



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
IN THE ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 25 OF 2015

ATANASIO KITHURE FRANCIS PLAINTIFF

VERSUS

CLARE REGINA KAGWIRIA.....1ST DEFENDANT

FRIDAH KAGENDO KABURU.....2ND DEFENDANT

RUTH KATHAMBI MUTUA.....INTERESTED PARTY

R U L I N G

1. The Plaintiff filed an Application dated 15.04.2015 which sought the following orders:
 1. ***THAT on the grounds more specifically set out in the Certificate of Urgency filed herewith this Application be certified urgent and service therefor be dispensed within the first instance.***
 2. ***THAT this Honourable Court be pleased to visit the locus in quo being the land comprised in NGUSICHI SETTLEMENT SCHEME NUMBER 585/586/587 pending the hearing and determination of this Application.***
 3. ***THAT pending the interparties hearing and determination of this Application, an injunction do issue restraining the Defendants/Respondents jointly and severally either by themselves, their employees, agents or otherwise howsoever from harvesting, removing, alienating, selling or otherwise disposing the wheat planted on the property comprised in NGUSICHI SETTLEMENT SCHEME NUMBER 585/586/587.***
 4. ***THAT pending the hearing and determination of the suit, an injunction do issue restraining the Defendants/Respondents jointly and severally either by themselves, their employees, agents or otherwise howsoever from harvesting, removing, alienating, selling or otherwise disposing the wheat planted on the property comprising in NGUSICHI SETTLEMENT SCHEME NUMBER 585/586/587.***
 5. ***THAT pending the inter-partes hearing and determination of this Application, an injunction do issue directed at the Defendants/Respondents, detaining and preserving the wheat planted on***

the property comprised in Gusichi Settlement scheme number 585/586/587.

6. ***THAT pending the hearing and determination of the suit, an injunction do issue directed at the Defendants/Respondents, detaining and preserving the wheat planted on the property comprised in NGUSICHI SETTLEMENT SCHEME NUMBER 585/586/587.***
7. ***THAT the Honourable Court be pleased to direct the Court's Bailiff to ensure compliance with its Orders herein.***
8. ***THAT this Honourable Court be pleased to direct the Officer Commanding Station at Timau Police Station to ensure compliance with its Orders issued herein.***
9. ***THAT this Honourable Court be pleased to make any other order it deems fit and just in the circumstances.***

2. The Application had the following grounds:-

a) ***The Defendants/Respondents without any colour of right have dispossessed the Plaintiff of 30 acres of land being part of NGUSICHI SETTLEMENT SCHEME NUMBER 585/586/587 and proceeded to plant wheat thereon despite the Plaintiff's undoubted right thereto.***

b) ***The Plaintiff is therefore unable to utilize the said 30 acres of land yet the same is leased to him for a limited period expiring on 31st December, 2015.***

c) ***The wheat subject of this Application and the suit grows to maturity within 24 weeks and there is every likelihood that the same may be harvested and disposed of by the Defendants/Respondents unless they are restrained by this Honourable Court, thereby rendering the adjudication of the suit filed herein nugatory.***

d) ***The parties' proprietary and beneficial interest to the land comprised in NGUSICHI/SETTLEMENT SCHEME NUMBER 585/586/587 upon which the subject wheat is planted is a matter for determination in this suit and questions will arise as to which party is entitled to the benefits of the produce thereof and hence it is imperative that the said produce be preserved pending the hearing and determination of this application and the suit.***

e) ***The Defendants' have by their actions exhibited a blatant disregard for the rule of law and it is manifestly clear that given their propensity to disregard the law, they shall unless checked by this Honourable Court continue to trample the rights of the plaintiff and defiantly render the process of this Court moot.***

f) ***No party shall suffer any prejudice from the Orders sought herein and hence it is in the interest of justice that the orders sought be granted at the earliest.***

3. When the Application came up for Interparties hearing on 19/05/2015, the parties submitted a consent that effectively dispensed with the application. The Consent was in the following items:-

1. ***The Interim Orders issued on 17th April, 2015 be and are hereby confirmed pending the hearing and determination of the main suit.***
2. ***The Costs of the Application be in the cause.***
3. ***The suit to be heard on its merits and parties be and are hereby ordered to comply with the provisions of Order 11 of the Civil Procedure Rules within fourteen (14) days from today's date.***

4. To facilitate the hearing of the suit, although the parties had indicated that they were amenable to an out of Court settlement, I issued the following Orders/ directions.

1. **Parties to fully comply with Order 11, CPR within 14 days which compliance should include Case Summary and issues for determination.**
2. **Directions to be issued regarding developments in this matter including a possible out of Court settlement and/oral possible priority hearing date on 09/06/2015**

5. On 14/7/2015 the firm of Joan W.G. Ndorongo & Co, Advocates wrote a letter to this Court's Deputy Registrar whose second and third paragraphs stated as follows:-

2nd paragraph - "Kindly do favour us with a mention date on priority basis over the aforementioned matter. The matter is urgent since the suit matter is premised on a lease that is bound to expire early August this year when the Honourable Court will be on vacation".

3rd paragraph- " The parties wish to draw a consent for adoption by the Honourable Court to avoid wastage of their produce on the lease land".

6. The Advocate representing the parties came to Court and asked the Court to give them 30 days so that they could negotiate a settlement. The matter was stood over generally to allow the parties to reach a settlement. They were directed to obtain a date from the registry once they were ready to present their Consent to Court.

7. On 23/07/ 2015, the parties came to court and asked that they give a date on which they would record their Consent.

8. On 28.07.2015, Mr. Mutunga, Advocate for the 1st and 2nd Defendants, told the Court that the parties had opposing offers. He told the Court that the 1st and 2nd Defendants were offering 30 acres for the Plaintiff to harvest and his clients to harvest 50 acres. Miss Gituma, Advocate for the Plaintiff told the Court that their offer was that all the 80 acres be harvested in the presence of all the parties and the proceeds be deposited in a joint account to be operated by the parties' Advocates. Mr. Mutunga disagreed.

9. The parties filed their offers on 29/07/2015 and on the same day informed the Court that they sought the Court's Ruling. The Court fixed the date for delivery of this Ruling as 30/07/2015, the next day.

10. The 1st and 2nd Defendants offer is that they be allowed to harvest 50 acres and the other 30 acres be harvested by the Defendants and the Plaintiff jointly and the proceeds be deposited in a joint account to be operated by the parties' Advocates. In the alternative they offered that the proceeds be deposited in Court.

11. The offer contained a history of the matter and explanations giving the rationale for the offer. I find that the explanations given by the Defendants can only be entertained during the hearing of the suit as they relate to disputed issues.

12. The Plaintiff's offer is that the harvest of the wheat and by-products be done under the supervision of all parties on a date to be appointed by all the parties and that the wheat and by-products be sold to a dealer or buyer agreed upon by all the parties and with the supervision of all parties. Then the proceeds of the apposite sale should be deposited in an interest earning Bank of good repute agreed by the parties and in the name of all parties as signatories. They say that the funds deposited in the Bank Account should be disbursed upon finalization of this matter and in accordance with Court Orders.

13. The Explanations and comments accompanying the offer raise issues that can only be canvassed at the hearing of the suit as they concern disputed issues.

14. I have carefully examined the contesting offers. My careful consideration of this matter has taken me back to the Consent agreed by the parties and adopted as an Order of this Court on 15/06/2015. Item 1 of the terms of the Consent said:

“1. The Interim Orders issued on 17th April, 2015 be and are hereby confirmed pending the hearing and determination of this suit”.

Confirmation of the Interim Orders which had been issued on 16/04/2014 meant that prayer 4 in the Application dated 15th April, 2015 was confirmed. Prayer 4 reads as follows:-

“4. THAT pending the hearing and determination of this suit, an Injunction do issue restraining the Defendants/Respondents jointly and severally either by themselves, their employees, agents or otherwise howsoever from harvesting, removing, alienating, selling or otherwise disposing the wheat planted on the property comprised of NGUSICHI SETTLEMENT SCHEME NUMBER 585/586/587”.

15. This Consent binds the parties pending the hearing and determination of this suit. The only problem is that the Consent did not say what should happen to the wheat when it matures. I opine that the Defendants and the Plaintiff can only be assisted by a Court Order, their contesting offers notwithstanding.

16. Wheat is a Perishable product. Good Public policy will not allow a perishable food product to go to waste. The imperative of proportionality will allow the crop to be harvested as the parties continue to duel in court.

17. It is necessary to preserve the proceeds of the wheat crop and its by products until this suit is heard and determined. In the Circumstances, and in accordance with the inherent power of this Court to make such orders as may be necessary for the ends of justice, as stipulated by Section 3 A of the Civil Procedure Act, I issue the following Orders:

1. **The wheat and its by-products on the property comprised in NGUSICHI SETTLEMENT SCHEME NUMBER 585/586/587 be harvested under the supervision of all parties on a date or dates to be appointed by the parties and be sold to a dealer or a purchaser agreed upon by all the parties and with the supervision of all the parties.**
2. **The proceeds thereof to be deposited in a Joint account, interest earning or otherwise, in a reputable bank agreed upon by the parties and the Advocates of the parties be signatories.**
3. **The funds deposited in the joint Account be released upon determination of this matter and in accordance with the Orders of this Court.**
4. **Parties are at liberty to arrive at a Consent, and if they do so come back to Court for appropriate directions.**
5. **Costs shall be in the cause.**

It is so ordered.

Delivered in Open Court at Meru this 30th day of July, 2015

in the presence of:-

CC:Lilian/Daniel

Mutunga for Defendants

Miss Gituma for Plaintiff

P.M.NJOROGE

JUDGE