

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 101 OF 2002

GERALD WANYIRI WAMBUGU PLAINTIFF

VERSUS

FREDRICK WANJOHI MWANGI DEFENDANT

J U D G M E N T

The Plaintiff filed this suit against the Defendant seeking interalia eviction orders against him in respect of land parcel **Narumoru/Narumoru Block 2/Aguthi/931** hereinafter referred to as “*the suit premises*”, general damages for the Plaintiff’s house and crops that were destroyed, mesne profits for illegal occupation and costs of the suit.

The Plaintiff’s suit as can be gathered from the Amended Plaint dated 17th August 2002 and filed in court on 19th August, 2002 is anchored on the fact that he was the registered owner of the suit premises measuring 3.87 acres whereas the defendant was his immediate neighbour owning land parcel **Narumoru/BK2/Aguthi/932** measuring 5.4 acres. The defendant without any colour of right has been claiming ownership of the Plaintiff’s portion that borders his said land parcel. Though between 1998 and 2001 the Plaintiff managed to evict him from the disputed portion, the defendant later forced himself back into the same portion of the suit premises. In the process the defendant destroyed the Plaintiff’s fence, a house and crops hence this suit.

On being served the defendant entered appearance and thereafter filed a statement of defence and counterclaim. In the main he denied in toto the Plaintiff’s averments. Instead he claimed that he had been in continuous and un-interrupted occupation and possession of the said portion which forms part of his land aforesaid. He further averred that the Plaintiff had been charged and convicted on his own plea of guilty in Nyeri Chief Magistrate’s Court Criminal Case number 2774/01 for the offence of trespass and malicious damage to property and sentenced to a fine of Kshs.2000/= in default one month imprisonment. In his counterclaim the defendant averred that it was indeed the Plaintiff who was interfering with the defendant’s quite and peaceful possession of the portion of the suit premises that belonged to him and prayed for a permanent injunction to restrain the Plaintiff from further interfering with the defendants land in issue. He also prayed for the costs of the suit as well as costs of the counterclaim upon dismissing the main suit.

In support of his case the Plaintiff testified and also called the Land Registrar, Nyeri and the then Agricultural Officer, Kieni East Division. The Plaintiff’s evidence merely replicated what he had stated in his plaint. On her part the Land Registrar confirmed having visited the suit premises and took measurements and established that the defendant had indeed encroached on the portion of land in the suit premises belonging to the Plaintiff. However she was unable to determine the dispute with finality as it was not a boundary dispute rather the dispute was all about ownership of a portion of the suit premises. The agricultural officer’s evidence was really on assessment of damages. He testified that he visited the suit premises and assessed the value of damage occasioned to the Plaintiff by the defendant. He assessed the same at Kshs.275,600/=. The Plaintiff then closed his case.

When the suit came up for defence hearing on 25th March 2009, neither the defendant nor his advocate were present in court. As no explanation for their absence was tendered and noting that the hearing date had been taken by consent of the advocates of the parties and at the urging of **Mr. Mugo**, learned advocate for the Plaintiff I directed that the suit proceeds for further hearing the absence of the defendant and or his advocate notwithstanding. In the absence of the defendant, I deemed that he had no evidence to tender in support of his defence and counterclaim. Accordingly I closed his case.

Subsequent thereto, **Mr. Mugo** filed written submissions which I have carefully read and considered. In the absence of any evidence to the contrary, I am satisfied that the Plaintiff has proved his case on the balance of probability. Through unchallenged and uncontroverted evidence, the Plaintiff has been able to demonstrate that he is the registered proprietor of the suit premises, a portion whereof have been illegally acquired and occupied by the defendant. There is the certificate of title, the sale agreement between the Plaintiff and one, **Wiliam W. Muchemi** who sold him the suit premises. There is also a map of the area clearly showing that the portion of land occupied by the defendant actually belongs to the Plaintiff. I have also seen a letter dated 12th September 2001 addressed to the OCS, Narumoru Police Station by District Officer, Kieni East Division in which he categorically states that the land belongs to the Plaintiff as per the records held in the District Lands office and according to the area plan approved by the Provincial Surveyor, Central Province. Hence the defendant has no legal right to claim plot No. 931. The District land registrar's evidence which too was unchallenged was to the effect that what was being disputed was not a boundary but ownership of land. However in her opinion the map indicated clearly that the disputed portion was part of the suit premises belonging to the Plaintiff. In his defence, the defendant had claimed that the plaintiff had been arrested, charged, convicted and sentenced for a criminal offence of trespassing and malicious damage over the said portion. However a copy of the charge sheet tendered in evidence does not support the defendant's contention. In that charge sheet, the Plaintiff was merely charged with setting fire to vegetation without lawful authority contrary to section 3(1) of the Grass fire Act. So it is quite true when the Plaintiff pleads that he had never been charged with any offence of trespass or malicious damage to property but with an offence of burning grass which fire then extended from the disputed portion of the suit premises to the defendant's land.

A report prepared by Divisional extension co-ordinator (PW3) dated 14th December, 2001 confirms that the Plaintiff's crops valued at Kshs.275,600/= were destroyed by the Defendant. The Plaintiff is obviously entitled to be compensated in damages to that extent. No evidence was led with regard to mesne profits. There is therefore nothing on record to assist me reach or make such an award.

As already stated the Plaintiff has on balance of probability proved his claim and is thus entitled to the order sought in the plaint, that is to say, that the defendant shall forthwith be evicted from the Plaintiff's parcel of land known as **Narumoru/Narumoru Block 2/Aguthi/931**. The defendant shall pay the Plaintiff a sum of Kshs.275,600/= being the pecuniary value of the crops destroyed by the defendant. The plaintiff shall also have the costs of this suit. No evidence have been led in support of the counterclaim, the same is hereby dismissed with costs to the Plaintiff as well.

Dated and delivered at Nyeri this 11th day of May 2009

M. S. A. MAKHANDIA

JUDGE