



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE 50 OF 2003**

**DANIEL KIBE RITHO (*Suing as administrator of the estate of ROBINSON RITHO KIHARA(deceased)*).....PLAINTIFF**

**VERSUS**

**FREDRICK MUTONYI GITONGA.....DEFENDANT**

**J U D G M E N T**

By a plaint dated 6<sup>th</sup> June, 2003 and filed in court on the same day through **Messrs Peter Muthoni & Company Advocates, Daniel Kibe Ritho** hereinafter referred to as “*the plaintiff*”, sought from **Fredrick Mutonyi Gitonga**, hereinafter referred to as “*the defendant*” an order for delivery of vacant possession of land parcel number **Othaya/Kiahagu/754** hereinafter referred to as “*the suit premises*” and costs of the suit plus interest. The plaintiff’s claim was founded on the following undisputed facts; that **Robinson Ritho Kihara**, deceased on whose behalf the plaintiff had initiated this suit as the administrator of his estate was at all material times the absolute registered proprietor of the suit premises having been issued with a freehold title in respect thereof on 14<sup>th</sup> September, 1988. He acquired the suit premises for valuable consideration from Barclays Bank of Kenya Ltd in the exercise of its statutory powers of sale. Apparently the suit premises initially belonged to the defendant who had charged it as security to the said bank but was unable to service the loan. Accordingly the bank in exercise of its statutory power of sale under the charge offered for sale the suit premises in a public auction and the deceased was a successful bidder. The deceased thereafter obtained possession of the same and shortly thereafter commenced developing it. He passed on sometimes in 1997 and the defendant without any colour of right, trespassed, invaded and encroached on the suit premises and had since refused to vacate the same. The plaintiff’s claim therefore was for an order for delivery of vacant possession of the suit premises by the defendant.

Upon being served, the defendant entered an appearance and subsequently filed a defence. In Paragraph 2 of the defence, the defendant alleged that he had been in occupation of the suit premises for more than twelve years after the same had been transferred and registered in the name of the deceased. Accordingly the plaintiff’s claim had no legal basis. I would want to imagine that by this pleading the defendant was saying that he had acquired prescriptive rights over the suit premises by virtue of his continuous and uninterrupted occupation of the same for a period in excess of 12 years. He had therefore acquired the suit premises by way of adverse possession.

On 20<sup>th</sup> May, 2004, the case came up for hearing before **Okwengu J.** However, **Mindo**, learned advocate then acting for the defendant sought an adjournment on the basis that the suit was not yet ready for hearing as documents had not been exchanged. He also needed time to amend the defence. The adjournment was granted. Thereafter no steps were taken in the suit until 12<sup>th</sup> January, 2005 when again the suit was fixed for hearing for 22<sup>nd</sup> September, 2005. On that day none of the parties appeared and the suit was stood over generally. The defendant had not taken steps to amend his defence as he had earlier claimed. On 18<sup>th</sup> October, 2005, the suit was again fixed for hearing on 15<sup>th</sup> June, 2006. On 8<sup>th</sup> August, 2007 the defendant now acting in person filed what he called an “**application to strike out plaint and to amend defence**”. He fixed the hearing of that application for 21<sup>st</sup> November, 2007. The record is silent on whether the said application came up for interpartes hearing on that date. However, it would appear

like it did not since the following day the defendant fixed the very same application for hearing on 6<sup>th</sup> February, 2008. There is nothing on record to suggest that the application was indeed heard on that date either. Instead the record shows that on 22<sup>nd</sup> December, 2008, the defendant fixed the main suit for hearing on 10<sup>th</sup> June, 209 ex-parte. However in between he had filed further amended defence and counterclaim on 8<sup>th</sup> August, 2007, an application for injunction on 21<sup>st</sup> August, 2007, “**withdrawal of an issue from Notice of Motion dated 8-8-2007**” on 28<sup>th</sup> January, 2008, Notice to admit facts on 15<sup>th</sup> July, 2008, counterclaim on 17<sup>th</sup> November, 2008 and “**Notice of applying for judgment**” on 2<sup>nd</sup> June, 2009. The sum total of all the foregoing is that the defendant was confused as to how to move the suit forward. He was oblivious of rules of engagement in civil matters as espoused in the Civil Procedure Act and the rules made thereunder. Yes he might have been acting in person, however the rules of engagement makes no distinction as to compliance. Every litigant is therefore expected to comply with rules of procedure. It is for that reason that I will ignore a reply to the amended defence for no such amended defence was filed and if it was, then it was filed without leave of court. I will also for the same reason Ignore the further amended defence and counterclaim filed on 8<sup>th</sup> August, 2007. There are two applications dated 8<sup>th</sup> August, 2007 and 21<sup>st</sup> August, 2007 respectively. However knowing that the said applications were pending in court, the defendant opted to fix the main suit for hearing. It must therefore be taken that he had abandoned pursuing the two applications aforesaid. In any event by his “**withdraw of an issue from Notice of Motion dated 8-8-2007,**” the defendant effectively withdrew the application dated 8<sup>th</sup> August, 2007. The counterclaim too filed by the defendant on 17<sup>th</sup> November, 2008 cannot be considered as part of the pleadings herein as it was filed unprocedurally and without leave of court. The “Notice of applying for judgment” is of no consequence as it simply remains that, a notice of intention to apply for judgment.

Anyhow the suit eventually came for hearing before me on 10<sup>th</sup> June, 2009: The defendant applied that he be allowed to prosecute his application dated 2<sup>nd</sup> June, 2009. **Mr. Muthoni**, learned counsel for the plaintiff responded that there was no such application served on him. What there was, was a mere Notice which did not amount to an application. I agreed with **Muthoni** and overruled the defendant’s application. The defendant sought for time to file a formal application in that regard. **Muthoni’s** reaction was that he did not know what the intended application was all about and insisted that the case should proceed since the defendant was responsible for taking the hearing date, I felt that the defendant was now engaging the court in a ping pong game unnecessarily. I therefore directed that the suit proceeds to hearing.

The plaintiff testified as follows; that **Robinson Ritho Kihara**, deceased was his father. He passed on sometimes in 1997. He petitioned and was issued with a limited grant letters of administration ad colligenda bona of the deceased’s estate in Nyeri High Court Succession Cause number 573 of 1999. He tendered in evidence the said limited grant. The deceased had bought the suit premises at a public auction conducted on behalf of Barclays Bank of Kenya Ltd. The deceased successfully bid for the suit premises. He was later issued with the title deed in respect of the suit premises. That title deed was exhibited in evidence. The defendant later sued the deceased in Nyeri HCCC No.7 of 1989 over the suit premises. However that suit was subsequently dismissed for want of prosecution. The deceased never took possession of the suit premises until he passed on because of the aforesaid case. Since the suit premises belongs to the estate of the deceased and the defendant had remained thereon albeit illegally, the plaintiff prayed to the court for an order directed at the defendant to deliver to the plaintiff with vacant possession the suit premises. He also asked for costs of the suit.

Called upon to cross-examine the witness, the defendant declined to do so. With that the plaintiff then closed his case. Asked whether he was ready with his defence; the defendant once again declined to offer his defence claiming that he was not ready for the hearing on that day. The court noted that it was the defendant who had infact fixed the case for hearing on that day. How then could he turn around and claim not to have been ready for the hearing. The court then took the view that the defendant was not candid in whatever he was saying and that he was merely interested in prolonging the case unnecessarily so that he may continue enjoying the unlawful possession of the suit premises. The court thus proceeded to deem that the defendant had no evidence to offer in terms of *order XVI rule 4* of the Civil Procedure Rules.

**Mr. Muthoni** did not wish to submit. Instead he opted to leave the matter to court. The defendant too was unwilling to submit.

What then I have before me is the unchallenged and uncontroverted evidence of the plaintiff. There is nothing to stop me from acting on such evidence. The plaintiff has candidly been able to demonstrate that he is the administrator of the estate of his deceased father. He tendered in evidence limited grant of letters of administration ad colligenda bona issued under *section 67 (1)* of the Law of Succession Act. His deceased father no doubt bought the suit premises at a public auction. From the entries in the green card that was also tendered in evidence, the defendant did charge the suit premises to secure a loan. However on 14<sup>th</sup> September, 1988 the suit premises were transferred to the deceased by the chargee. I would want to assume that this was around about the time that the deceased must have purchased the suit premises at the auction. Subsequent thereto a title deed was issued to the deceased. A copy of the said title deed in respect of the suit premises was tendered in evidence. The title deed is explicit; the suit premises have been registered in the name of the deceased since 14<sup>th</sup> September, 1988. There is evidence that sometimes in 1989, the defendant sued the deceased, the Attorney General as well as Galaxy Auctioneer & Court Brokers over the auction. This was in Nyeri HCCC No.7 of 1989. Apparently that case was dismissed for want of prosecution. However it is not clear when this was. Since the defendant had sued the deceased as aforesaid time stopped running for purposes of section 38 of the Limitation of Actions Act. It only started running after the dismissal of the suit.

All the aforesaid considered it is clear that the defendant has no business being on the suit premises. He is therefore a trespasser liable to be evicted. No reasons have been advanced by the defendant to dissuade me from granting prayers (a) and (b) of the plaint. Accordingly they will issue forthwith.

*Dated and delivered at Nyeri this 22<sup>nd</sup> day of July, 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**