



## **SEVENTH DAY ADVERTIST CHURCH**

**(EAST AFRICA) LIMITED.....PLAINTIFF**

**VERSUS**

**1. MIRIAM WANJIRU**

**2. HABIBA ABDI ANYANGO AND FIVE OTHERS.....DEFENDANT**

### **JUDGEMENT**

The plaintiff moved to this court, vide a plaint dated 5<sup>th</sup> day of May 2007 and filed on 8<sup>th</sup> May 2007. The salient features of the same are as follows:-

- The plaintiff is a limited liability company with power to sue and be sued in its corporate name.
- Vide paragraph 3 thereof, that they are the registered proprietors of land Reference No. L.R.209/10510 situated in Huruma Nairobi and have been in possession thereof.
- Vide paragraph 5 thereof, that the defendants have trespassed on the said land and created illegal structures.
- Vide paragraph 6, that they intend to use the space occupied by the trespassers to put up a primary school.

By reasons of the afore set out averments the plaintiffs seek from this court the following reliefs:-

- (a) An eviction order directing the defendants, their relatives, agents or whoever is on the land parcel NO. LR NO. 209/10510 Huruma Nairobi to move out of the said parcel No. LR NO. 209/10510 Huruma forthwith and the order to be supervised by the officer compounding Muthaiga police station, Nairobi.
- (b) Any other or further orders that the Honourable court, shall deem fit and just to grant in the circumstances in terms of justice.
- (c) Costs of the suit.

Summons to enter appearance were taken out and served. Memorandum of appearance was filed in person on 10<sup>th</sup> day of July 2007. It is filed on 7/11/07 but not stamped although there is an official receipt to that effect. There is no notice of appointment of advocate on the record; there is a defence dated on 16<sup>th</sup> day of February 2008 and filed on 18<sup>th</sup> February 2008 by counsel namely Newton Mwangi Advocate. The sum total of the same are as follows:-

- Vide paragraph 3 thereof denied the content of paragraph 3 of the plaint whereby the plaintiffs have averred that they are the registered owners of the disputed land.

- Content that the suit land was allocated to Huruma Mosque and Madarasa Self Help Group, which is a society registered under the Societies Act.
- The property was allocated to them way back in 1979 by the then member of parliament Andrew Ngumba and they have been in continuous occupation of the suit property through its members since 1979 to date .
- They have been paying rates in respect of the said property from 1979 to date.
- Vide paragraph 7 thereof that it is the plaintiff which encroached on to their land in 1979.
- Vide paragraph 9 thereof, that despite the encroachment, the plaintiffs were allowed to put up a small structure on the said suit land.
- That unknown to the defendants, the plaintiff appears to have surreptitiously and wrongfully dispossessed the defendants of the said suit land.
- By reason of what has been averred above, they deny trespassing on to the plaintiffs land.
- Vide paragraph 13 thereof, that the plaintiff has sued persons who are not members of the Self Help Group.
- Denied issuance of the demand notice and urged the court, to dismiss the suit with costs to them.

The matter came up for hearing today 17<sup>th</sup> day of June 2009. The file was called out, but the defendants were not present. The plaintiff filed a Return of service, and the court, being satisfied that the defence had due notice of the hearing date allowed the plaintiff to proceed *ex parte*.

One witness was fielded by the plaintiff. The witness simply produced the title, the surveyors report confirming the beacons and the letter of allotment all confirming that the plaintiff is the title holder.

On the courts', assessment of the facts on record, it is clear that the defence only has a memo of appearance and defence on record and no evidence. The question is whether the plaintiffs have a walkover in their claim against the defence. Case law from the court of appeal has provided guide lines on the way forward. There is the case of **BACHU VERSUS WAINAINA 91982) KLR 108 where the CA** held *inter alia* that “*at the *ex parte* hearing the plaintiff was under a legal duty to prove his case against both defendants.*”

*(2) That the burden of formal proof is the same as that required in any civil case.”*

Also the case of **KARUGI AND ANOTHER VERSUS KABIYA AND 3 OTHERS (1987) KLR 347,** also a court of appeal decision where the CA held *inter alia* that:- “*the burden on a plaintiff to prove his case remains the same throughout the proceedings , even though the burden only becomes easier to discharge when the matter is not validity defended. The burden of proof is in no way less and because the case is heard by way of a formal proof*”

Applying these guiding principles to the facts herein, it is clear that the question that this court, has to determine is whether on the facts before it, the plaintiff has discharged that burden.. It is on record that there is a title under the RTA. Section 23 of the said Registration of the Titles Act cap 281 laws of Kenya. Reads “*23 (1) the certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor there of shall be taken by all courts, as conclusive evidence that the person named there in as proprietor of the land, is the absolute and indefeasible owner thereof, subject to the encumbrance, easement, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge except on the grounds of fraud or misrepresentation to which he is proved to be a party.*”

*(2) A certified copy of any registered instrument signed by the registrar and sealed with his seal of office shall be received in evidence in the same manner as the original”*

Applying the content of that provision to the facts herein, it is clear that PW1 production of exhibit satisfies that section. In addition to the title produced, there is confirmation by exhibit 2 and 3 the letter from the provincial surveyor and the letter of allotment.

As stated earlier on, no testimony came from the defence and the court, has to determine first of all whether the defence on record has to be taken into consideration in the first instance, and in the second instance determine the weight to be attached to it in opposition to the plaintiffs’ pleadings and evidence.

Concerning the first limb of the above question, this court, has judicial notice of the requirement that it is now trite, established by case law, that this court, has judicial notice of, that once a pleading is on record however irregularly filed the same should not be ignored. It therefore follows that this court, is bound to consider the said pleading in this judgement. Having ruled that it has to be considered, the court, has first of all to deal with locus standi of the defendants. As mentioned earlier on, there is a memo of appearance filed by all the defendants. It purports to be for all defendants. It is not signed but has the name of Mariam Wanjiru written below the space for the signature. This document therefore offends the provisions of order IX rule 5 CPR which reads:-

*“If two or more defendants appear in the same suit by the same advocate and at the same time, the names of all the defendants so appearing shall be inserted in the same memorandum of appearance”*

A reading of this provision reveals that it is only an entry of appearance entered by an advocate for more than one defendant which is permitted to have the names of all the defendants in one sheet. It therefore follows that where individuals are appearing in person as at the time of entry of appearance, they are required each to file a separate entry of appearance.

There is also another requirement to be met by the defendant entering appearance that is the affixing or appending of a signature as provided for in order IX rule 2 91) CPR which reads:-

*“Order IX 2 (1) Appearance shall be effected by delivering or sending by post to the proper officer a memorandum of appearance in triplicate in form No. 25 of Appendix XA, with such variation, as the circumstance require, signed by the advocate by whom the defendant appears or if the defendant appears in person by the defendant or his recognized agent”*

The afore set out requirement required the defendants to sign the memo of appearance each and file the same. Even if this court, were to bend backwards and find that the document mentioned has been signed by inscription of the name on it of Mariam Wanjiru, then it will only operate for Mariam Wanjiru and not the other defendants. The net result of this is that the other defendants will be deemed not to have entered appearance in this matter.

It is to be noted that there is some paper work which had been done by an advocate namely an application for leave to file defence out of time. The question that the court, has to ask itself is whether the entry of counsel on the record cures any defect that may have existed on the record. In this courts’, opinion, that cure could have been provided by the concerned counsel filing a notice of appointment of advocate and then the filing of a memo of appearance. These two documents are not on the court, record.

The above findings notwithstanding there is a defence on record. There was no complaint raised against this defence by the plaintiffs’ counsel. Assuming that a notice of appointment of counsel was filed, served but a copy of the same is missing from the court, record and therefore the defence on record is properly on record, then the court, has to determine whether the averments in it, in the absence of evidence go to oust the averment in the plaint and the evidence tendered by PW1 in support of those averments. This court, has given due consideration to the above, and it is of the opinion that the plaintiffs averment in the plaint was mainly, that they have title to the land and that the defendants are trespassers. Which averment has been supported by testimony of PW1 and production of exhibits 1, 2, and 3 which are title documents

and a survey report. These when weighed against the defence assertion that the plot had been allotted to them by the then area member of parliament Mr Andrew Ngumba, the court is of the opinion that this assertion does not operate to oust the sanctity of title that the plaintiff now has in its name, which title the law says is only defasibieon account of proven fraud and misrepresentation which has not been demonstrated herein. The defence therefore stands ousted.

For the reasons given in the assessment, the court, is satisfied that the plaintiff has on the facts demonstrated herein discharged the burden of proof placed on it and proved its claim on a balance of probability. The court therefore proceeds to pronounce judgement in its favour on the following terms:

1. An eviction order be and is hereby issued directing the eviction of the defendants, their relatives, agents or whosoever is on the land parcel number LR. NO. 209/10510 Huruma to be evicted there from forthwith.
2. An order be and is hereby given that the order of eviction be and in hereby ordered to be supervised by the officer commanding Muthaiga Police Station Nairobi.
3. The plaintiff will have costs of the suit.

**DATED, READ AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2009.**

**R.N. NAMBUYE**

**JUDGE**