

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 144'A' OF 2009

CHRISTINE WAMBUI PLAINTIFF

VERSUS

DAVID NKUBITU RIMBERA DEFENDANT

RULING

The plaintiff who is the wife of the defendant filed this case seeking for two prayers. The first is for mandatory injunction to compel the defendant to allow the plaintiff back into her house which is on LR. No. *Abothuguchi/Ruiga/1925*. The second prayer is a prayer for prohibitory injunction restraining the defendant from preventing the plaintiff to occupy that house. This suit was filed on 30th October 2009. There is no evidence before court that the defendant was served with the summons and plaint. The plaintiff when she filed the plaint she simultaneously filed a Notice of Motion dated 28th October 2009. In that Notice of Motion, she seeks pending the determination of this suit and order to be made restoring her into her house. Again, I can find no evidence that the said Notice of Motion was served on the defendant. When that application came for hearing before court on 1st March 2010 the matter was adjourned because the court had not authorized the plaintiff to effect substituted service on the defendant. The affidavit of service that was before the court on that day showed that the defendant on 12th February 2010 was served with a hearing notice. The purported hearing notice that was served on the defendant on that day was not annexed to the affidavit of service. When the Notice of Motion came for hearing once again before court on 16th March 2011 the plaintiff had filed an affidavit of service which again showed that the defendant was served with a hearing notice. What I find is that there is the very possibility that the defendant has not been served with the summons and plaint or the Notice of Motion under consideration. That may explain why when the Notice of Motion was heard on 16th March 2011 the defendant did not attend court. Further, it is clear that the plaintiff seeks not only to evict the defendant from the suit property but also another person called Agnes Wanja. It would seem that that is the reason why the plaintiff's prayer in her plaint seeks a mandatory and prohibitory injunction against the defendant, his servants or agents. That prayer is perhaps intended to capture the defendant and the other person, Agnes Wanja. It is because the Notice of Motion seeks to enforce an injunction order against a person who is known and yet not a party in this case that I find that the Notice of Motion must fail. To allow the prayers sought without joining Agnes Wanja in this action would be contrary to the principles of natural justice. There is also the doubt whether the defendant was served with the application. For those reasons, the Notice of Motion dated 28th October 2009 is dismissed with no orders as to costs.

Dated, signed and delivered at Meru this 18th day of May 2011.

MARY KASANGO

JUDGE