servants or agents or otherwise howsoever is wrongfully in occupation of the suit property and is accordingly, a trespasser on the same.
- c. A permanent injunction be and is hereby issued restraining the defendants from trespassing, interfering, alienating, occupying and/or in way dealing with the Plaintiff's quiet possession and/or interest of the said property known as Title Number Plot No. 460 Mlolongo/Ngwata Phase II A.



- d. The Defendant shall vacate the suit property within 90 days of this judgment, in default, he shall be evicted therefrom at his cost.
- e. The Plaintiff is awarded costs of the suit.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mwenda for the Plaintiff

No appearance for the Defendant

Ms Josephine Misigo – Court Assistant

