



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 13 OF 2001 (OS)

**IN THE MATTER OF ADVERSE POSSESSION OF LAND PARCEL MWIMBI/CENTRAL
MAGUTUNI/121 MEASURING 1.4 ACRES (0.42HA) REGISTERED IN THE NAMES OF TITUS
MUGAMBI M'IRERI**

SABINA GATUNE RUCHA 1ST APPLICANT
MARICELLA MUTHONI RUCHA 2ND APPLICANT

VERSUS

SALESIO KANAMPIU M'TWARUCHIU 1ST RESPONDENT
TITUS MUGAMBI M'IRERI 2ND RESPONDENT

RULING

Sabina Gatune Rucha and Malicella Muthoni Rucha filed this originating summons seeking declaration that they had acquired title over parcel number *Mwimbi/Central – Magutuni/121* (suit property) by way of adverse possession. Salesio Kanampiu M'Twaruchiu and Titus Mugambi M'Reri defended the suit and denied that the plaintiffs were in possession and further pleaded in their defence that the plaintiffs had no locus standi to bring the present action since they had not obtained letters of administration in respect of the estate of the husband. In the replying affidavit of the defendant, it was stated that the defendant was an innocent purchaser. This suit was filed on 24th January 2001. The plaintiff's counsel on 3rd November 2009 took a hearing date of the suit with the consent of the defendant for 9th February 2010. On 9th February 2010 no counsel appeared before court. The court made the following order:-

“This is a very old suit. The hearing date was taken by consent at the invitation of the counsel for the plaintiff. There being no reason given for either counsels or the plaintiff absenteeism the suit (O.S.) is hereby dismissed with costs to the 1st and 2nd respondents who alone are present in court.”

The plaintiff presumably on learning of that dismissal filed a Chamber Summons dated 30th August 2010 seeking to set aside the proceedings of 9th February 2010 and all consequential orders. That application came before court on 2nd September 2010 and in the absence of the plaintiff and the defendant's counsel the court made the following order:-

“No appearance in the certificate dated 3rd August 2010. The same is hereby dispensed with without any orders.”

The plaintiffs have now brought a Notice of Motion dated 3rd February 2011 which was argued before me. The application seeks an order for stay of execution of warrant of possession dated 6th August 2010 until the application dated 30th August 2010 is heard and determined. The plaintiffs in their affidavit in support of that application deposed that as they were waiting for the hearing of the application dated 30th August 2010 for the reinstatement of their dismissed suit the defendants obtained warrant of possession for purpose of evicting them from the suit property. It was argued by learned counsel Miss Nelima for the plaintiffs that there was no legal basis of issuing those warrants because the orders of 9th February 2010, which dismissed the suit, did not entitle the defendants to evict the plaintiffs. Further that the defendant had wrongly obtained warrants when the defendant had not filed a counter claim in this suit. The defendant in the replying affidavit failed to specifically reply to the issues raised by the plaintiffs in their application. Instead, the defendant dealt with the plaintiff's failure to attend court when the suit was dismissed. This file is one of many that I have come across in this station and this is a trend that is disturbing where the registry is allowing execution to proceed with no orders having been made by a judge. The plaintiff's suit was dismissed but in the dismissal, the judge did not order for warrant of possession to issue. There was absolutely no legal basis for the defendant to apply for execution by way of issuing warrant of possession of the suit property. The plaintiff is therefore correct to submit that those warrants are illegal. I ask myself a rhetorical question whether the plaintiff have a legal basis to challenge those warrants. I answer that question in the negative. This is because the suit as it now stands is dismissed. The plaintiff should have first reinstated the suit then sought stay of the warrants. I have come across a letter in this file of Clear Real Traders Auctioneers dated 23rd August 2010. That letter is addressed to the deputy registrar of this court which is pertinent to this ruling and is in the following terms:-

***“The Deputy Registrar
Meru High Court
P.O. Box 118
MERU***

**REF: MERU HCCC NO. 13 OF 2001 (OS) SABINA GATUNE RUCHA & ANOTHER – VRS.
SALESIO KANAMPU M'TWARUCHIU & ANOTHER**

The above captioned matter refers where warrants to give possession was assigned to us for execution.

We executed the same by removing the plaintiffs Sabina Gatune Rucha & Maricella Muthoni Rucha from land No. Mwimbi/Central Magutuni/121 and put the defendant one Titus Mugambi M'Ireri to the above land.

We are now returning the warrant in court dully executed.

Yours faithfully

For: CLEAR REAL TRADERS

***CC
M/S KIOGORA ARITHI & CO. ADVOCATES
MERU.”***

That letter indicates that the plaintiffs were evicted by at least the 23rd August 2010. The court cannot stay what has already been executed. It is for that reason that I grant the following orders:-

- 1. The Notice of Motion dated 3rd February 2011 is dismissed but because the defendants had no legal basis to apply for warrants of possession, there shall be no orders as to costs.***
- 2. The order issued on 9th February 2011 staying the warrants of possession dated 6th August 2010***

is hereby set aside and vacated.

Dated, signed and delivered at Meru this 13th day of February 2011.

MARY KASANGO
JUDGE