



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO. 48 OF 2006 (OS)

**JUSTA MARIGU NJIRU.....PLAINTIFF/
RESPONDENT**

VERSUS

**LUCAS NDUNGO.....DEFENDANT/
APPLICANT**

R U L I N G

- 1 This suit was initiated in this court on 5th June 2006 by Justa Marigu Njiru (hereinafter referred to as the Respondent). She had come to this court by way of an originating summons seeking orders that the title of Lucas Ndungo (hereinafter referred to as applicant) to land known as **NGANDORI/KIRIGI/1326** (hereinafter referred to as suit property) has been extinguished through adverse possession. The respondent further sought to be declared and registered as proprietor of the suit property.
2. The applicant filed a replying affidavit in which he explained that he purchased the suit property jointly with 2 others from the respondents' husband one Kathuri Kareko Njiru. The suit property was registered in their names on 16th December 1975. The applicant denied the allegation that the respondent was in actual possession of the suit property since 1961 contending that the respondent and her family moved out of the suit property soon after the applicants and his co-proprietors purchased it.
3. On 27th February 2008 the Respondent was granted leave to include the other registered proprietors of the suit property.

On 29th July 2009 the court dismissed the Respondent's suit for want of prosecution. The applicant has now come to this court under Sections 1A, 3A and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya, seeking an order that the Respondent and her family members remove themselves and their properties from the suit property. The applicant contends that the respondent is in illegal occupation

of the suit property since he has no right, license or permission to occupy and cultivate the suit property.

4. From the above and the affidavit of the applicant sworn in support of the application, it is evident that the applicant is in actual fact seeking an order for the eviction of the respondent from the suit property. Nonetheless this is a suit which was brought by the respondent seeking to be declared the owner of the suit property by virtue of adverse possession. The applicant did not lodge any counter claim for vacant possession or the eviction of the respondent from the suit property. In fact in his affidavit sworn in reply to the respondent's originating summons, the applicant maintained that the respondent was not in actual possession of the suit property, but that the suit property has been in the applicants possession and control although the applicant and co-proprietors do not physically reside on the land.

5. I find that the applicant's present contention that the respondent has been in illegal occupation of the suit property contradicts the applicant's response to the originating summons.

Further the respondent's suit having been dismissed this court is now *funtus officio*. The applicant's prayer for eviction of the respondents from the suit property is not anchored on any substantive claim. Without a substantive claim the prayers sought cannot lie under Section 1A which deals with overriding objective of the Civil Procedure Act and Rules, nor can they lie under Section 3A which reiterates the inherent powers of the court, or Section 63(e) of the Civil Procedure Act. Accordingly the application dated 11th November 2010 is dismissed with no orders as to costs.

H.M. OKWENGU

JUDGE

Delivered, signed and dated at Embu this 26th day of January 2011

In presence of:- Applicant present in person

Njue C/C