

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 69 of 2003

JOHN MWANIKI MIRICHI.....PLAINTIFF

Versus

JOHN IRERI ISAAC.....DEFENDANT

JUDGMENT

The Defendant was served with the summons and plaint in this matter but failed to enter an appearance within the prescribed period. Interlocutory judgment was entered and thereafter this matter came up before me for formal proof. In the amended plaint filed in court on 30th July 2007 the Plaintiff averred that he purchased parcel no. L.R. EVURORI/EVURORI/1210 and had himself registered as the owner on or about the 2nd April 1990. He averred that he is the absolute proprietor of that land. On or about June 2002 the Defendant encroached on the Plaintiff's property and thereby set up temporary structures and began cutting down trees and other cultivation. He also began to carry out cultivation and planted subsistence crops. The Plaintiff in his plaint pleaded that the said encroachment and trespass was wrongful, illegal, unlawful, and without any colour of right. That as a result of that trespass he has suffered damage. The Plaintiff therefore prayed for an order of eviction of the Defendant and a permanent injunction of himself, his servants, or agents or relatives from the said land. The Plaintiff also prayed for mesne profit from the date of encroachment until the date of vacant possession. The Plaintiff gave evidence and stated that he purchased the said land from Nathan Marioko in 1990. He exhibited the title that he obtained after that purchase. He stated that his purchase of the land was legal and followed the correct process. He was not residing on the suit property and therefore left Nathan Marioko to take care of the land. It was the said Marioko who informed him that the Defendant had encroached on his land. The Defendant was summoned by the chief with two letters dated 18th June 2002 and 5th August 2002. The Defendant failed to avail himself before the chief. The Plaintiff produced copies of those letters. He further stated that the Defendant is destroying trees and crops on the land. That he has further been using the trees to burn charcoal. The said trespass has caused him loss of Kshs.4,000/= per season per acre. He said that the seasons are two in a year. He therefore prayed for orders as stated in the Plaint.

P.W. 2 was Nathan Nyaga Marioko. The witness confirmed that in 1990 he sold the suit property to the Plaintiff. He confirmed that the Defendant had encroached on that land and gave the background of his trespass as follows: that the Defendant was chased by Joseph Mwega from his land and he thereafter went and settled on his cousin's property. The cousin is called Ephrahim Mugo. The said Mugo told the Defendant that he would find him an alternative land to occupy. He took the Defendant to the Plaintiff's land. P.W.2 confirmed that the Defendant has destroyed vegetation and has been burning coal from the Plaintiffs trees. He also confirmed that the Defendant failed to obey the summons of the chief.

Having regard to that evidence I find and I hold that the Plaintiff has proved on a balance of probability that the Defendant did trespass the suit property and is still in occupation. The Plaintiff, however, failed to prove his claim of mesne profit for it is a claim in the nature of special damages and needed to be proved by documentation. Accordingly the judgment of this court is as follows:

1. An order of eviction is hereby granted against the Defendant to give vacant possession of the suit property **EVURORI/EVURORI/1210**.
2. A permanent injunction is hereby issued to restrain the Defendant, his servants, agents, relatives or otherwise from further trespassing on the suit land or cutting any vegetation or building any structures or planting any crops thereof.
3. The Plaintiff is granted costs of this suit.

Dated and delivered at Nyeri this 5th day of October 2007.

MARY KASANGO

JUDGE