

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE 165 OF 1988

PAUL MATHENGE.....PLAINTIFF

Versus

JOEL KARUNGARI KING'ORI.....DEFENDANT

RULING

The subject matter of this ruling is the motion dated 25th January 2008, in which Rachael Karungari King'ori, defendant herein, has applied for Joseph Mwangi Mathenge the plaintiff herein, to be ordered to vacate the parcel of land known as Thegenge/Karia/38 to give vacant possession to the defendant. The defendant filed an affidavit she swore in support of the motion. The plaintiff filed a replying affidavit to oppose the motion.

It is the submission of the defendant that litigation having come to the end as respect the rights of the parties vis-à-vis the parcel of land in dispute it is necessary that the successful party does have the right appatenant to such successful litigation. It is the argument of the defendant that the plaintiff's suit was dismissed on 21st November 2007. She said she attempted on two occasions to enter the land but the plaintiff has been hostile and threatened her with violence. She said she has not utilized the land yet she has title to the land. It is the submission of the plaintiff that the motion lacks merit because there is no decree in the entire litigation. It is said the ruling of 14th November 2007 should not be used as the basis of seeking eviction orders in the absence of a decree the plaintiff is of the view that the stalemate cannot be solved by invoking the inherent power of this court.

I have taken into account the divergent submissions. The original plaintiff Paul Mathenge Muchemi (deceased) filed this suit in 1988 against Rachael Karungari King'ori the administratrix of the estate of King'ori Wahogo (deceased). The present plaintiff Joseph Mwangi Mathenge was substituted for the deceased plaintiff by consent of all the parties on 14th March 1991. The Plaintiff's claim is based on adverse possession. That he entered the land as a purchaser in 1961. The defendant does not deny that the plaintiff has been in occupation. Her contention is that the sale agreement relied by the plaintiff is null and void for want of any land control board consent. There is no doubt that Lady Justice Kasango dismissed this suit on the basis that the same is res-judicata. The plaintiff is aware that the defendant is in possession of the title to the land in dispute. I have been urged to issue an order to direct the plaintiff to vacate the suit land. It is admitted by both parties that litigation came to an end upon the dismissal of the plaintiff's suit. Upon making the dismissal order this court became functus officio. The suit was dismissed hence finalized. In any case the record shows that the defendant's husband (deceased) had filed Nyeri H.C.C.C. No. 3 of 1973 King'ori Wahogo =VS= Paul Mathenge M. Wanjao in which he sued the plaintiff's father (deceased) for trespass and eviction from the suit land. In 1983, the aforesaid suit was dismissed under Order XVI rule 6 of the Civil Procedure Rules. Under the aforesaid provision there is no bar to the filing of a fresh suit. It would appear the defendant did not bother to take advantage of that. Lady Justice Ang'awa in her ruling of 16th December 1993 found that the arbitration award of filed in court on 16th January 1990 and read to the parties on 10th July 1990 declared that the land in question belonged to the defendant. The award and the adoptive order has not been challenged. It is obvious that the defendant is the registered proprietor of the parcel of land known as Thegenge/Karia/38. Her rights are protected under sections 27 and 28 of the Registered Land Act. If well advised, it is obvious that there many avenues in which the defendant

can seek redress but I must state that one of those avenues is not through this suit. I have already stated that this suit is already spent and the court is rendered functus officio. I find the motion incompetent. The same is ordered struck out with costs to the plaintiff.

Dated and delivered this 26th day of February 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Mugo for the Respondent Mindo for applicant.

J.K. SERGON

JUDGE