



REPUBLIC OF KENYA



KENYA LAW
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Harun (Trading as Nelson Harun & Company Advocates) v Kaluworks Limited & another (Environmental and Land Originating Summons 181 of 2019) [2024] KEELC 3580 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3580 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 181 OF 2019**

JG KEMEI, J

APRIL 9, 2024

BOOTH EXTRUSIONS LIMITED - PLAINTIFF

VS

DUMBEYIA NELSON MUTURI HARUN - DEFENDANT

AND

**IN THE MATTER OF THE JUDGMENT IN THE
COURT OF APPEAL, CA NO. 249 OF 2015 NAIROBI**

BETWEEN

BOOTH EXTRUSIONS LIMITED - APPELLANT

VS

DUMBEYIA NELSON MUTURI HARUN - RESPONDENT

AND

IN THE MATTER OF ORDER 37 RULE 11 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF SECTIONS 3 & 19 OF THE
ENVIRONMENT AND LAND COURT ACT**

AND

**IN THE MATTER OF SECTIONS 1A, 1B, 1C & 3A OF
THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA**

AND

IN THE MATTER OF L.R. NO. 4953/1421 (I.R 37819) THIKA TOWN, KIAMBU COUNTY

BETWEEN



NELSON MUTURI DUMBEBYIA HARUN (TRADING AS NELSON HARUN & COMPANY ADVOCATES) PLAINTIFF

AND

KALUWORKS LIMITED 1ST DEFENDANT

BOOTH EXTRUSIONS LIMITED 2ND DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated the 10/12/2019 filed by the Plaintiff/Applicant against the Defendants/Respondents pursuant to Order 37 Rule 11 of the Civil Procedure Rules and Sections 1A, 1B, 1C & 3A of the Civil Procedure Act and Sections 3 & 19 of the Environment and Land Court Act, the Plaintiff sought the following orders:-
 - a. That a declaration be and is hereby issued that the Plaintiff is the *bona fide* beneficial owner of LR No. 4953/1421 (IR 37819) pursuant to the Judgment of the High Court of Kenya in ELC No. 937 of 2013 Nairobi (OS) Booth Extrusions Limited –versus- Dumbeyia Nelson Muturi Harun delivered on December 17, 2014 and affirmed on December 1, 2017 by the Court of Appeal at Nairobi in Civil Appeal No. 249 of 2015 Nairobi, Booth Extrusions Limited –versus- Dumbeyia Nelson Muturi Harun.
 - b. That the Plaintiff Nelson Muturi Dumbeyia Harun be registered as the registered proprietor of LR No. 4953/1421 (IR 37819) upon service of this order and a certified copy of this Court’s Judgment on the Land Registrar, Nairobi or the appropriate registry of LR No. 4953/1421 (IR 37819).
 - c. That the Court be pleased to award *mesne profits* calculated on the basis of lost market rental income based on the valuation report exhibited from 17/12/2014 (the date of the Judgment of the High Court in ELC No. 937 of 2013 Nairobi, Booth Extrusions Limited –versus- Dumbeyia Nelson Muturi Harun).
 - d. That the costs of this Originating Summons be borne by the Defendants.
 - e. Any other or further relief the Court may deem fit and just to grant.
2. The Originating Summons is supported by the Affidavit of the Applicant sworn on 10/12/2019. The Plaintiff deponed that the 1st Defendant surrendered the title of the suit land to the 2nd Defendant for a consideration of Kshs. 610,000/-. That the Plaintiff was instructed to cause a transfer of the suit land to the 2nd Defendant which transfer aborted. That notwithstanding the 2nd Defendant subsequently surrendered to the Plaintiff the title to the suit land in settlement of part fees agreed between the Plaintiff and the 2nd Defendant.
3. That in Nairobi ELC 937 of 2013 (OS) the 2nd Defendant sought orders of delivery of the original title and deed plan in respect of the suit land by the Plaintiff. The Court dismissed the case of the 2nd Defendant. The 2nd Defendant being dissatisfied with the decision of the Court, filed an Appeal CA No. 249 of 2015 Nairobi which appeal suffered the same fate.
4. The Plaintiff avers that since the delivery of the Judgement, the Defendant has not exhibited any intention of willingly executing the transfer and hence the need to now approach this Court seeking orders that the suit land be registered in his name pursuant to the Judgement of the Court.



5. The Defendants were duly served with the pleadings however they failed to enter appearance and file a defence.
6. At the hearing of the suit, the Plaintiff led evidence in Court and relied entirely on his lengthy witness statement dated the 7/6/2023. He reiterated the contents of lengthy proceedings between the parties in this suit. He averred that the Court of Appeal was categorical in its decision that he was entitled not only to retain the title which came into his possession by virtue of the contractual relationship between the parties but also to effect a transfer of the suit property to his name.
7. That after the delivery of the Court of Appeal Judgment the 2nd Defendant through its previous advocates proposed to the Plaintiff to purchase the suit land. In addition that he then demanded the market rent for the suit land in the sum of Kshs 200,000/- per month from the 2005 when the 2nd Defendant surrendered and or assigned its beneficial interest in the property to him. That the proposals led to the deed of settlement between the parties. But due to the differences of opinion with respect to the proposed value of the suit land, he declined to execute the deed of settlement leading to the collapse of the negotiations. He reiterated that the duty of this Court is to issue enforcement orders in line with the orders of the High Court and the Court of Appeal.
8. Further the Plaintiff averred that the 2nd Defendant has had ample time to comply with the orders of the Court and transfer the title to him but have through their inaction forced the Plaintiff to file these proceedings. In addition, that the Defendants have kept him out of the property and have continued to use it hence the prayer for *mesne profits*.
9. The Plaintiff filed written submissions dated 18/8/2023. I have read and considered the same. The Defendants failed to comply with the directions of the Court to so file their submissions.

Analysis and Determination

10. Having considered the Originating Summons, the supporting pleadings and the evidence tendered at the hearing, the Court finds the following issues are for determination;
 - a. Whether the rights of the parties were determined by the Court.
 - b. Whether the Plaintiff is entitled to *mesne profits*.
 - c. Costs of the suit.

The rights of the parties

11. There is no contention that this dispute has been determined first, by the Nairobi Environment and Land Court ELC No. 937 of 2013 in 2014 and later at the Court of Appeal CA No. 249 of 2015 where the Appellate Court stated as follows;

“That being the law, we are of the considered view that no matter how the Appellant tries to put it, it was at fault to frustrate the contract by hatching a facially fraudulent scheme to renege from its explicit commitment to the Respondent. This is because it is apparent from the record that it was bound by the contents of the letters and minutes of the meeting.

It is clear to us that the Respondent and the Appellant expected, intended and accepted that the title document to the suit property was to be held and converted by the Respondent to settlement of the legal fees owing from the Appellant and in accordance with the letters express instructions.



Having carefully perused the impugned Judgement and exhaustively considered the record, we find that the trial Judge properly took into consideration the evidence adduced by the parties in arriving at his decision and we see no reason for interfering with his exercise of discretion. This appeal herein lacks merit and is hereby dismissed with costs to the Respondent.” (emphasis mine)

12. This Court notes that the rights of the parties were settled by the Environment and Land Court and the Court of Appeal in their extensive Judgments, which Court of Appeal Judgment binds this Court and what remains in my view is the question of enforcement of the said orders.
13. In exercise of its jurisdiction bestowed on it by the Article 162 (2) (b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*, this Court is mandated to make any order and grant reliefs as the Court thinks fit and just including *inter alia* declaratory orders. The Judgement of the Court of Appeal having been delivered and no evidence that the same has been appealed, vacated and or set aside, this Court is persuaded that the Plaintiff is entitled to the declaratory orders as to ownership of the suit land.
14. The Court finds that Prayers (a) and (b) are founded and are allowable.

Mesne Profits

15. According to *Black's Law Dictionary* 9th Edition, *mesne profits* is the name given to damages for trespass brought by a landlord against his tenant where the latter fails to quit demised premises upon termination of a lease.
16. The legal provisions for *mesne profits* are anchored in Order 21 rule 13 of the *Civil Procedure Rules*:-

“[Order 21, rule 13.] Decree for possession and *mesne profits*.

13.

- (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 decreeholder 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 subrule (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.”

17. *mesne profits* are akin to special damages in that they must be specifically pleaded and proved. This was the holding of the Court in the case of *Karanja Mbugua & Another vs. Marybin Holding Co. Ltd* [2014] eKLR stated as follows with regard to *mesne profits*:-

“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 *Civil Procedure Act.*”

18. *mesne profits* is also the term used for the compensation due for the occupation of land to a person with right of immediate occupation, where no permission has been given for that occupation. In the case of *Inverugie Investments Ltd vs. Hackett* [1995]3 All ER 841 [1995] WLR 713, where the privy council held that one who was deprived of the use of his property is entitled to recover damages in the form of *mesne profits*.

19. How should *mesne profits* be calculated? The answer is found in the case of *Mwaya Wa Kitavi and Another vs. Peter Kitemwa Muia* Nrb ELC No. 10 of 2013 where the Court held that;

“The Plaintiffs sought the damages in the form of *mesne profits* which means “the profits of an estate received by a tenant in wrongful possession between two dates.”

20. The Plaintiff has argued that he was entitled to the land since 2015 after the delivery of the Environment and Land Court Judgement. The Plaintiff has decried the continuous occupation of the land by the Defendants despite the definitive decision of the Court that the Plaintiff is entitled to beneficial ownership in settlement of the agreed legal fees.

21. It is trite that *mesne profits* are akin to special damages for which an Applicant must proof before the Court. In this case the Plaintiff has sought *mesne profits* in the sum of Kshs 200,000/- per month from 1/1/2015 for a period of 103 months totalling Kshs. 20.6 Million. The Plaintiff has urged the Court to grant *mesne profits* to compensate him for the delay in transferring the property to him. That the period should be calculated from the 1/1/2015 following the date of the delivery of the Environment and Land Court Judgment on 17/12/14 when the rights of the parties were determined. The Defendants have not controverted the Plaintiff’s evidence with respect to the rental values of the property. In the absence of any rebuttal the Court grants the prayer as sought.

Final orders for disposal

22. In the end I enter Judgement in favour of the Plaintiff against the Defendants as follows;

- a. It is hereby declared that the Plaintiff is the *bona fide* beneficial owner of LR No. 4953/1421 (IR 37819) pursuant to the Judgment of the High Court of Kenya in ELC No. 937 of 2013 Nairobi (OS) *Booth Extrusions Limited vs. Dumbeyia Nelson Muturi Harun* delivered on December 17, 2014 and affirmed on December 1, 2017 by the Court of Appeal at Nairobi in Civil Appeal No. 249 of 2015 Nairobi, *Booth Extrusions Limited vs. Dumbeyia Nelson Muturi Harun.*
- b. It is hereby ordered that Nelson Muturi Dumbeyia Harun be registered as the registered proprietor of LR No. 4953/1421 (IR 37819) upon service of this order and a certified copy of



this Court's Judgment on the Land Registrar, Nairobi or the appropriate registry of LR No. 4953/1421 (IR 37819).

- c. It is hereby ordered that the Plaintiff is entitled to an award *mesne profits* calculated on the basis of lost market rental income based on the valuation report exhibited from 17/12/2014 (the date of the Judgment of the High Court in ELC No. 937 of 2013 Nairobi, *Booth Extrusions Limited vs. Dumbeyia Nelson Muturi Harun*) to the date of transfer and handover of the property to the Plaintiff.
- d. No orders as to costs.

23. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 9TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – present in person

1st and 2nd Defendants - Absent

Court Assistants – Phyllis/Oliver

