



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

**CIVIL SUIT NO. 2004 OF 1990**

**WALTER KAMAU KINYANJUI.....PLAINTIFF/APPLICANT**

**VERSUS**

**WAMBUI WAMBU .....DEFENDANT/RESPONDENT**

**RULING**

**1. The Application and Papers Filed**

The plaintiff's Notice of Motion dated 5<sup>th</sup> May, 2004 was filed on 6<sup>th</sup> May, 2004. It was brought under Orders L, rule 1, XXI, rule 20(1) and (2), XXX of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap. 21). The applicant's prayers were as follows:

- (i) that, the Court do issue an eviction order directed to the defendant/respondent, her servants, agents or anyone acting under her or under her authority in occupation of L.R. No. KARAI/KARAI/293;
- (ii) that, the Officer Commanding the Kikuyu Police Station do oversee the enforcement of the eviction order and provide the applicant with the necessary assistance in execution of the order issued herein;
- (iii) that, the costs of this application be provided for.

The Notice of Motion was premised on four grounds:

- (a) that, the applicant is the registered owner of L.R. No. KARAI/KARAI/293;
- (b) that, the defendant/respondent was on 28<sup>th</sup> March, 1992 evicted from L.R. No. KARAI/KARAI/293;
- (c) that, the eviction order issued by this Court on 20<sup>th</sup> March, 1992 had expired;
- (d) that, the respondent was inching her way back into the applicant's land.

Evidence in support of the application is in the form of depositions by the plaintiff, dated 5<sup>th</sup> May, 2004. He avers that judgement was delivered in this matter on 9<sup>th</sup> January, 1991 and the respondent was ordered to deliver up vacant possession of L.R. No. KARAI/KARAI/293 to the applicant. It is deposed that the

respondent did not comply with the decree despite being served with the same, which necessitated issuance of an eviction order by this Court. The respondent was subsequently evicted from L.R. No. KARAI/KARAI/293 on 28<sup>th</sup> March, 1992. It is deponed further that lately, a number of unfamiliar people have been noticed occupying one side of the suit land, and yet other unknown people have been cultivating the rest of the farm. Further inquiries have revealed to the applicant that the trespasser is the respondent with her daughter; and that she has leased part of the suit land to yet other persons who are practising agriculture thereon. It is deponed that the eviction order which had been issued by the Court, has now lapsed as it is more than a year since it was issued.

The respondent filed grounds of opposition as well as a notice of preliminary objection on points of law, on 21<sup>st</sup> September, 2004; and a replying affidavit on 27<sup>th</sup> September, 2004.

In the notice of preliminary objection, it is stated that —

“the current application is incompetent and does not comply with the mandatory legal requirement [and] is time-barred...”

In the grounds of opposition it is asserted —

(i) that, the application is misconceived and bad in law;

(ii) that, the application is ineffective and does not meet the legal requirements for the grant of the orders sought.

In the replying affidavit, the respondent avers that contrary to the applicant’s averments, she has lived on the suit land for over 40 years. She deposes that she has never been evicted from the suit land, and the attempt on 28<sup>th</sup> March, 1992 to evict her had been “thwarted by ...neighbours and fellow villagers.” She deposes that she has been in continuous and uninterrupted occupation of the land, L.R. No. KARAI/KARAI/193. She avers that it was only on 31<sup>st</sup> May, 2004 that she was served with the instant application — and she believes the advice of her advocate that such service was delayed and caught by the rule on lapse of time; and that consequently, it was not possible to grant the prayers sought.

## 2. The Submissions of Counsel

Learned counsel, **Mr. Mbaka**, for the applicant took the position that the applicant’s case was self-evident: *judgement had already been given, way back on 9<sup>th</sup> January, 1991*. The following passage in the interlocutory judgement given on that occasion by the Honourable **Mr. Justice Bosire** (as he then was) may be quoted:

**“I have uncontroverted evidence before me that the plaintiff bought the land from a person other than the defendant. He has tendered in evidence the certificate of title. There is no evidence before me to indicate that the defendant has any interest in the land. She was served with summons to enter appearance and [with] the plaint. She appeared by [the] firm of advocates, S.W. Waweru & Co., but did not file a written statement of defence. The suit was therefore set down for hearing *ex parte*. A hearing notice was served upon the defendants’ advocates pursuant to the provisions of O.IXB, rule 1(2) [of the] Civil Procedure Rules. Neither the defendant nor her advocates attended Court. Consequently I have no material before me to make me not grant the plaintiff the relief prayed for in prayer (a) of the plaint. I therefore grant it as prayed and allow the defendant 90 days from the date of service upon her of decree to give up and deliver vacant possession of the suit property to the plaintiff.”**

The defendant subsequently applied for review of the *ex parte* judgement; but **Mr. Justice Bosire** in his ruling of 19<sup>th</sup> February, 1992 refused the application in these terms:

**“On the date the plaintiff set down the suit for hearing there was no defence on record, nor**

had any been filed. Was the plaintiff obliged to wait indefinitely for the defendant to file defence? No. The plaintiff did what he was required to do under the law. The Court was satisfied in that regard before proceeding to hear the case *ex parte*. A defence which is filed after a step has been taken on record in furtherance of the suit cannot be taken cognisance of. That is the more so where a suit has been set down for hearing and [the] defendant who has notice of the hearing date and place of hearing fails to attend.

“I have no basis for exercising my discretion in favour of a review. Having come to that conclusion I have no basis for considering the prayer for a stay of execution.

“The application fails and is dismissed in entirety.”

This is the background against which an eviction order had, on 28<sup>th</sup> March, 1992 been issued against the defendant. Counsel stated that the defendant had encroached upon the suit land, in defiance of the eviction order aforementioned; and as that eviction order has expired, the plaintiff was seeking a fresh eviction order, so as to give fulfilment to the judgement of 9<sup>th</sup> January, 1991.

Learned counsel, **Mr. Kaburu** for the defendant/respondent, contended that the application was incompetent. He submitted that the application ought to have been made under Order XLIX (which provides for *extension of time*), rather than Order XXI which, it was argued, does not give powers to issue orders once they have expired. The orders in question, counsel averred, had been issued over 12 years ago and had already expired; and he invoked the provision of s.4(4) of the Limitation of Actions Act (Cap. 22) which provides that the decree in a judgement cannot be enforced after the expiration of 12 years. Counsel noted that the applicant had waited for 12 years before bringing an application to enforce the decree of the Court. On this ground he submitted that the application merited being dismissed.

Counsel contended that, contrary to the eviction orders of 28<sup>th</sup> March, 1992 the respondent had always remained on the suit land. He wondered why the applicant had not specified the date on which the respondent is alleged to have started encroaching on the suit land; and affirmed that the reason is that the respondent had “never been evicted therefrom”. Counsel urged that on this account, the application should fail.

**Mr. Kaburu** then contested the form in which the application had been brought — Notice of Motion rather than Chamber Summons; “they ought to have come by Chamber Summons because this is an application under Order XXI”. Counsel submitted that such an application is an abuse of the process of the Court and should be dismissed.

The response of learned counsel, **Mr. Mbaka** was that want of form does not render proceedings formally defective, and the matter is to be decided on merits.

**Mr. Mbaka** averred that the respondent had indeed been evicted by virtue of the eviction order of 28<sup>th</sup> March, 1992, and that this was clear from the supporting affidavit and from annexure WKK3 — a letter from the Court brokers. The said letter, dated 28<sup>th</sup> March, 1992 from Ostrich Lion Ltd addressed to the applicant’s advocates then on record, M/s. O.T. Ngwiri & Co., thus reads:

*“With reference to your letter dated 26<sup>th</sup> March, 1992 we immediately acted ... with a Court Bailiff from Sheria House and with security men from Kikuyu Police Station and evicted the judgement debtor herein from all that parcel of land known as KARAI/KARAI/293 in Kikuyu Division, Kiambu District near Kamangu Trading Centre. The judgement debtor was present at the time of eviction.”*

**Mr. Mbaka** submitted that the respondent had not disputed the fact of the eviction order having been issued against her; and since she thereafter encroached the suit land, she could not now claim that time had elapsed, and so her encroachment should, in effect, be upheld.

### 3. Analysis

It is clear that this Court had given judgement on 9<sup>th</sup> January, 1991 stating categorically that the suit land, L.R. NO. KARAI/KARAI/293 was the *property of the plaintiff/applicant*, and that the defendant/respondent had no rights thereto. That decision was never appealed against; and the attempts to review the same were dismissed by this Court on 19<sup>th</sup> February, 1992. I have to state, in those circumstances, that the suit land so far as the law is concerned, *is and remains* the property of the plaintiff/applicant who is entitled to exercise his full constitutional rights of ownership in respect thereof.

That is the foundation from which I have to begin, as I give my ruling in this decision.

The logical consequence of the foregoing statement of law is that the defendant/respondent cannot make any claim to the suit land except under (and by the correct procedures of) a *recognised legal exception* — such as adverse possession, or concrete evidence of the existence of a trust.

Short of such exceptions, the respondent will not get very far with any application in respect of the suit land; and neither will she be able to prove any better rights than those of the applicant, through the medium of responding to such application as the plaintiff/applicant may make.

So, of what materiality would it be whether the plaintiff makes his application under Order XXI (as he has done) or under Order XLIX (as the respondent thinks he ought to have done). I will attach primacy to issues of substance, and decline to accept that submission coming from the respondent.

The same reasoning will apply to the respondent's contention that the eviction orders of 1992 had expired after 12 years. Yes, they did expire. But that will not alter the fact that the suit land has been judged to be the property, in law, of the applicant. In relation to that property, the respondent has no legal foothold; she may not question the applicant's absolute rights to his own property — unless she has a substantive motion claiming a share of the applicant's prima facie exclusive property, for instance through claims based on trust or adverse possession. The twelve-year rule sought to be relied upon by the respondent is not available to her; she has no substantive legal rights and has made no claims to such; therefore she cannot rely on a procedural rule on the footing that such secondary rule could validate a trespass upon substantive property rights.

I must also reject the respondent's claim that she was always on the suit land, and that the applicant has been unable to specify the exact date when she would have been removed (by eviction) from possession of the suit land. It is for certain and is indeed common ground, that: (i) the Court had given authoritative judgement on 9<sup>th</sup> January, 1991 declaring the suit land to be the property of the applicant; (ii) the respondent never appealed against that judgement; (iii) the respondent's attempts to have that judgement reviewed, were rejected by this Court on 19<sup>th</sup> February, 1992; (iv) eviction orders were issued by the Court against the respondent, on 28<sup>th</sup> March, 1992. From this account, the legal position is that the respondent was to cease being in possession of the suit land, and to permanently stay away from the same since 28<sup>th</sup> March, 1992. When, therefore, the respondent avers in her replying affidavit that the eviction orders made by this Court had been "*thwarted by ... neighbours and fellow villagers,*" she is proclaiming before this Court that she has, with utter contumacy, flouted the Court's Orders. It appears like contempt for a second time, though at this stage I will only state that this Court should not hear such a party and, if it exercises its discretion to do so, must set its face firmly against the flagrant disobedience thus manifested. The contention, therefore, that the respondent has been in occupation of the suit land for a continuous period of ever so many years, has no relevance to the main issues in the instant application.

Thus other procedural questions, such as the contention by counsel that the application should have been made by Chamber Summons and not Notice of Motion, have no relevance to the merits of this matter. Besides, I am in agreement with counsel for the applicant that want of form will not render the proceedings formally defective.

It is clear to me, in the circumstances, that the expiration of a period of more than twelve years since the eviction order of 28<sup>th</sup> March, 1992 has created no rights for any unauthorised occupation of the plaintiff's land; and such expiration of time limited for the life of Court orders does not deprive the proprietor of his

legal rights against trespass to his land. Therefore, any number of eviction orders in favour of the proprietor may properly be issued, so long as the respondent has no claims of substantive rights over the suit land.

#### **4. Orders**

Consequently, I will make the following orders:

**(i) that, an eviction order be and is hereby issued, directed to the defendant/respondent, her servants, agents or anyone acting under her or under her authority in occupation of the plaintiff's land, L.R. No.KARAI/KARAI/293;**

**(ii) that, the Officer Commanding the Kikuyu Police Station shall oversee the enforcement of this eviction order and provide the plaintiff/applicant with the necessary assistance in the execution of this order;**

**(iii) that, the defendant/respondent shall bear the costs of this application.**

***Orders accordingly.***

DATED and DELIVERED at Nairobi this 13<sup>th</sup> day of May, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiff/Applicant: Mr. Mbaka, instructed by M/s. O.T. Ngwiri & Co. Advocates**

**For the Defendant/Respondent: Mr. Kaburu, instructed by M/s. Kaburu Miriti & Co. Advocates.**