

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE 285 OF 2000

DIXON GAUTAMA WARUINGE.....PLAINTIFF

V E R S U S

KURIA MWANGI (alias WAHINYA).....1ST DEFENDANT

SAMUEL WARUINGE.....2ND DEFENDANT

J U D G M E N T

The Plaintiff is the registered proprietor of the parcel of land known as Kiganjo/Gachika/2235. He came before this Court on 21st February, 2000 and sued the two Defendants alleging that they had on 1st February, 2000 and 14th February, 2000 trespassed on the said parcel of land and destroyed trees, burned vegetation and prepared to cultivate thereon. He sought an injunction and general damages for trespass.

The Defendants were served with summons to enter appearance on 14th July, 2000. They neither filed appearance nor defence and so on application by the Plaintiff. The Deputy Registrar entered interlocutory judgment on 5th October, 2000. The matter was set down for formal proof on 26th March, 2001 when an Advocate who had not filed a Notice of appointment appeared before Aganyanya, J. and applied for adjournment on behalf of the 1st Defendant. An order was nevertheless made that the 1st Defendant shall pay court adjournment fees of Shs. 1,000/= and then file an application within 15 days. The application would be one for setting aside the interlocutory judgment and for leave to file defence out of time. The deadline was thus 10th April, 2001. But no application was filed.

The Plaintiff then set down the suit for Formal Proof twice before it finally came before me on 11th April, 2002. I was satisfied with the service of hearing notice in respect of the 1st Defendant. The 2nd Defendant never entered appearance.

I heard the Plaintiff testify on oath on the ownership of the land through purchase and grant of the Land Control Board's consent. He produced the title document issued on 25th January, 2000. He also testified how he confronted the Defendants on 14th February, 2000 after they had entered on the land and committed the acts of trespass he complained of and the Defendants admitted it. He seeks general damages. That evidence was not controverted. I have no reason to disbelieve the Plaintiff on it.

An opportunity was given to the Defendants to have the interlocutory judgment set aside and for their defences to be filed out of time. Under Order IX rule 1 of the Civil Procedure Rules provides that a Defendant may appear at any time before final judgment and may file a defence at any time before interlocutory judgment is entered or if no interlocutory judgment is entered any time before final judgment. There is an interlocutory judgment entered in this matter on 5th October, 2000 and, therefore, any appearance or defence should have been filed before then or out of time with leave of Court.

Such leave has never been properly sought despite the opportunity to do so having been given by Aganyanya, J. on 26th March, 2001. The purported defence placed on record on 18th May, 2001 must, therefore, be ignored. I grant prayer (a) as prayed in the plaint. I also award Shs. 1,000/= in general damages for trespass against both Defendants jointly and severally.

The Plaintiff shall have costs of the suit.

DATED at NAIROBI this 17th day of April, 2002.

P.N. WAKI

JUDGE