

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 972 of 2005

JOHN KIRUI MUTHIORA.....PLAINTIFF

VERSUS

STEPHEN WAWERU MUTHIORA.....DEFENDANT

JUDGMENT

The plaintiff and the defendant in this case are brothers. . The dispute herein revolves around a parcel of land originally known as L.R. No. Dagoreti/Riruta/217, which was registered in the name of Wandaka Kirui, the late father of the parties herein through Succession Cause No. 13 of 1971. The said piece of land was to be equally shared between the plaintiff, the defendant and P.W. 1 who is one of their brothers. At that time, both the plaintiff and P.W. 1 were minors while the defendant was an adult. The defendant caused this particular piece of land to be subdivided. However, instead of subdividing the land into 3 equal portions the defendant subdivided it into four portions. That is , Dagoreti/Riruta/1600 for P.W. 1 ,Joseph Gicheru Muthiora, Dagoreti/Riruta/1601 for John Kirui Muthiora the plaintiff herein, Dagoreti/Riruta/1613 for Stephen Waweru Muthiora the defendant herein and Dagoreti/Riruta/1615. This last parcel of land is not known to who it was allocated, although in evidence the defendant claimed it as his.

The plaintiff subsequently divided his title into several portions which included Dagoreti/Riruta/3851, which the defendant has occupied since the plaintiff was a minor, but without the plaintiff's consent or authority. The plaintiff therefore filed this case to restrain his brother the defendant from trespassing or in any other way interfering with the said parcel of land, and to be compelled to remove and demolish any structure thereon. He also claimed general damages for trespass and mesne profits.

The defendant on the other hand claims that the parcel he received after the sub-division was less than the plaintiff's parcel and that of his brother. He however did not call any evidence nor did he call the surveyor who did the original subdivision of the original title Dagoreti/Riruta/217. There was also no evidence that the plaintiff and his other brother P.W. 1 were to surrender any portion of their parcels to the defendant so that the parcels of land could be equal.

The defendant filed a counter claim asking for a portion of 0.32 acres to be curved out of the plaintiff's property, Dagoreti/Riruta/3851. However, he did not plead adverse possession. The said parcel No. Dagoreti/Riruta/3851 is registered in the name of the plaintiff. The defendant is aware of this and indeed says he is alive to the principle of sanctity of title.

Attempts to have the parties herein settle this matter out of court failed. The hearing was only conducted when the court was persuaded that no progress would be made by the parties meeting outside the court. The law must therefore follow its own course. The parcel occupied by the defendant belongs to the plaintiff. The defendant says he has lived on that piece of land 1979 and even buried 2 of his children on that property. That is why an out of court settlement would have been better in this matter. That notwithstanding, I am unable to bend the law to suit the interest of the defendant in this matter. He has admitted that he was the one who was in charge of the subdivisions. The land was supposed to have been subdivided into 3 equal portions; instead he created 4 portions contrary to the orders in the Succession Cause. If it is true the portions are not equal then he is to blame not his brothers.

On the evidence before me, I find that the plaintiff has proved its case against his brother to warrant the orders sought. However, the defendant shall not be evicted as sought by the plaintiff, without the orders of this court. The final order is that the plaintiff shall have the costs against the defendant in this suit.

Orders accordingly.

Dated, signed and delivered at Nairobi this 31st day of July, 2011.

A. MBOGHOLI MSAGHA

JUDGE