



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO.134 OF 2003

CATHERINE KAWIRA.....PLAINTIFF

VERSUS

MURIUNGKIRIGIA.....DEFENDANT

RULING

Eviction Order

[1] The significant orders sought in the Motion dated 18th May 2011 are:

(a) That the Defendant be evicted from the suit premises, namely; (1) L.R. NO IGOJI/KIANGU/2036; (2) L.R. NO IGOKI/KIANGU2037; and (3) L.R. NO IGOKI/KIANGU/2038.

(b) That OCS NKUBU Police Station to provide security during the eviction of the Defendant from the said suit premises; and

(c) Costs of the suit.

[2] The Motion is expressed to be brought under section 1A, 1B, 3, and 3A of the Civil Procedure Act, and Order 51 Rule 1 of the Civil Procedure Rules. The Motion is supported by the Plaintiff's Affidavit sworn on 18th May 2011 and grounds set out in the Motion and as amplified in the submissions by the Plaintiff.

[3] The major grounds for applying is that:

There is already a final judgment in this matter against the defendant to the effect that the suit properties be registered in the name of the plaintiff. A decree arising from the judgment has already been executed and the suit properties now stand in the name of the plaintiff. Except, the defendant has refused to yield vacant possession of the suit premises. Therefore, in the absence of orders of stay of execution it can only be in the interest of justice that eviction orders should be issued against the defendant. The submissions by the plaintiff merely emphasized the foregoing grounds; and more specifically that the continued occupation of the suit premises by the defendant is simply illegal.

[4] The defendant opposed the application and filed written submission. His major point of opposition is that the plaintiff did not plead for eviction of the defendant for the suit land or that he has been in unlawful occupation thereto. He submitted therefore, that eviction is an afterthought; a

move that is misconceived, misplaced, bad in law, an abuse of court process and should be resisted by this court. According to the defendant the plaintiff cannot now seek for eviction of the defendant in a matter that is fully concluded. He proposed that a fresh suit for eviction must be filed as this court is *functus officio*.

DETERMINATION

[5] I have considered all the rival arguments of counsel. I have looked at the judgment of this court (Kasango J) and this clearly is a clear case of clear breach of trust by the defendant. In fact the court stated this:

“Section 93 of the law of succession cannot shield the defendant from the court retransfer property wrongly registered, in his name to the plaintiff. In the case of Jane Gachoki Gatheca vs Priscilla Nyawira..... Civil Appeal No. 343 of 2002, the Court of Appeal, where the facts were similar to this case stated:-

“A thief acquires no right of interest which is transferable in stolen property.”

The defendant was a thief. The transfers he undertook of the deceased properties are traceable.

[6] The said judgment still stands and in a trust set up, the intermeddler cannot claim to keep the trust or estate property. A court in such circumstances as these will not sit helpless and allow an injustice to pass under its nose. The defendant seems bent at keeping the suit premises at all costs. His proposal that it is only in a fresh suit where orders of eviction can be issued is an epitome of his avowed desire to keep the trust or estate property. Not for the love of law and justice. But in the new constitution, all that matters is substantive justice. In this case trust or estate is traceable to him and a court of equity would evict such trespasser. A trespasser has no right whatsoever to, and to be in the property; the appropriate owner may remove such person from his lands although it is always convenient to seek an order of the court. In these circumstances, this court is not *functus officio* and I direct that:

- a) The defendant shall be evicted from the suit premises forthwith;***
- b) The OCS of Nkubu Police Station shall provide security during the eviction herein.***
- c) The defendant shall pay costs of this application.***

Dated, Delivered and Signed in open court at Meru this 18th day of April, 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Wamache advocate for Gitonga Advocate for plaintiff

Mr. Ndubi advocate for defendant – absent.

F. GIKONYO

JUDGE