



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL CASE NO.241 OF 1998**

JOYCE WANJIRU BARU.....PLAINTIFF

**VERSUS**

SAMUEL WAMBUGU MWANGI & OTHERS.....DEFENDANTS

**RULING**

By plaint dated 6/8/1998 the plaintiff a resident of Nyeri and an owner of plot No.1820 Oljororok Salient Scheme worth approximately Kshs.600,000 in Nyandarua District, until she sold the same to a third party, claimed that the defendants were illegally occupying the said parcel of land and her requests to have them move out or to stop cultivating the same were fruitless and prayed for an order of eviction against all the defendants from plot No.1820 Ol joro orok Salient Scheme.

The defendants filed their defences on the 17/9/1998 denying the averments in the plaint. On the 11/10/2007, the court after hearing the plaintiff in the absence of the defendant considered the plaintiffs uncontroverted evidence found that the plaintiff had proved her case on a balance of probability and accordingly entered judgment and issued an order of eviction against all defendants from title No.NYANDARUA/ OL JORO OROK SALIENT/1820. The plaintiff was awarded the costs of the suit and even filed a bill of costs on the 13/12/2007. The costs were taxed and a certificate of costs was issued for Kshs.343,436. The plaintiff applied for execution of the decree in the application dated 20/2/2008 by way of personal arrest and committal to civil jail of the defendants. A warrant of arrest of the defendants was issued on the 27/3/2008 and a warrant of committal to civil jail was issued on the 11/6 2008.

On the 18/6/2008 the 5th defendant applied for the setting aside of the judgment entered on the 7/11/2008 and all the consequential orders.

Ultimately, the judgment and all consequential orders were set aside by Justice M.S.A. Makhandia on the 9/10/2008 and the money already paid was ordered to be deposited in the joint accounts of the advocates.

The firm of Gori Ombongi came on record for the 1st, 3rd, 4th, 6th defendants and also filed an application to set aside the judgment and all consequential orders. The orders were granted on the 5/2/2009 by lady Justice Kasango on 27/11/09. The 1st, 3rd, 4th and 6th defendants filed an amended defence and counter claim for a refund of the purchase price of Kshs.100,000 and prayed for the suit to be dismissed with costs. A reply to defence and counter claim was filed on 14/12/2009.

On the 28/1/2012, the 5th defendant filed an application for the dismissal of the suit and the deposit of Kshs.600,000 made by the plaintiff with the interest that accrued as from the date the amount was

deposited in Barclays Bank Nyeri Branch Account No.0301024975 in the joint names of Wahome Gikonyo & Co. Advocates and Muchiri wa Gathoni & Co. Advocate be released to the firm of Muchiri wa Gathoni & Co. Advocates.

The application is based on the grounds that the subject matter of the litigation herein land parcel No.Nyahururu/OlJOROROK Salient/1820 had already been transferred, and a title deed issued to a 3rd party one James Kariuki Macharia and therefore litigation must come to an end.

Mr. Wahome Gikonyo filed grounds of opposition that the application was bad in law, a gross abuse of the process of the court, falsely and incurable defective, frivolous and vexatious, otherwise without merit and should be dismissed with costs.

When the matter came before court all parties were ready to proceed. Mr. Wagathoni's main point was that the subject matter was sold on 10/3/2010 and registered In the name of Macharia. The 5th defendant was no longer occupying the land hence it was his argument that litigation must come to an end.

Mr. Wahome on his part argued that the claim is based on trespass to land. The mere fact that she was transferred the land does not take away her claim on mesne profits as it was her right to make use of the land. Though the mesne profits are not claimed in the plaint, the plaintiff is still at liberty to amend his plaint to include mesne profits.

Mr. Gori argued that the suit lapsed when the plaintiff sold the property. A party cannot come to court and then dispose of the same property the subject matter of the suit.

Mr. Wahome in reply to Gori's submissions argued that this court has unlimited powers under Section 100 of the Civil Procedure Act to order amendment of the pleadings. Moreover, that Section 159 of the Constitution is relevant as it prohibits the court from taking undue regard to technicalities to chase away a litigant from the seat of justice.

I have heard all parties and considered application and do find that the subject matter in this suit has been disposed off by the plaintiff. The plaintiff only seeks eviction of the defendants and costs. There is no claim for mesne profits. I do hold that the prayer for eviction against the 5th defendant has been overtaken by events as he is no longer in occupation as he voluntarily moved out. Mr. Macharia, the current owner of the parcel of land is not a party to the proceedings and therefore the current title holder appears not interested In the suit. I agree with Mr. Wagathoni and Mr. Gori that litigation has to come to an end.

However, there are issues that need to be determined before the matter is brought to an end. The plaintiff deposited some money in the joint account of the two advocates, this amount should be released to one person who will finally succeed in this suit. Moreover this court still needs to award costs to one party who succeeds in the suit. The counter claim filed by the 1st, 3rd, 4th and 6th defendant complicates the matter further.

The upshot of the above is that the application is not allowed with no orders as to costs.

***Dated, signed and delivered at Nyeri this 28th day of March 2014***

**A. OMBWAYO**

**JUDGE**