

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 144 of 2007

ANGELINA WANJIKU.....PLAINTIFF

VERSUS

MARRIETA

WANJA.....DEFENDANT

RULING

The defendant is one of the widows of Daniel Gitonga Chege alias Daniel Chege Kariuki (deceased). It is alleged in the plaint that she had separated from the deceased since 1975. When the deceased died on 3rd March 2007, she came back and with other family members she was allowed to occupy her co-wife's house at Kabati. After burial she refused to move out of the house thus prompting this suit. Along with the filing of the suit the co-wife who is the plaintiff in this case applied for a mandatory injunction to have her evicted from the house.

After hearing the application the Honourable Justice Musinga found that the defendant had taken advantage of the courtesy extended to her to throw the Plaintiff out of her house and ordered the Defendant's eviction from her co-wife's house.

She has now applied for a review of that order of mandatory injunction on the grounds that there is an error on the face of the record and that there are sufficient grounds upon which the order should be reviewed.

On the first ground of error on the face of the record Mr. Ndubi for the defendant contends that looking at the affidavit in support of the application for injunction it is clear that the claim herein is being urged on behalf of the estate of the deceased. In the circumstances this suit is bad in law as the plaintiff should have first obtained a grant of letters of administration before filing it. In his view that is an error on the face of the record warranting a review of Justice Musinga's order.

There is absolutely no merit in this contention. Mr. Ndubi had the affidavit in support of the application for injunction before he argued it. If he did not notice the alleged error then he is now in a round about way creating a new issue in the name of an error on the face of a record which he should have raised in the application for injunction. Besides the failure to raise the issue at the hearing of the application there is no error on the face of the record as alleged in this matter. Having perused the pleadings in this case it clear to me that this is a dispute by two widows over the occupation of a house at Kabati and not ownership of the deceased's piece of land. In the circumstances the plaintiff did not require letters of administration of the estate of their deceased husband in order to urge her claim for occupation of the house. Consequently this ground falls a cropper.

On the ground of sufficient cause Mr. Ndubi submitted that the plaintiff is in occupation of the deceased's property at Thika and another one known as Salama Bar. In the circumstances he contended that in the interest of justice and fairness to both parties the defendant should be left in occupation of the disputed house or at least the farm until this suit is heard and determined.

I have perused the court file and I agree with Miss Njoroge for the plaintiff that this is the same argument

Mr. Ndubi made before the Honourable Justice Musinga. Apart from not being a ground for review, to allow the application on that ground would be tantamount to seating on appeal on Justice Musinga's order. I cannot do that.

For these reasons I find that this is a frivolous application which has absolutely no merit and I accordingly dismiss it with costs.

DATED and delivered this 7th day of May, 2009.

D. K. MARAGA

JUDGE.