



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 378 of 2007

**MARY NDUTA NJAGA.....PLAINTIFF
VERSUS**

WALLACE WAWERU NJUGUNA.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant in respect of the parcel of land known as title No.Dagoretti/Thogoto/828.

In her plaint she stated that the subject title belonged to her through Succession Cause No.276 of 1989 in respect of the estate of David Njaga Njuguna and after that the defendant filed a Civil Case No.99 of 1990 claiming ownership of the said title.

The defendant's claim was dismissed by the court but he did not vacate the said land. The plaintiff's claim against the defendant was therefore for eviction from the said parcel of land and the costs of the suit.

The defendant filed a defence and counterclaim and at the instance of the plaintiff, his defence was struck out by Hayanga J. on 21st June, 2002 but was given the opportunity to prosecute his counterclaim. There is now an application before me under Order XVI Rule 5a, c, d and Order L of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that, the defendant's counterclaim against the plaintiff herein be dismissed for want of prosecution, and the court do issue an eviction order against the defendant from the plaintiff's parcel of land and that, the OCS Kikuyu Police Station ensures compliance. There is also the prayer for costs of this application and entire suit.

The reasons for the application are set out on the face of the applications which are that;

- a) The suit was filed on 5th July, 2001 and the defendant duly entered appearance and filed a defence and counterclaim on 20th August, 2001 which defence was struck out on 21st June 2002 and the defendant was allowed to prosecute his counterclaim which he has failed to set down for hearing or to prosecute in any way.
- b) That in the premises it is clear that the defendant is no longer interested in the progress and or conclusion of this matter; and
- c) The defendant has developed cold feet as his counterclaim has no basis while he continues to rake in huge profits from land reference No.Dagoretti/Thogoto/828.

In addition to the said grounds there is an affidavit sworn by the plaintiff Mary Nduta Njaga.

The application is opposed and there is a replying affidavit by the defendant. Both counsel have filed submissions in respect of the application. It is now established law that however weak a party's pleading maybe, he should be given his day in court and the defence can only be struck out if there are no triable issues raised in the defence or pleading. A counterclaim is the claim of a defendant against the plaintiff.

In this particular case the counterclaim consists three paragraphs and these read as follows;

“5 The defendant by way of counterclaim and without prejudice to the foregoing averment claims beneficial interest of the parcels of land before stated as his said brother was merely a trustee for the two of them.

6. In the alternative and without prejudice the defendant claims the said parcel as proprietor by way of adverse possession having lived and occupied the said parcel openly by way of right for a period of 12 years uninterrupted.

7. The defendant contends that the plaint is fatally defective as it does not conform to Order VII Rule 1(e) of the Civil Procedure Rules and that the same should be struck out.” Order VII Rule 1(e) states as follows;The plaint shall contain the following particulars;

e. An averment that there is no other suit pending, and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter”.

It is true that the plaint does not specifically comply with the wording of the said rule but paragraphs 5 and 6 of the said plaint clearly allude to previous proceedings and that there is no pending case between the two parties, the said proceedings having been dismissed before. That leaves the defendants with the two previous paragraphs 5 and 6 of the counterclaim.

The property is now registered in the name of the plaintiff and the law is clear that in such a situation, her title and interest are indefeasible. There has been no fraud that has been alleged against the plaintiff in the counterclaim and the defence having been dismissed that claim stands dismissed.

On the other hand, the claim for adverse possession cannot be sustained because it cannot be premised on a counterclaim. It is trite law that such a claim can only be instituted by Originating Summons supported by an affidavit. That has not been the case in this matter.

The title in the name of the plaintiff is dated 1st December, 2000. The defendant cannot by any means justify the claim based on adverse possession as at the time he filed his counterclaim that is 20th August, 2001. Whereas it may be true that this matter was taken out of the cause list on 7th October, 2009, no steps have been taken to list the counterclaim for hearing. Order XVI Rule 5 of the Civil Procedure Rules is therefore applicable. And so in the end I find that he did not prosecute his counterclaim within a reasonable time and that there are no triable issues that exist in the counterclaim to justify the sustenance of the said counterclaim.

Accordingly, the Notice of Motion dated 26th February 2010 and filed on 17th March, 2010 is hereby allowed. The defendant's counterclaim is hereby dismissed for want of prosecution. An eviction order shall issue as prayed in the plaint and the plaintiff shall have the costs of both this application and the main suit.

Orders accordingly.

Dated, signed and delivered at Nairobi this 12th day of October, 2010.

A. MBOGHOLI MSAGHA
JUDGE