



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**HCC 301 OF 2012**

**Agatha Kaluki Mutie.....PLAINTIFF**

**VERSUS**

**THE Director St. Teresa's Academy.....DEFENDANT**

**JUDGEMENT**

By a plaint dated **9<sup>th</sup> August, 2012** the plaintiff Agatha KalukiMutie instituted this suit against the respondent, The Director, St Teresa's Academy seeking among other orders eviction of the defendant and demolition of the illegal structures from the suit property,a permanent injunction restraining the Defendants,their families, agents and or/servants from further or continued trespass or encroachment and or entry upon the suit premises or alternatively to compensate the plaintiff with the correct market price and costs from the time the defendant occupied the suit property,mesne profits, costs and interest.

The defendant's agent was served as deponed in the affidavit of service sworn by Mose David Osoro on **24<sup>th</sup> August 2012** but the Defendant did not enter appearance.

On **27<sup>th</sup> August, 2012** the plaintiff requested for judgment against the Defendant which was entered on **27<sup>th</sup> August, 2012** and the matter set down for formal proof.

During the hearing of the case, the plaintiff did not call any witnesses. She testified thatshe was the legal registered owner of **Gilgil Township Block 2/36** measuring approximately 0.1896 hectares having been issued with a letter of allotment dated **12<sup>th</sup> November,1992** and had met all the statutory requirements by paying all dues owing on the suit land. shewas granted a certificate of lease on **13<sup>th</sup>September, 2011**and was therefore the indefeasible owner under the**section 28** of the **Registered land Act Cap 300** (Repealed).

She further stated that the defendant hadin 1998 trespassed onto her land and erected permanent structures.

She produced the following documents as exhibits;

1. Letter of allotment dated **12<sup>th</sup> November, 1992**
2. Letter accepting the plot and its conditions dated **20<sup>th</sup> November, 1992**
3. Letters dated **23<sup>rd</sup> August, 2010,14<sup>th</sup> December,2005** asking the plaintiff to make paymentfor rates and fees to facilitate processing of a lease title.

4. Receipt for payment of rates dated **1<sup>st</sup> August 2011**.
5. Demand notes for land rent for the years **2008** and **2009**.
6. Demand letter from Onkoba, Omariba & Co. Advocates dated **18<sup>th</sup> July 2012**.
7. Certificate of lease dated **13<sup>th</sup> September 2011**.

I have read the plaint and carefully considered the evidence adduced by the plaintiff in support of her case and submissions.

The defendant in this suit has been named as "The Director, St Teresia's Academy" It is not clear to me whom the plaintiff intended to sue. Is it the school, St Teresia Academy or its proprietor/partners?

**Order 30** of the **Civil Procedure Rules, 2010** provides for suits by or against firms and persons carrying on business in names other than their own. **Rule 9** of the said order provides as follows;

*"any person carrying on business in a name or style other than his own name may be sued in such name and style as if it were a firm name: and, so far as the nature of the case will permit, all rules under this order shall apply"*

**Halsbury's Laws of England (4<sup>th</sup> Edition; Volume 37; paragraph 268)** refers to **Order 81 Rule 9 Civil Procedure Rules of England** which mirrors Kenya's own **Order 30 Rule 9** of our **Civil Procedure Rules 2010**; and states

*"An individual carrying on business within the Jurisdiction in a name or style other than his own name may be sued in that name as if it were the name of the firm"*

*The text then under footnote 3 goes on to state that*

*"if he sues, however, he should do so in his own name, describing himself as 'trading as'*

This is also the position taken in the Supreme Court of Kenya decision in *Lakhman Ramji Vs. Shivji Tessa & Sons [1965] E.A.*; where *Rudd J* at page 128, held thus:

*The legal position is quite clear, a sole proprietor of a business cannot sue in the name of that business if that name is not his own. He should not even sue in his own name trading in the business name. He should sue in his own name simpliciter and then in the body of the plaint he can say he carries on business in the name of whatever his business name happens to be and is the sole proprietor of that business."*

If the defendant intended to sue the school which is registered as a business name, then a certificate of registration should have been exhibited and the proprietor or partners named in the body of the plaint.

This defect is minor and therefore curable during proceedings under **order 1 rule 10 (2)** of civil procedure rules 2010 which states;

**(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

A more serious shortcoming is that although the plaintiff has produced documents to prove that she is the registered owner of the suit land and therefore her rights should not be defeated as stated under **section 28** of the Registered land Act Cap 300 (Repealed) which states thus;

**“ The rights of a proprietor, whether acquired on a first registration or whether acquired subsequently for valuable consideration, or by an order of the court shall not be liable to be defeated except as provided under this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever.....”.**

**And** replicated in the land Registration Act 2012 in section 25 which states thus:

**25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to....."**

she failed to adduce evidence to show how the defendant had trespassed, taken possession and constructed permanent structures on the suit land. Counsel for the plaintiff did not assist the court by exhibiting photographs or calling witnesses to corroborate the plaintiff's testimony as required under the Evidence Act in a manner that would lead the court to determine and give a well considered judgment.

A party seeking justice must place before the court all material evidence and facts which considered in light of law would enable court to arrive at a decision as to whether the relief sought is available, hence the legal dictum **"he who alleges must prove"**

In the premises, I strike out the suit with no orders as to costs as the defendant did not enter appearance .

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of August 2013**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr. Machage holding brief for Mr. Onkoba for the Plaintiff

No appearance for the Defendant

Court Clerk: Stephen Mwangi