



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELC NO. 594 OF 2009**

**JOHN KURIA GIKUIYU.....PLAINTIFF**

**VERSUS**

**GRACE WANGUI KAMITI.....DEFENDANT**

**RULING**

The plaintiff brought this suit against the defendant in respect of a parcel of land known as LR No. Limuru/Bibirioni/T. 622 which he claimed to be the registered owner thereof. The defendant is said to be living in a house within the said parcel of land as a licensee of the plaintiff's predecessor in title. He claimed orders that the defendant do vacate the said premises and damages for trespass.

The record shows that the defendant was served with summons to enter appearance but did not comply. The plaintiff proceeded to ask for judgment which was granted and the matter listed for formal proof. The case was heard by Muchelule J who on 28<sup>th</sup> June, 2010 entered judgment in favour of the plaintiff against the defendant and ordered that she vacates the land within 60 days failing which she would be forcefully removed. The plaintiff subsequently obtained a stay order which has remained in place to date.

There is now before me an application by way of Chamber Summons Under Order IXA Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking to set aside the judgment entered herein and that the defendant be given unconditional leave to defend the suit. The basic ground is that the defendant a the defence that raises triable issues. The application is opposed and there is a replying affidavit sworn by the plaintiff/respondent. Both learned counsel have also filed written submissions that I have noted.

The defendant applicant has admitted that she was served with summons to enter appearance. She then handed over the documents to advocates known as Nganga Njau advocates who however failed to act as

instructed. It is instructive to note that the said advocates have not sworn an affidavit to support the plaintiff's allegations. This would mean that the advocates have not been asked and have not owned up to their mistake or omission as alleged by the defendant/applicant.

I have also looked at the supporting affidavit of the plaintiff sworn on 15<sup>th</sup> December, 2010. The defendant/applicant says that she perused the court file and discovered that there was an interlocutory judgment entered and that the matter was scheduled for judgment on 28<sup>th</sup> June, 2010. She did not however take any steps to arrest the said judgment. In the draft defence and counter claim and in particular prayer (b) thereof the defendant/applicant says that the court should issue a declaration that the suit property belongs to the deceased and I believe in this case she means her late husband. However, if that property belongs to the deceased, she has not justified her legal capacity to plead that the property be declared as such. That is to say she has not shown she is the legal representative of her late husband's estate. Lack of capacity per se disentitles her the locus to move the court relating to the suit property.

If it is true that she instructed counsel to take up her defence which has not been done, her remedy lies against those advocates. The time has come when litigants must squarely blame their advocates for any acts of omission or negligence. In this case however as I have already observed the said advocates have not owned up in that regard. I have also looked at the judgment of Muchelule, J and in particular the learned judge's observations in respect of Sections 27 and 28 of the Registered Land Act, Cap 300 Laws of Kenya. With respect, even after looking at the annexed draft defence and counter claim, I am not persuaded that the defendant/applicant has raised any triable issues to justify the setting aside of the said judgment.

The application is therefore dismissed with costs.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 4<sup>th</sup> day of May, 2011*

**A. MBOGHOLI MSAGHA**

**JUDGE**