



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 261 OF 1996**

**VIRGINIA NJERI CHEGE .....APPELLANT**

**VERSUS**

**PAUL NDUATI MUNGAI .....RESPONDENT**

**JUDGMENT**

In a suit filed in the court of the Senior Principal Magistrate at Thika on 30th August 1995 the respondent sought an order of eviction against the appellant from his land Loc 16/Kiamathare/241.

The respondent claimed that although he had got married to the appellant under Kikuyu Customary Law, this marriage had been dissolved and the appellant had gone back to her parents with the children of the marriage.

But that in 1991 she came back to the suit land purporting that she was his wife, hence the suit subject to this appeal.

The defence of the appellant filed in court on 19th September, 1995, while admitting that the marriage between her and the respondent had been dissolved, stated that the parties had remarried in 1990 and that they had since been cohabiting.

The case was placed before an Acting Resident Magistrate (B.A.O. Asunah) on 7th March 1996 when it was heard, with either party adducing evidence on the basis of the pleadings.

Judgment was delivered on 28th March 1996 when an eviction order was issued as sought in the plaint.

The appellant was not satisfied with the magistrate judgment and she lodged this appeal on 25th September 1996 in a memorandum of appeal which listed 4 grounds of appeal complaining that the appellant had been divorced by the respondent without sufficient or any evidence to this effect and/or he failed to find that the appellant had been living on and tilling the suit land all along and/or that he had no jurisdiction to issue an eviction order against the appellant.

The appeal was placed before this court on 13.6.2002 when counsel for both parties appeared before it to either urge or oppose the appeal.

Counsel for the appellant stated that the Magistrate was wrong to issue an eviction order on the basis of Kandara District Magistrate's Court Civil Case No. 224 of 1979 when the appellant was not a party thereto.

But counsel for the respondent countered that in that case the father of the appellant had been sued to

refund dowry to the respondent arising out of the couples marriage, which meant such marriage had been terminated.

The appellant acknowledged in the lower court case that the marriage between her and the respondent had at one time been dissolved.

If then the parties remarried in 1990 as she stated in the defence and the evidence in the lower court, then the onus was upon her to prove this remarriage on a balance of probabilities; which on the evidence on record she did not discharge.

Just telling the lower court that the parties remarried without calling further evidence to support this assertion was not enough.

The appellant had to call evidence to show all customary rites under Kikuyu Customary Law were performed to revive this marriage, given that dowry had been returned as decided in the Kandara case. No such evidence was called.

And if the respondent had, in 1990, gone for the appellant as she alleged, there would have been no reason for him not to maintain her and the children of the marriage as well as instituting the suit subject to this appeal to evict her from the suit land.

A suit for the refund of dowry is instituted against the father of the girl but the effect of it is that the marriage has failed to work and/or that the couple has parted ways and are no longer husband and wife. The girl herself is not joined to such suit as a party.

On the available evidence on record, I am satisfied the magistrate's judgment was sound and once the appellant had ceased to be the respondent's wife, there was no responsibility placed upon the latter to maintain the former and/or her children.

And I agree that the intention of the appellant in coming to occupy and/or remain on the suit land was to annoy the respondent.

I dismiss this appeal with an order that each party bears his/her own costs of this appeal and the case in the lower court.

Delivered this 2nd day of July, 2002.

**D.K.S. AGANYANYA**

**JUDGE**