



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Civil Suit 4 of 2007**

**SAMSON OLE TIAN ..... PLAINTIFF**

**VERSUS**

**THE CLERK,**

**TRANS MARA COUNTY COUNCIL ..... 1<sup>ST</sup> DEFENDANT**

**TRANS MARA COUNTRY COUNCIL .... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff's suit was uncontested, the defendants' defence having been deemed as struck out for failure to make discoveries in time in terms of a consent that was recorded on 16<sup>th</sup> October, 2007. The suit proceeded to formal proof on 29<sup>th</sup> September, 2009. The defendants' advocate had been duly notified of the formal proof but chose not to attend court.

In the plaint, the plaintiff, who is the registered proprietor of a parcel of land known as L.R. NO. TRANSMARA/OLALUI/15, situate within Kilgoris Division and which measures approximately 24.28 hectares, hereinafter referred to as "**the suit land**", claimed that the defendants had encroached on to his property. He claimed that the defendants had unlawfully extended a cemetery that is next to his land by fencing off a portion of the suit land measuring approximately 2 hectares. He further stated that the defendants had trespassed upon a portion of the suit land by dumping garbage thereon and thus denying him the right of use of that portion of land. As a result he has suffered loss and claimed damages. He prayed for a declaration that he is registered proprietor of the suit land and for a permanent injunction to restrain the defendants by themselves, their agents and/or servants from trespassing, fencing, dumping garbage or interfering in any manner with the suit land whatsoever. He also prayed for an order of eviction and mesne profits.

During the formal proof the plaintiff produced the title deed to the suit land and a certificate of official search. The land was registered in his name on 29<sup>th</sup> July, 2005. He sufficiently demonstrated that the defendants had trespassed onto his land by unlawfully extending the boundaries of the cemetery and by creating a dumping site thereon. He produced photographs which show the dumping site and part of the cemetery which is fenced with a barbed wire. The plaintiff's homestead is about 100 meters from the dumping site and the same has become a nuisance to the plaintiff and his family members because of the foul smell emanating therefrom.

The area that has been unlawfully encroached onto by the defendants measures about five acres. The

plaintiff has been denied use of that portion of his land. He is unable to utilize the same for maize planting. He testified that before the said encroachment he used to plant maize thereon and the average yield was 20 bags of maize per acre. He used to plant twice in a year. In one season he would harvest 100 bags and the price of a bag of maize at Kilgoris is Kshs. 2,400/=. For two seasons in a year he would get 200 bags and the encroachment has gone on for three years. In monetary terms the loss suffered can be computed as hereunder:

**200 bags x 3 years x Kshs.2,400 = Kshs. 1,440,000/-.**

The plaintiff urged the court to award him the aforesaid sum as mesne profits.

Having considered the plaintiff's unchallenged evidence, I am satisfied that he is the registered proprietor of the suit land. He is therefore entitled to exclusive use and possession of the entire parcel of land measuring 24.28 hectares. The defendants have unlawfully encroached onto the suit land and have denied the plaintiff right of use of about 5 acres thereof. The plaintiff's prayer for a permanent injunction is merited and I grant the same as prayed. The defendants should forthwith vacate the suit land failing which an eviction order shall issue and the defendants shall be liable for the costs that may be incurred by the plaintiff in carrying out the eviction.

As regards the plaintiff's prayer for mesne profits, Mr. Oguttu for the plaintiff referred this court to the decision of the Court of Appeal for East Africa in **RIOKI ESTATE CO. (1970) LIMITED -VS- KINUTHIA NJOROGE** [1977] KLR 146. In the said decision the court referred to the definition of "mesne profits" in section 2 of the **Civil Procedure Act**. The section provides:

**"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."**

It is not in dispute that the plaintiff has been denied use of about 5 acres of his land. I accept his evidence that he used to grow maize on that land. He has testified about his expected annual yield. However, the plaintiff did not tell the court what his net profit would have been after subtracting the production costs.

Accepting the sum of Kshs.1,440,000/= as the gross income over a period of 3 years, I will discount one third of the said sum on account of the farm inputs including cost of labour. The net sum comes to Kshs. 960,000/= which I award the plaintiff as mesne profits.

The plaintiff shall also have costs of the suit as well as interest on the mesne profits from the date of this judgment until payment in full.

**DATED, SIGNED AND DELIVERED AT KISII THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**20/11/2009**

Before D. Musinga, J.

Mobisa -cc

Mr. Oguttu for the Plaintiff

N/A for the Defendant

**Court:** Judgment delivered in open court on 20<sup>th</sup> November, 2009.

**D. MUSINGA**

**JUDGE.**