



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
LAND CASE NO. 131 OF 2000

JOSEPH WANDERA OWIDI.....1ST PLAINTIFF

RAILI OWIDI.....2ND PLAINTIFF

VERSUS

WAFULA SITIALO.....DEFENDANT

R U L I N G

1. The plaintiff filed an application dated 27/2/2017. He sought the following prayers:-

(1).....spent

(2) That this Honourable Court be pleased to order stay of execution of the order and/or directions made on 16th February, 2017, by the Deputy Registrar Kitale High Court on the 16th February, 2017 pending the hearing and determination (sic) this application *inter partes*;

(3) That this Honourable Court be pleased to set aside, review and/or recall orders/directions made on 16th February, 2017 and all consequential orders emanating therefrom requiring a re-survey to ascertain the ground status as pertains to the acreages of Parcel No. Trans-Nzoia/Makutano/ 47 and 31 registered in the names of the defendant and plaintiff.

(4) That the Honourable Court do order for the implementation of the decree on the ground in regard to the suitland.

(5) That the costs be in the cause (sic).

2. The basis of this application is that the Deputy Registrar's directions went contrary to the final decree of the court. The

said decree stated as follows:-

“(a) That the plaintiffs have proved their case against the defendant on a balance of probabilities.

(b) That the defendant has encroached out the plaintiffs plot to the extent of 0.528 Hectares forming part of LR. No. Trans-Nzoia/Makutano/31.

(c) That the defendant do deliver to the plaintiff vacant possession of the encroached portion measuring 0.528 Hectares forming part of LR. No. Trans-Nzoia/Makutano/31.

(d) That in default of (b) above an eviction order to issue to forcefully evict the defendant from the encroached portion measuring 0.528 Hectares forming part of LR. No. Trans-Nzoia/Makutano/31.

(e) That the defendant to pay to the plaintiffs their costs of this suit”.

3. As is evident from the decree only **0.528 Hectares** were to be hived off from **LR. No. Trans-Nzoia/Makutano/47**. This excised parcel was to be added to **LR. No. Trans-Nzoia/Makutano/31**. It was to be as simple as that.

4. The directions of the Deputy Registrar which are now impugned were not the first attempt to have the decree implemented, if at this juncture such expression can be used. Before those directions were issued, an application for stay of execution pending appeal had been granted by Ochieng J on 19/9/2007. The appeal that had been filed was withdrawn vide a notice dated 22/9/2009. Upon the basis that there was no longer any pending appeal, the plaintiffs applied for orders that the defendants/respondents be evicted from the suit property. They also sought orders be reissued to the effect that the District Surveyor be ordered to go to the suitland and survey/partition the same. This was applied for vide a Notice to Show Cause dated 2/11/2009 and they were issued by D.M. Ochenja, P.M., on 24/2/2010. An oral application for stay of execution was made immediately after this ruling and rejected by the Principal Magistrate.

5. The matter never ended there. After a flurry of activities spiced with Notices to Show Cause in respect of taxed costs, the defendants filed a motion dated 2/12/2013 which came before this court and an order was issued by consent of both parties on 15/7/2014 to the effect that the matter be referred to the Deputy Registrar to satisfy herself on behalf of this court that the execution process in this matter was undertaken in a proper and satisfactory manner and/or to order a repeat of the process if the need arises, if only to do justice to all concerned parties.

6. This matter was placed before Mrs. J.A. Owiti, Deputy Registrar for the purpose of compliance with the directions of the court given on 15/7/2014. On 14/4/2015, the Deputy Registrar heard the parties and gave a ruling date of 30/4/2015. In her ruling, she noted that the defendant avers that an excessive portion of his land was hived off by the District Surveyor; that the excised portion was added to the plaintiffs' land; that the parties were in agreement that the said excision in execution of the decree and order dated 26/2/2010 was done in the absence of the defendant; that it would have been in the interest of justice that both parties be present during the exercise as doubts as to the propriety of the entire process would not have arisen. She then ordered that the County Land Surveyor Trans-Nzoia/West Pokot to repeat the implementation process of the said decree and order dated 26/2/2010 this time in the presence of both the plaintiffs and the defendant. This ruling was delivered by Hon. D. Wangeci, Deputy Registrar, on 1/12/2015.

7. Later on 9/2/2017, Professor Sifuna informed the court, albeit his statement was not correct, that Hon. Obaga J had directed that the surveyor goes on the ground to establish whether the land the parties are occupying on the ground is equivalent to the land on their title deeds. This order was not made by the Hon. Obaga J but by Hon. Karanja J., and in my view, it was not exactly in the terms that Professor Sifuna put it. Professor Sifuna proceeded to inform the court that there was a Surveyor's Report duly filed by the surveyor and prayed the court to adopt the report dated 9/2/2012. Mr. Analo for the plaintiffs opposed this application for adoption.

8. In his determination the Deputy Registrar on 16/2/2017 noted that on the second visit that gave rise to the report in question, the County Land Surveyor proceeded to the suit property in the absence of the plaintiff. In order to conclude the matter for once and for all, the Deputy Registrar gave directions do the effect that the County Land Surveyor to revisit the site in the presence of both the plaintiff and the defendant and their advocates. She further ordered that parties were at liberty to involve their privately

appointed surveyors to witness the exercise. She gave 30 days for the carrying out of the exercise and parties were ordered to share costs emanating therefrom. Those are the directions that gave rise to the application currently under consideration.

9. When the applicant came before this court on 1/3/2017 in Chambers, this court granted prayer No.2. The application was finally argued on 5/4/2017 before me. Judgement was delivered in this matter on 3/11/2004. Thirteen odd years later the matter has not had its final rest.

10. It would be a disaster of unmitigated proportions if just a third of the litigation commenced in this country followed a course similar to the one this case has undergone. It is neither here nor there, as urged by Professor Sifuna in his opposition to the plaintiffs' application that the hearing of the main suit proceeded *ex parte*.

11. The only issue arising at the present moment is whether the decree dated 26/2/2010 was properly executed. Any step taken by the plaintiffs beyond what the decree states would be illegal. Of course other appendages to the implementation process, such as the presence of both parties, their advocates and probably their privately appointed surveyors were meant to enhance transparency in the process. However on two separate occasions, the surveyor has visited the site at the instance of one party without the invitation and presence of the other party thereby dragging this matter unduly. It is such one site visit that gave rise to an exercise which the defendant has consistently insisted gave more land to the plaintiffs than they were entitled to under the decree.

12. On his part the plaintiff does not now appear keen that another visit should be made to the suit property. To him, it appears, it does not matter that this court is the one that mandated the Deputy Registrar to inquire into how the implementation of the decree was done, and, if she found it necessary, to order a repeat of the exercise if only to do justice to all concerned parties. That directive by this court still stands. The ruling by the Deputy Registrar delivered on 1/12/2015, which was made pursuant to this court's directive, still stands. None of these were appealed against, reviewed or set aside by the plaintiff.

13. The directions issued by the Deputy Registrar, both on 1/12/2015 and on 16/2/2017 bear the same theme emphasized by the court's directive issued on 15/7/2014.

14. Incidentally the order issued on 15/7/2014 was made pursuant to a consent by both parties. The dissatisfaction on the part of the defendant in relation to the manner of implementation on the decree has been the only outstanding issue in this matter, since it appears that an appeal that had been filed was withdrawn.

15. It cannot be understood how the plaintiff expects prayer No. 4 of the application he has filed to be issued and implemented if prayer No. 3 is granted. By granting both prayers, this court would end up taking from the Deputy Registrar's hands the very mandate which it conferred upon her by its directions dated 15/7/2014, which amounts to making the court go round in circles with no meaningful outcome witnessed from its directions. As far as this court can observe, the directions of 15/7/2017 have never been implemented fully in that no visit to the suitland as ordered by the Deputy Registrar on 1/2/2015 and on 16/2/2016 has ever been undertaken.

16. In the eyes of the Deputy Registrar, she is more than convinced that the implementation process was flawed, hence the directions that another visit to the land be undertaken. Is the Deputy Registrar exceeding her mandate as granted by this court on 15/7/2014? I do not see how that can be said to be the case.

17. The applicant says that the only remaining step is the enforcement of the decree by the defendant through delivery of vacant possession of the encroached portion. However I find that if the defendant's complaint is true the plaintiff may end up reaping where he never sowed if the portion he seeks to annex is larger than 0.528 Hectares. I also do not find that any irreparable loss would arise on the part of the plaintiff from an implementation of the Deputy Registrar's directions.

18. In total, the plaintiff has not demonstrated how the same is at variance with the decree. I find that if all parties adhere to the guidelines issued on the 16th February, 2017, and do so with the utmost sincerity, without any attempts at taking advantage of one another or even reopening the case afresh, those directives are likely, if obeyed, to bring this long standing matter to a speedy conclusion.

19. The upshot of the above analysis is that I do not find any merit in the applicant's application dated 27/2/2017 and the same is hereby dismissed with costs to the defendant.

It is so ordered.

Signed, dated and delivered at Kitale on this 30th day of **May, 2017**.

MWANGI NJOROGE

JUDGE

30/05/2017

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah

Prof. Sifuna for the J.D.

Mr. Khisa for the J.C.

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/05/2017