



**SAMUEL MWANGI ..... APPELLANT**

**AND**

**JEREMIAH M'ITOBU ..... RESPONDENT**

*(An appeal from the Judgment and Decree of the High Court of Kenya at Meru (Etyang, J) dated 8<sup>th</sup> April, 1998*

**in**

**H. C. A. No. 70 of 1994)**

\*\*\*\*\*

### **JUDGMENT OF VISRAM, JA**

There is one simple legal issue for determination in this appeal: can an “occupier” of land sue an “intruder” for trespass?

By a plaint dated and filed in the Principal Magistrate’s Court at Meru on 9<sup>th</sup> July, 1987, the appellant (plaintiff in the lower court) sought special damages of Kshs.5,000/= and an order of eviction against the respondent arising from an act of trespass allegedly committed by the respondent on the appellant’s land.

The respondent (defendant in the lower court) denied that the appellant had title to any land as alleged. The relevant averments in his defence are as follows:

**“5. The Defendant states that the whole of the Meru Land Unit is an area already declared to be subject to Land Adjudication Act and therefore no consent having been obtained from the Land Adjudication Officer, this suit is in-compent (sic) and should be struck out.**

**6. The Defendant further and without prejudice to the foregoing states that the plaintiff is a Kikuyu by his ethnicity and as such he has no Customary right to hold land in Meru under Kimeru Customary Law.**

**7. The Defendant still further, (and without prejudice to the defences heretofore advanced) denies to have trespassed unto any of the plaintiff’s so-called “shamba” or land (or however described) either in the month of October 1986 or any other month at all and puts the plaintiff into (sic) strict proof.”**

After hearing the evidence presented before his court, the learned trial Magistrate (Mr. S. A. Wamwayi), although dismissing the claim for special damages, found for the appellant in trespass and ordered the eviction of the respondent from the suit land.

Aggrieved by that decision, the respondent preferred an appeal to the High Court of Kenya at Meru. In his judgment dated 8<sup>th</sup> April, 1998, Etyang, J, allowing the appeal, expressed himself, in part, as

follows:

***“In law, therefore, the Plaintiff respondent was entitled only to occupation of the land in question which he had been given by the Bwetha Clan pending his registration as the absolute proprietor of the same. It is only after that registration that he would have had absolute right of occupation and ownership but not before. During the pendency and currency of this suit the Plaintiff/Respondent had not been so registered.***

***The Chief Magistrate was right to hold that the Plaintiff/Respondent had satisfied him on the balance of probabilities, that he was given land by his in-laws, the Bwetha Clan, being Land No.34 Block 3 at Lakathu and that is where he stays. That finding only related to occupation, the physical possession of the same but it did not relate to ownership of that land, by him as the chief Magistrate would have had no jurisdiction to determine on ownership until the process of land adjudication was completed and titles issued.***

***The Chief Magistrate therefore fell into error when he held that the Plaintiff/Respondent was entitled to succeed on the issue of trespass based on ownership and to the order of eviction of the appellant from the same. He should have dismissed both claims of the Respondent.”***

The appellant is now before us in this second and final appeal. He has outlined the following three grounds of appeal:

- “1. The learned Judge erred in Law facts (sic) in finding that the respondent could not be found to be a trespasser and infact be evicted from the suit property while the same was under Adjudication yet the court appreciated that the appellant had consent to sue, was in occupation, was on (sic) physical, occupation and was given the land.***
- 2. The learned Judge erred in Law in failing to find that being in physical occupation and entitled to occupy gave appellant right to evict the respondent who was a trespasser.***
- 3. The judgement of the court was unjust in all circumstances of the case.”***

In his submissions before this Court, Mr. C. Kariuki, learned counsel for the appellant, argued that both the courts below had found the appellant to have been in lawful occupation of the suit land, giving the appellant the right “to ward off a trespasser”. He relied on **Winfield** and **Jolowicz** on Tort (12<sup>th</sup> edition @ p. 361/362) for the proposition that an “occupier” of land had the right to sue in trespass.

Mr. M. M. Kioga, learned counsel for the respondent, while not disputing that the appellant was in actual occupation of the suit land, simply argued that the notion of “trespass” was unknown to customary law, and the suit land being customary land, the appellant had rights only to a claim in damages to his crops, but not to trespass. Mr. Kioga failed to cite any authorities for the propositions advanced by him.

The material facts in this case are not in dispute. Both courts below found that the appellant was in lawful occupation of the suit land.

The learned Magistrate expressed himself as follows:

***“The plaintiff has satisfied me on the balance of probabilities that he was given land by his in laws the Bwetha clan being land No. 34 Block 3 at Lakathu and that is where he stays.”***

The learned Judge of the High Court agreed with that finding, expressing himself, as follows:

***“The Chief Magistrate appreciated this fact when he said in his Judgment that:-***

***‘The Plaintiff claims that the land was given to him by Bwetha clan who are the In-Laws. The fact that the Plaintiff obtained a consent letter from the District Land Adjudication Officer shows that the***

**land at Athiru – Gaiti is under adjudication.’**

***In law, therefore, the Plaintiff respondent was entitled only to occupation of the land in question which he had been given by the Bwetha Clan pending his registration as the absolute proprietor of the same.”***

There are, therefore, concurrent findings of facts by the two courts below that the appellant was in lawful occupation of the suit land. These facts are also accepted by the respondent. However, his argument simply is that mere occupation of land does not entitle the appellant to evict another person. That “other” person in this case is neither the owner of the suit land, nor anyone claiming the right to occupation. He is, in fact, the respondent, a trespasser for all intents and purposes. The learned Judge of the High Court erred in his conclusion that only an “owner” of land had the right to sue in trespass. That is clearly not so. As **Winfield** and **Jolowicz** state in their book “Tort” (12<sup>th</sup> Edition @ p. 361):

***“Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person’s right to possess (the “jus tertii”) unless he can prove that he acted with that person’s authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.”***

Accordingly, and for reasons stated, I allow this appeal as prayed, with costs to the appellant, both here and in the High Court.

This judgment has been delivered under **rule 31 (3)** of the Court of Appeal Rules, and as Koome, JA also agrees, the orders shall be as outlined herein before.

**Dated and delivered at Nyeri this 5<sup>th</sup> day of July, 2012.**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

**IN THE COURT OF APPEAL  
AT NYERI**

-  
**CORAM: WAKI, VISRAM & KOOME, J.J.A.**

-  
**CIVIL APPEAL NO. 264 OF 2007**

**SAMUEL MWANGI ..... APPELLANT**

**AND**

**JEREMIAH M’ITOBU ..... RESPONDENT**

**(An appeal from the judgment & decree of the High Court of Kenya at Meru (Etyang, J) dated 8<sup>th</sup> April, 1998**

**in**

**HCA NO. 70 OF 1994)**

**\*\*\*\*\***

**JUDGMENT OF KOOME J.A.:**

I have had the advantage of reading the judgment of Visram, JA. I agree with him that the appeal should succeed to the extent indicated in the said judgment.

**Dated and delivered at Nyeri this 5<sup>th</sup> day of July, 2012.**

**M. K. KOOME**

-----  
**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**