

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 55 OF 2004

ROSE LWAKOSA PLAINTIFF

V E R S U S

KEITH GOGO ASAVA DEFENDANT

R U L I N G

The application dated 17.5.2013 seeks stay of execution of the judgment delivered on 2.5.2013 as well as review of the said judgment. Parties agreed to determine the application by way of written submissions. None of the parties complied with the consent. The application is supported by the affidavit of the plaintiff sworn on 17.5.2013 while the defendant filed a replying affidavit on 27.6.2013.

The main issue raised in that application is that the defendant filed his defence and subsequently made an application to have the defence amended so as to raise a counter claim. The application was heard and Justice G.B.M. Kariuki dismissed it on the 17.11.2005. In essence therefore the court in its judgment could not have granted the land to the defendant as his counter claim was not part of the proceedings. The replying affidavit merely indicates that the applicant's rights over the said land have become extinct. That the defendant has all along resided on the land having bought it from the plaintiff's father.

I have gone through the record and it is true that there was an application to have the defence amended which was dismissed. All what remained was the original defence dated 30.8.2004. I have gone through the defence and it is clear that the defendant was claiming ownership of the land having bought it in 1975 and settled thereon in 1976. The defendant avers in that defence that the plaintiff obtained registration after filing succession of her late father without involving him. The judgment of this court referred to the counter claim. However, it is clear that the plaintiff's prayer for eviction of the defendant from the suit land was dismissed. In essence therefore the land was awarded to the defendant. Even if the judgment is reviewed and the words counter claim are removed still the effect is the same. The court nullified the registration of the plaintiff and her sisters as the proprietors of plot numbers **KAKAMEGA/LUMAKANDA/3 & 6** and ordered that the same be registered in the names of the defendant. The application for review shall not change the status even if the counter claim is not considered. On the issue of stay of execution it is clear that the defendant is the one who has been in possession since 1976. He has developed the property. The plaintiff can pursue her appeal and should she succeed then the defendant will be evicted from the suit land. The same fate will befall the registration of the defendant as a proprietor and the land will revert to the plaintiff. There is no prejudice that will befall the applicant.

In the end, I do find that the application lacks merit and the same is dismissed with no orders as to costs.

Delivered, dated and signed at Kakamega this 19th day of May 2014

SAID J. CHITEMBWE

J U D G E