



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

**Civil Appeal 86 of 1993**

**MARY GATHONI KABURI .....**  
**APPELLANT**

**VERSUS**

**JAMLICK MAGONDU GITHINJI)**

**EVANS KABURI GITHINJI ) .....**  
**RESPONDENT**

*(Appeal from original Judgment in Principal Magistrate’s Court at Embu in*

*Civil Case No. 81 of 1993 dated 3rd September 1993 by E. M. Mutahi – R.M. – Embu)*

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

The suit in the lower court was commenced by one Jamleck Magondu Githinji (hereinafter referred to as the 1st Respondent) who sued his brother Evans Kaburi Githinji (hereinafter referred to as the 2nd Respondent) claiming that he holds land parcel No. Kabare/Njuki/205 in trust for the 1st Respondent and a judgment that the 2nd Respondent subdivides the said land into two equal shares and transfers one share to the 1st Respondent.

In a defence filed on 31st March 1993, the 2nd Respondent indicated that he had no objection to the subdivision of the land on condition that he was compensated for the tea stems that may fall on the side of the 1st Respondent and a further condition that the land being sloppy the person getting the better flat part should get slightly less.

The appellant who is the wife of the 2nd Respondent then filed an application under Order I rule 10 of the Civil Procedure Rules to be joined as a third party to enable her claim her right over the land subject of the suit between the 1st and the 2nd Respondent.

In her affidavit in support of the 3rd party notice, the appellant averred that she had single handedly developed the suit land and planted 9,000 tea bushes, 400 gum trees, napier grass and other subsistence crops and temporary houses. She claimed she was entitled to the land or in the alternative compensation for the developments.

On the 28th May 1993 the court granted the appellant’s application to be joined as a 3rd Party.

On the 30th June 1993, the 1st Respondent filed a Chamber Summons seeking to have the written statement of defence filed by the 2nd Respondent struck out as the 2nd Respondent had admitted the claim. Whereupon the appellant filed what she called a written statement of defence, but in which she

made no reference at all to the 1st Respondent's suit but claimed that she was by virtue of having entered and solely developed the suit land entitled to be registered as proprietor of the whole parcel. In the alternative she claimed she was entitled to compensation for developments effected on the suit land. She therefore prayed for orders:

***(1) That the court do declare that she has acquired title to the suit land by adverse possession.***

***(2) That the 2nd Respondent be ordered to transfer the suit land to her name.***

***(3) In the alternative the 1st and 2nd Respondent compensation for the development effected on the land at a value to be established by a competent valuer.***

There is no evidence on the court record as to whether this defence was served on the 1st or 2nd Respondent. Whatever the case it seems to have elicited no response from the Respondents.

The appellant also filed a replying affidavit in response to the 1st Respondent's application for judgment in which she urged that no judgment should be entered against the 2nd Respondent without taking into consideration her claims over the suit land.

On the 3rd September 1993 the parties appeared before the court together with the advocate for the 3rd Party. The court then ordered that the application dated 30th June 1993 is:

***“hereby allowed as there is no objection. Judgment for the Plaintiff against the Defendant. Case to be heard between the Plaintiff and the 3rd Party.”***

The appellant being aggrieved by that order has now brought this appeal contending inter alia that the judgment entered is erroneous in law as the appellant's claim to the suit land has been prejudiced by that judgment, she claimed that the judgment was premature and the court erred in not taking into account the appellant's claim.

The appellant also claims that the magistrate erred in entering judgment as there was no clear admission by the 2nd Respondent and no evidence having been taken the order for judgment was a nullity.

The hearing of the appeal proceeded ex-parte because the Respondent's did not attend court despite having been served with a hearing notice.

It is evident from the above that although the appellant was joined as a 3rd Party to the suit, she did not come to the court under order 1 rule 14 of the Civil Procedure Rules which deals with the issuance of 3rd Party notice. The appellant's application to be joined as a 3rd Party was brought under Order I rule 10 of the Civil Procedure Rules which rule deals with substitution or addition of parties to a suit. From the 3rd Party defence filed by the appellant it is not clear whether she was joined as a defendant in respect of the 1st Respondent's suit or whether she was joined as a 3rd Party claiming against the 2nd Respondent. Further, there was no clear 3rd Party notice setting out the nature of the appellant's claim. What is clear however, is that the appellant claimed the same suit land which was the subject of the suit between the 1st and 2nd Respondent. The appellant having clearly filed a replying affidavit objecting to the judgment being entered in favour of the 1st Respondent the trial magistrate was obliged to hear and determine the application for judgment. Although the court stated that there was no objection to the application. Neither the appellant who was present in court nor his advocate addressed the court to this effect and the position therefore remained as stated in the replying affidavit which was still on record.

Further the trial magistrate failed to consider that the admission of the 2nd Respondent was not an unqualified admission as he had raised an issue with regard to compensation for the trees on the land and the subdivision taking into account the sloppy nature of the land. I find that the judgment on admission was improperly entered. Accordingly I do allow this appeal and set aside the judgment entered on the 3rd September 1993. The suit shall therefore be remitted back to the lower court.

I award costs of this appeal to the appellant. Orders accordingly.

*Dated signed and delivered this 23rd day of November 2005*

**H. M. OKWENGU**

**JUDGE**