



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 18 OF 2019

PAUL NGASHEMA KAMAU.....PLAINTIFF

VERSUS

HALIMA SAID.....DEFENDANT

JUDGEMENT

By a Plaint dated the 5th March, 2019, the Plaintiff prays for Judgement against the Defendant for:

- a) An Eviction Order directed to the Defendant ordering him to forthwith vacate the Plaintiff's parcel of land namely LR No. KAJIADO/ KAPUTIEI CENTRAL/ 2815.
- b) A permanent injunction restraining the Defendant, his family, kin, agents, employees, servants or anyone claiming under them from trespassing upon, ingressing into, cultivating, selling, disposing off or in any other manner interfering with the Plaintiff's quiet possession and ownership of Land Reference Number KAJIADO/ KAPUTIEI CENTRAL/ 2815.
- c) Mesne profit.
- d) Costs of this suit.
- e) Any other relief that this honourable court may deem just and fair to order.

The Defendant though duly served as evident in the affidavit of service sworn on the 10th June, 2019, failed to enter appearance nor file a Defence. The matter proceeded for hearing on 27th July, 2020 where the Plaintiff had one witness.

Evidence of the Plaintiff

The Plaintiff as PW1 testified that he is the registered co - proprietor of land parcel number Kajiado/ Kaputiei Central/ 2815 hereinafter referred to as the 'suit land'. Further, that he was issued with the Certificate of Title dated the 30th December, 2015. It was his testimony that the Defendant has encroached on some portion of the suit land without any license, permission or any form of authorization from him. He claimed the Defendant had proceeded to till the land and together with her labourer begun ploughing the land in preparation for the planting season. Further, that the Defendant had constructed a temporary mud and mabati structure on the suit land. He

insisted that the Defendant had declined to heed the Chief and Elder's appeal to vacate the suit land.

The Plaintiff produced his Certificate of Title and a Demand Letter dated the 24th August, 2018 as his exhibits.

Analysis and Determination

Upon consideration of the Plaintiff, Witness Testimony, Exhibits and Submissions, the following are the issues for determination:

- Whether an order of eviction should issue against the Defendant.
- Whether the Defendant should be permanently restrained from interfering with the suit land.
- Whether the Plaintiff is entitled to mesne profits.
- Who should bear the costs of the suit.

As to whether an order of eviction should issue against the Defendant.

The Plaintiff as PW1 tendered evidence to prove he is the registered co- proprietor of the suit land and they were issued with a Certificate of Title to that effect, which he produced as an exhibit. It was his testimony that the Defendant had encroached on the suit land and declined to heed to the Chief and Elder's appeal to vacate the suit land. Further, that the Defendant has proceeded to put up a structure on the suit land and together with his labour commenced tilling it. I note the Defendant failed to file a Defence to controvert the averments of the Plaintiff and in making reference to section 26(1) of the Land Registration Act which provides that'

'The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '

Further, Section 24 (a) of the Land Registration Act states that: **' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'**

Further, in the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** the Court held as follows: **' the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.'**

From the legal provisions cited above, as well as associating myself with the quoted decision, I hold that since the Plaintiff is one of the co absolute proprietor of the suit land and their Certificate of title having not been challenged, he is entitled to all rights and privileges belonging or appurtenant thereto and hence entitled to protection of the law as envisaged in sections 24, 25 and 26 of the Land Registration Act. Further, based on these findings, I hold that the Defendant should indeed be evicted from the suit land.

As to whether the Defendant should be permanently restrained from interfering with the suit land.

The Plaintiff claims the Defendant has continued to cultivate the suit land and even put up a temporary mud and mabati structure thereon. Further, that she has declined to heed the call of the Chief and Elders to vacate the suit land. Since the Plaintiff is one of the co registered proprietor of the suit land and they hold a Certificate of Title to that effect, I find that the Defendant is indeed a trespasser and in line with the principles established in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**, I find that the Plaintiff has established a prima facie case as against the Defendant who should hence be permanently restrained from interfering with the said land.

As to whether the Plaintiff is entitled to mesne profits.

The Plaintiff has sought for mesne profits as against the Defendant who he claims has encroached on his land.

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;***

While Order 21 Rule 13 of the Civil Procedure Rules provides as follows: -***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 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.***

I note that except for pleading mesne profits, the Plaintiff did not furnish court with any evidence on the period the Defendant had been on the land, the extent of encroachment and the loss he had suffered.

In the case of **Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR**, the Court of Appeal while dealing with the issue of mesne profits held 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.”

Based on the evidence placed before me while associating myself with the legal provisions and decisions cited above, I find that the Plaintiff had failed to discharge his burden of proof to prove that he is indeed entitled to a claim of mesne profits and I will decline to award him the same.

Who should bear the costs of the suit.

Since the Plaintiff has been inconvenienced with the Defendant’s defiance to move from the suit land, I find that he is entitled to costs.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will proceed to make the following orders:

a) The Defendant be and is hereby directed to give vacant possession of LR. No. KAJIADO/ KAPUTIEI CENTRAL/ 2815 to the Plaintiff within 90 days from the date hereof, failure of which an eviction order will issue.

b) The Costs of the suit is awarded to the Plaintiff

Dated signed and delivered in open court at Kajiado this 30th day of November, 2020

CHRISTINE OCHIENG

JUDGE



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