



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Elc. Civ. Suit 774 of 2007**

**TERESIA WANJIKU TAIT ..... PLAINTIFF**

**VERUS**

**CECILIA WANGARI KIGONDU ..... DEFENDANT**

**JUDGMENT**

(1) Teresia Wanjiru Tait, the Plaintiff in this case, filed suit on the 4<sup>th</sup> September 2002 against Cecilia Wangari Kigondu, the Defendant. In her Amended Plaintiff filed on the 26<sup>th</sup> September 2002, the Plaintiff avers that on the 17<sup>th</sup> June 2002, she was registered as the proprietor of Plot Title Number Dagoretti/Uthiru/409 (“**the suit property**”) pursuant to a transfer in her favour by Housing Finance Company of Kenya (“**HFCK**”) in exercise of the chargee’s power of sale consequent upon the Defendant’s failure to pay moneys lent to the Defendant by HFCK. The Plaintiff further averred that by letter dated the 17<sup>th</sup> June 2002, the Plaintiff requested the Defendant to hand over possession of the suit property but the Defendant refused and/or neglected to vacate and continues to occupy the suit property resulting in loss to the Plaintiff of the monthly sum of Kshs.7,000/= being the expected monthly rent which the Plaintiff could have received from a tenant had the Defendant vacated the suit property. The Plaintiff alleges to have given notice of her intention to sue the Defendant prior to the filing of the suit in which the Plaintiff prays for judgment against the Defendant for:

- (a) A declaration that the Defendant is a trespasser on L.R. No. Dagoretti/Uthiru/409**
- (b) Eviction order**
- (c) A permanent injunction restraining the Defendant from entering the suit land**
- (d) Damages based on monthly rent up to the date of handing over vacant possession of the said land to the Plaintiff**
- (e) Costs of this suit.”**

(2) The Defendant entered appearance on the 11<sup>th</sup> October 2002 and filed her Defence on the 31<sup>st</sup> October 2002. When the suit came up for hearing on the 16<sup>th</sup> November 2004 before Mugo, J., learned counsel for the Defendant applied for an adjournment on the grounds that he had lost contact with his client who was said to be in the United States of America. The learned Judge declined to grant the application for adjournment and on the court’s own motion proceeded to order the striking out of the Defence with costs. Justice Mugo further ordered that the suit proceeds to formal proof.

(3) On the 24<sup>th</sup> February 2009, the suit came before me for formal proof. Learned counsel for the Defendant applied for an adjournment on the basis that he had lost contact with the Defendant who had migrated to the United States of America. The application was refused and the hearing stood over to the 25<sup>th</sup> February 2009 when the Plaintiff gave evidence.

(4) In her testimony, the Plaintiff stated she did not know the Defendant personally. She bought the suit property from the Bank (HFCK) which re-possessed the house from the Defendant. She had met the Defendant only once when

she went to the suit property to tell the Defendant that as she, the Plaintiff, was the owner of the house, the Defendant should vacate the same. The Plaintiff said that the visit was during the same week that she bought the house and the title was still in the name of the Defendant. The Plaintiff produced a certified copy of an extract of title and the original Title Deed to prove that she is the registered proprietor of the suit property. The Plaintiff further testified that the Defendant refused to vacate even after written notice by her Advocate whereupon she filed action in Court. The Plaintiff reiterated the prayers in her Amended Plaintiff and asked for judgment accordingly.

(5) In cross-examination, the Plaintiff could not recall the exact date on which she met with the Defendant but said it was in the year 2002. She found the Defendant in the company of her two children of school-going age and a granddaughter. The Plaintiff said that she has not been to her house (the suit property) since as she has been waiting for the Court to evict the Defendant.

Asked if she knew who lived in the suit property, the Plaintiff stated that she had heard Mr. Paul Nyaga (the Defendant's learned counsel) inform the court on the 24<sup>th</sup> February 2009 that the Defendant is resident in the United States of America and that it is the Defendant's daughter who resides in the house. Furthermore, the Plaintiff's children, who worship at the same Church as the Defendant's daughter at Uthiru, had informed the Plaintiff that it is the Defendant's daughter who lives in the house.

On re-examination, the Plaintiff stated that she did not know when the Defendant left Kenya for the United States of America except what she had heard from third parties.

(6) In his submission, Mr. Geoffrey Kamonde, learned counsel for the Plaintiff, noted that the Plaintiff had proved that she is the registered proprietor of the suit property; that the Plaintiff had visited the suit property in the year 2002 when she found the Defendant in the company of her children and demanded vacant possession which the Defendant had failed to deliver; and that the Plaintiff was therefore entitled to judgment as prayed with the Amended Plaintiff.

(7) Mr. Nyagah, learned counsel for the Defendant, urged that the suit be dismissed with costs because the Plaintiff had failed to prove her case on a balance of probability either for the purposes of the eviction order sought or for damages for trespass based on the monthly rent or at all.

(8) Having reviewed this evidence in conjunction with the Amended Plaintiff and the record, it is clear that the Plaintiff has been for quite some time now known that the Defendant permanently resides in the United States of America and is not in possession or physical occupation of the suit property. On the 16<sup>th</sup> November 2004 when opposing the Defendant's application for an adjournment, Mr. Kamonde for the Plaintiff is recorded as having informed the court that **"the Defendant migrated in the year 2002 without giving instructions as to her defence in this suit."** The Plaintiff has testified on oath that she has not visited the suit property since the year 2002 and that her own children have informed her that it is the Defendant's daughter who lives in the suit property.

(9) Other than leading evidence to prove that she is the registered proprietor of the suit property, the Plaintiff made no attempt whatsoever to establish that the Defendant is trespassing on the suit property or that she is in possession or physical occupation thereof. Rather, the Plaintiff admits that it is the Defendant's daughter who lives on the suit property, and I so find and hold. In these circumstances, it would have been appropriate for the Plaintiff to have enjoined the Defendant's daughter as a defendant in these proceedings. The claim for trespass therefore fails and consequently, the orders for eviction and injunction cannot issue. It follows that the claim for damages cannot succeed as in any event, the Plaintiff failed to prove her alleged loss at the monthly rate of Kshs.7,000/= as pleaded or at all.

(10) In the end, the Plaintiff's claim as set out in the Amended Plaintiff dated the 25<sup>th</sup> September 2002 and filed on the 26<sup>th</sup> September 2002 fails and I order that this suit be and is hereby dismissed. As the suit was not defended, there will be no order as to costs.

So ordered.

Dated and delivered at Nairobi this Twenty-seventh day of March, 2009.

**P. Kihara Kariuki**

**Judge.**