

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 311 of 1993

ELIJAH MAINA KARIUKIPLAINTIFF

Versus

DUNCAN MUTHEE KAHAMA DEFENDANT

JUDGMENT

The original plaintiff brought this action against the defendant claiming that the defendant the registered owner of property NYERI/UASO NYIRO/5 had encroached her parcel of land being NYERI/UASONYIRO/97 and had occupied 36.6 acres. When the case came for hearing the original plaintiff had died. She had been substituted by her son Elijah Maina Kariuki. The said son gave evidence in support of late mother's claim. The original defendant had also been substituted after her death. The defendant failed to attend court for the hearing of this case and on an application being made on his behalf for an adjournment the court declined to grant that adjournment. The plaintiff in evidence stated that he and his family settled on parcel No. 97 in 1964. The defendant's family which neighbours their land settled on their land in 1963. The defendants were therefore on their land before the plaintiffs. In 1988 the original plaintiff decided to subdivide her land to give it to her children. She engaged a surveyor to carry out that subdivision and when the surveyor began to do his work he found that the defendants had occupied 36.6 acres of the plaintiff's land. The plaintiff produced green card of both parcels of land. In respect of parcel No. 97 it had 107 acres. It is still in the name of his late mother. In respect of parcel No. 5 it has 13.8 hectares. The surveyor on finding that the defendant had occupied the plaintiff's land directed the plaintiff to refer the matter to the Land Registrar. The Land Registrar and a surveyor did go on the parcel of land and indeed found that where the two parcels shared a common boundary the defendant had encroached 36.6 acres or the plaintiff. The plaintiff therefore was seeking an order of the court to evict the plaintiff. PW 2 was a Surveyor at Nyeri District Survey office. He confirmed that they were summoned to go to the two parcels of land. He went in the company of the District Land Registrar known as Mr. Njoroge. He also confirmed that the finding of their investigation was that the defendant had encroached the plaintiff's land. As they did so they marked on the ground the extent of each parcel of land. PW 3 was a Land Registrar based in Nyeri land office. She was able to confirm that the report forwarded to court by the District Land Registrar was indeed made by the said Land Registrar. In that report the District Land Registrar observed as follows:-

“The problem is the common boundary of the two lands (5 and 97) which we have been ordered to put on the ground.”

He also confirmed that after the exercise carried out by him and the surveyor they marked the boundary. That was the evidence offered by the plaintiff. The defence did not call any evidence. It is clear from that evidence that the plaintiff has proved his case on a balance of probability that the defendant has encroached on his land. The court therefore grants the following judgment.

1. *That the defendant do vacate and give vacant possession of the portion of 36.6 acres illegally encroached by the defendant of Parcel No. NYERI/UASONYIRO/97.*
2. *The defendant shall give a vacant possession of that portion within 30 days from this date hereof, in default eviction to issue.*

3. *The plaintiff is awarded costs of this suit.*

DATED AND DELIVERED THIS 26TH DAY OF JUNE 2008

MARY KASANGO

JUDGE