

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 1116 OF 2001

MARY NDUTA NJAGAPLAINTIFF

V E R S U S

WALLACE WAWERU NJUGUNADEFENDANT

R U L I N G

This is an application by way of Chamber Summons filed on 21st April 2002 under Order VI r13 of the Civil Procedure Rules and Section 3A of Civil Procedure Act cap 21 for orders that the defendant's defence be struck out and the court to give eviction order against the plaintiff. It is based on the ground that the defence does not disclose reasonable grounds of defence. In supporting affidavit of Mary Nduta Njaga the applicant sworn on 23rd April 2002 the applicant says that the land belonged to her late husband but devolved on her after his death as administrator of her husband's estate and was decided so in Succession Cause No.276 of 1989, and that the Defendant never opposed the succession case or appointment of the administrator. Plaintiff as the administrator of the Estate she produced the Title Deed and copies of Gazette Notices.

The respondent Wallace Waweru appears at the hearing but did not file any affidavit in reply. In his submission he said that the plaintiff's claim is not true and that the Title Deed the plaintiff has was obtained by fraud and that he got the land from his mother but he did not show any Title Deed to the land.

I have looked at the defence which was filed on 20th August 2001 on behalf of Wallace Njuguna, the defence was filed by Ms Mwaura & Co. Advocates and says that the letters of administration were obtained by fraud in that the applicant failed to notify those that were to be notified, but this is a dishonest defence as the plaintiff showed the Succession Case number and the Gazette Notice no.2730 of 9th June 1989 which in law meant that the Notice was properly given.

I see the arguments in this case. There is no defence whatsoever to the claim. At this point the law is that if the defence raises any triable issue which should reasonably be tried the case should proceed to hearing. It does not have to be a defence that will succeed, except that it raises a triable issue. Here the defendant is alleging fraud on lack of notice which in fact was given, besides he has not even displaced the facts stated in the plaintiff's affidavit.

I allow the application and strike off defence. I shall however set the counter claim for hearing now on a date to be agreed before application allowed with. Cost to the plaintiff.

Read this 21st June 2002 to the parties in open court.

A. I. HAYANGA

J U D G E

Hearing of counterclaim on 16th July 2002

Date taken before by consent of the parties.

A. I. HAYANGA

J U D G E