



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 309 OF 2009

ELIZABETH NYAMBURA

THANANGA.....PLAINTIFF

VERSUS

CHARLES MWANGI

NYAGA.....DEFENDANT

JUDGMENT

The Plaintiff, a widow sued the Defendant herein, a complete stranger to her family, for two orders only -

- (1) *that the Defendant be evicted from the Plaintiff's parcel of land known as Nyandarua/Mawingo Salient/1164, and*
- (2) *costs of the suit be paid by the Defendant.*

The Plaintiff was filed through the firm of Chokaa & Co. Advocates of Chaka Road Nairobi. However by a **Notice to Act in Person** dated 16th November 2009, the Plaintiff terminated the brief or instructions to the said Advocates and henceforth acted in person or represented herself. In that capacity she made a request for judgment dated 16th November 2009. Judgment in default of appearance and defence was duly entered on 1st December 2009.

The Plaintiff had a change of mind to act in person and by a Notice of Appointment dated 7th December 2009 and filed on the same date, the Plaintiff appointed the firm of Sigilai Joel & Co. Advocates to act for her in the instant case.

In preparation for hearing of the suit, the said Advocates filed the Plaintiff's List of Documents which were in the possession of the Plaintiff and which the Plaintiff intended to rely upon. These were -

- (1) *Certificate of confirmation of the Grant in Nairobi Succession Cause No. 3163 of 2003,*
- (2) *Original title deed Number Nyandarua/Mawingo Salient/1164*
- (3) *Certificate of official search for Title Number Nyandarua/Mawingo Salient/1164 dated 2/11/2009.*

Having fixed a date for formal proof of her claim, and having been granted a Hearing Date for the case, the Plaintiff's Advocate sent a Hearing Notice dated 28th May 2010 clearly stating - "*Hearing Notice for*

Formal Proof in 7th July 2010."

According to the Affidavit of Peter Githinji Ngure sworn on 4th June 2010, the Defendant having been pointed out by one Geoffrey Njenga Thananya, the Plaintiff's son (*who knew the Defendant*), the Defendant was served with the "*Hearing Notice for Formal Proof*" on 28th May 2010. The Defendant is said to have accepted the notice but refused to sign an acknowledgment of receipt.

In the circumstances hearing of formal proof proceeded on 7th July 2010 without or in the absence of the Defendant who failed to attend court despite the notice of the hearing date.

The Plaintiff called one witness only, her son, Simon Kathaku Thananya who also held a General Power of Attorney from the Plaintiff, his mother. He testified that he is the first born, and knew the Defendant who had occupied the land illegally upon the death of his father, David Thananya Kathaku in the year 1997.

This witness further testified that upon his father's death his mother, the Plaintiff, obtained a Grant of Letters of Administration in Nairobi High Court Succession Cause No. 3163 of 2003 which grant was confirmed on 29th September 2009. The Certificate of Confirmation of Grant lists Nyandarua/Mawingo Salient/1164 as one of the properties of the estate of David Thananya Gathaku. The witness produced copies of both General Power of Attorney and Certificate of Confirmation of Grant as PExh 1 & 2.

The witness further produced copies of the Title Deed and a Certificate of Official Search of Title Number Nyandarua/Mawingo Salient/1164 as PExh. 3 & 4. Both the title and certificate of official search show David Thananya Gathaku as the registered owner or proprietor of the property.

The witness testified further since the Defendant entered the suit land in May 1997, his family's efforts to remove the Defendant from the suit land have been unsuccessful. The Defendant has refused to heed to the summons by the local chief to go and give an explanation as to why he is in occupation of land which does not belong to him. It is the local District Officer who advised the Plaintiff, a widow, to institute the suit the subject of this judgment.

Despite written notices to the Defendant to vacate the suit land, and further efforts through the Provincial Administration to the same effect, the Defendant has adamantly refused to vacate the suit land and according to the evidence of this sole witness, has resorted to issuing threats against members of the plaintiff's family.

The witness was affirmative that the Defendant has no colour of right to remain on the suit land. He is not a member of the Plaintiff's family, and had explained to the family that he would vacate the land but that he does not appear to be in any hurry. In the circumstances, Simon Thananga Gathaku prayed, the court do order the eviction of the Defendant so that the family could take possession of the land.

When questioned by the court, the witness stated that the Defendant was not a son to his late father nor their relative. The Defendant came from an area called Shamatta, and that he entered the suit land because it was fenced but vacant *i.e.* unoccupied and thus thought it was available to any one.

ANALYSIS AND CONCLUSION

From the documentation produced by Mr. SimonThanaaga Gathaku, and his evidence generally, it is clear to me that the Defendant has no colour of right whether in law or equity to be in occupation of the suit land. He is neither a relative of the Plaintiff's family nor did he seek permission by the Plaintiffs' family to enter and remain upon the suit land. He has neither licence or lease nor any interest recognizable in law to remain on the suit land. He is an opportunistic trespasser and has absolutely no right to remain on the Plaintiff's family's land.

The Plaintiff has proved her case on the balance of probability and deserves the grant of the orders she

seeks in her plaint.

In the premises, the Plaintiff succeeds in her suit, and I direct that -

- (1) the Defendant be evicted forthwith from the suit land, (Nyandarua/Mawingo Salient/1164, and if, he (*the Defendant*) does not do so, voluntarily, be forcible evicted with the assistance of the nearest OCS Police Station.
- (2) the Defendant pays the costs of the suit.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 12th day of November 2010

M. J. ANYARA EMUKULE

JUDGE