



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE NO. 5 OF 2007

WILLIAM KAMUNGE GAKUI.....PLAINTIFF

VERSUS

EUSTACE GITONGA GAKUI.....DEFENDANT

JUDGMENT

By the Plaint dated 28th January 2007, **WILLIAM KAMUNGE GAKUI**, the plaintiff herein, sued **EUSTACE GITONGA GAKUI**, the defendant herein, whereupon he prayed for judgment in the following terms:

- (a) An order for eviction evicting the Defendant, his family and properties from L.R. NO. KIRIMUKUYU/MUTAHINI/937 and damages for trespass.***
- (b) Costs of the suit.***
- (c) Interest on (a) and (b) above at Court rates.***

The Defendant filed a defence to deny the Plaintiff's claim. When the suit came up for hearing, the Defendant's defence was ordered closed when the Defendant and his counsel failed to turn up for the hearing despite having been served with a hearing notice.

The Plaintiff testified without the input of the evidence of independent witnesses. He produced the title in respect of **L.R. NO. KIRIMUKUYU/MUTATHINI/937** as an exhibit in evidence to show that he is the registered proprietor of the aforesaid land. The title shows that the Plaintiff got registered as the proprietor of the land in dispute on 20th February 1997. He alleged that the Defendant herein who is his brother has refused to vacate the land despite having been requested to do so. The Plaintiff urged this Court to issue an order of eviction. The Plaintiff claimed that the land was a subdivision of **L.R. NO. KIRIMUKUYU/MUTATHINI/461**. He claimed his late father subdivided the aforesaid land into five

subdivisions and gave him the suit land. The Plaintiff admitted in cross-examination that the structure standing on the suit land is his mother's house. He stated that his mother lives on the land while the Defendant lives in Garden Estate and that he has not put up any structure on the suit land. The Plaintiff further alleged that the Defendant evicted him from the land. The Plaintiff also admitted in cross-examination that he has not presented evidence on how he acquired the suit land. He stated that the subdivision was done by his late father who died on 2nd January 1997. It is further conceded that **L.R. NO. KIRIMUKUYU/MUTATHINI/461** is the subject matter of **NAIROBI H.C. SUCC NO. 372 OF 1997** which is still pending. The Plaintiff denied having fraudulently acquired the suit land. It is also admitted by the Plaintiff that the Defendant does not reside on the land. It is alleged that he utilizes the land through his agents.

I have considered the Plaintiff's oral evidence plus the documentary evidence. The Plaintiff has prayed for an order of eviction and damages for trespass against the Defendant. He has also asked for costs. The question which must be answered is whether or not the Plaintiff has tendered evidence establishing that the Defendant trespassed on his land. The Plaintiff was bound to establish through credible evidence that the Defendant committed the act of trespass in order to be given the order of eviction. There is no doubt the Plaintiff has shown he has title to the suit land. I have carefully analysed the evidence tendered by the Plaintiff. In his evidence in-chief, the Plaintiff states that the Defendant is in occupation of the land. In his evidence in cross-examination, the Plaintiff stated that the Defendant is not in occupation. In fact he stated that the structure standing on the land in dispute is his mother's house. He further stated that his mother resides in the aforesaid house. The Plaintiff further clarified that the Defendant actually lives in Garden Estate. He alleged that the Defendant utilizes the land through his agents. He did not name the Defendant's agents, hence this later piece of evidence cannot be relied upon. In the end I am not convinced that the Plaintiff has proved his case against the Defendant to the required standards in civil cases. The Plaintiff miserably failed to prove the tort of trespass against the Defendant. The Plaintiff's evidence appear to have exonerated the Defendant. For the above reasons I see no merit in the suit. It is dismissed with no order as to costs.

Dated and delivered at Nyeri this 18th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kingori holding brief Lompo for Plaintiff.