**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAKURU**

**Civil Suit 324 of 1996**

**BEATRICE E. J. YAGAN……..……..PLAINTIFF**

**VERSUS**

**JOSEPH YATOR……DEFENDANT**

**RULING**

By a decree issued by this court on 14th December 2007 the Plaintiff/Applicant was ordered to vacate the parcel of land known as **Nakuru Municipality/Block 10/185** and to give possession of the said property to the Defendant/Decree Holder within 45 days. The decree contained a default order to the effect that should the applicant fail to comply then the defendant would have an automatic right to secure her eviction without further recourse to the court.

The decree was issued pursuant to two judgments of this court, one issued on 21st September 2000 when the Plaintiff/Applicant's suit herein was dismissed after she refused to testify at the hearing and the final one on 14th December 2007, when the Defendant/Decree Holder's counterclaim was allowed after the taking of evidence thereon on 26th November 2007, in the absence of the Plaintiff/Applicant but in the presence of her counsel, the learned state counsel Mr. Makongo, who told the trial judge that there was no evidence to call in defence of the counterclaim, the Plaintiff/Applicant having not filed any Defence to the counterclaim. This court notes that a similar attempt as is made herein was made to set aside the judgment of the Hon. Lady Justice Ondeyo of 21st September 2000 but the same failed when the applicant's application was dismissed in a Ruling delivered on 3rd August 2005.

Subsequent upon the delivery of the said Ruling, the Honourable Attorney General was directed to take over the Plaintiff's case, presumably at the request of the applicant's advocates (as is evident from the letter from the Government's Chief Building Surveyor dated 15th February 2006 annexed to the Supporting Affidavit herein as 'BY III' which I note was not only copied to the late Hon. Mirugi Kariuki – M.P. but was written in reply to his letter of 9th February 2006).

The application before me seeks to stay the Execution of the decree herein and to set aside the judgment in the counterclaim mainly on the ground that the applicant was not accorded an opportunity to defend the decree holder's counterclaim. She claims that she was not notified of the hearing date and that the case proceeded in her absence for no fault of her own. She blames the Attorney General for keeping her in the dark as to the progress of the case and for not informing her of the "*dates when the case came up for hearing*".

Submitting for the applicant, counsel for the Defendant Mr. Kahiga told the court that the learned state

counsel who appeared at the hearing of the counterclaim on 26th November 2007 submitted that there was no defence when one had been filed on 10th April 1997. Interestingly a Reply to Defence and Defence to Counterclaim dated 10th April 1997 is annexed to the Supporting Affidavit herein as annexture "BY II". The same is drawn by the applicant's present advocates who, as I have already noted, appear to have been behind the matter being taken over by the Attorney General. If indeed they had filed the said pleading, would they not have brought the same to the attention of the Attorney General when he took over the matter either on their directions or at their request or with their acquiescence?

Counsel for the Respondent Mr. Kimatta submitted that the purported Defence to the counterclaim appears never to have been filed. This is clearly supported by the Hon. Mr. Justice Kimaru in his judgment where he records as follows;

"***I have read the pleadings filed by the parties to this case. As earlier stated in this judgment, the plaintiff did not file a defence to the counterclaim by the Defendant. The Defendant's counterclaim was therefore unopposed."***

If the learned judge was wrong in his above finding, an application such as is before me could have been filed immediately upon the delivery of the judgment in order to have the same reviewed and/or set aside under **Order XLIV Rule 1 (1)** of the **Civil Procedure Rules** since the court would have had no difficulty in finding that there existed a clear error apparent on the face of the record.

Mr. Kahiga concluded his submissions by stating that "*the record should confirm whether the Reply* (to Defence and Defence to counterclaim) was filed or not". I cannot fault my learned brother Justice Kimaru in his finding that a Defence to the counterclaim had not been filed by the applicant. His Lordship made that finding upon reading the pleadings filed. It is for the applicant to tell the court when the pleading dated 10th April 1997 was filed and to produce before the court a stamped copy thereof if at all there is one. That has not been done and the court will safely make a conclusion that no such Reply to Defence and Defence to Counterclaim was ever filed.

This court notes that on 10th November 2005 the applicant through the present advocates attempted to forestall the hearing of the counterclaim by filing an application for stay of proceedings. I have not been told what became of that application but I am not precluded from noting that the said application was premised mainly on the grounds that:

"…***d)…the Plaintiff is truly apprehensive that the Respondent may move to prosecute his counterclaim as ordered by the court on 21st September 2000 much to the applicant's detriment.***

***e)..should the said counterclaim proceed to trial the applicant stands to suffer substantial loss as it may even result in her eviction from the suit premises which, currently, <u>forms her sole place of abode</u>".***

It is quite clear from a thorough study of the record that neither the applicant, nor her present advocates herein believe in the merits of her application. This is borne out of the fact that the application is said to have been filed under **Section 3A** of the **Civil Procedure Act** and not under the prescribed provisions of the **Civil Procedure Rules**. It is unfortunate that the applicant's advocates should mislead the applicant as to her chances but quite a shame that they would wish to misrepresent and/or conceal material facts in regard to their long time involvement in the protracted suit. They and not the Attorney General are to blame for the applicant's predicament.

I have no hesitation to find, as I hereby do, that the application herein is merely intended to delay the execution of the decree. The applicant has never had any legal interest in the suit land and I am unable to see what arguments she would now advance to defeat what has properly been determined by two judges of concurrent jurisdiction as I have.

I am of the considered opinion that the application is not only an abuse of the process but is also devoid of merit. Being the equivalent of a final kick of a dying horse, the same is hereby dismissed with costs. Let

execution proceed forthwith.

**Dated, signed and delivered at Nakuru this 6th day of August 2008**

**M. G. MUGO**

**JUDGE**

In the presence of: **Mr. Kimatta for the Respondent.**

**No appearance for the Applicant**.