



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Civil Suit 27 of 1990**

**CHERUTICH KIBIWOT ..... PLAINTIFF**

**VERSUS**

**EMMANUEL CHEROMOI ..... DEFENDANT**

**ORDER/DIRECTIONS UNDER SECTION 3A, OF THE CIVIL PROCEDURE ACT**

This suit was dismissed on 13<sup>th</sup> September, 1994. Each party was to bear his costs. The Plaintiff did not appeal. The Defendant did not have any counterclaim.

As a result, the matter should have rested there. **HOWEVER**, the Defendant moved the court and filed a Notice of Motion on 12-7-02 dated 2<sup>nd</sup> May, 2002 seeking an Order of eviction against the Plaintiff in respect of the suit premises, Moiben/Kimnai/240. The Court subsequently granted the Order of eviction on 9<sup>th</sup> March, 2005. The Defendant has been attempting to enforce this order of eviction.

The Plaintiff has now moved the court to have the Order of eviction set aside.

It is my view and it is also clear from the record that all the proceedings taken by both parties after 13<sup>th</sup> September, 1994 were a nullity. The court was functus officio and it had no jurisdiction to allow any proceedings to take place unless it was for the setting aside of the Judgment for any reasons.

There was no appeal or review application. As a result what the parties have been doing have been in vain. They have wasted 12 years litigating over nothing. The position remains as it was before the suit as far as the question of the disputed titles are concerned. It is indeed sad that Counsel for the Defendant allowed this to happen since it is clear that for an eviction order to issue there must be a decree providing for it. Without a decree an eviction order cannot just be issued out of the blue.

I would have been inclined to grant costs to the Plaintiff in other circumstances. However, I am unable to do so, since this court cannot allow any proceedings to take place. Costs would mean taxation and enforcement thereof. This is not possible in law as the Decree herein has already been issued. What happened were nullities.

The Court can only correct its record and remove from its record all offending materials and proceedings which took place illegally. I have no power to award costs, unfortunately, in this matter.

In order to undo the irregular proceedings and nullities on record, I do hereby quash the eviction Order given on 9<sup>th</sup> March, 2005 and strike out all the proceedings on record after 13<sup>th</sup> September, 1994. The last record on this file are and shall remain the original Judgment and Decree. Parties are to go back to the drawing board and to pursue their claimed rights peacefully and in accordance with the law. None of them should take the law into their hands. If any one wants to evict another, he must go to court to obtain appropriate orders. Equally, if there is anybody who wants to move into any properties, he must also obtain appropriate court orders.

**DATED AT ELDORET THIS 16<sup>TH</sup> DAY OF JANUARY, 2007.**

**M. K. IBRAHIM**

**JUDGE**