



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO.252 OF 1983

KAMAU NGURE.....PLAINTIFF

VERSUS

MWANGI GATHAIYA

MBUTHIA KAHIGA

MURIMI NJOROGE.....DEFENDANTS

RULING

The application herein was brought under certificate of urgency on the grounds that though the defendants are the owners of the suit property, the plaintiff had threatened to evict them from the said suit property and yet the decree of the court does not cover the suit property.

The defendants live and have worked for a living on the suit land for more than 50 years and therefore would suffer irreparable loss if they are not urgently heard.

The only pending issue in this matter is prayer No.5 whose import is that for purposes of execution of the decree herein the Murang'a District Land Registrar and Surveyor do ascertain exact boundaries between land parcel number Lo.17/Maragua Ridge/50 on one hand **and** Maragua/Ridge/259, Maragua/Ridge/260, Maragua/Ridge/261, Maragua/Ridge/262, Maragua/Ridge/263, Maragua/Ridge/264, Maragua/Ridge/265, Maragua/Ridge/266, Maragua/Ridge/267, Maragua/Ridge/268 and Maragua/Ridge/269 on the other hand.

The application is based on grounds that the defendants are the owners and occupiers of land parcel numbers Maragua/Ridge/259, Maragua/Ridge/260, Maragua/Ridge/261, Maragua/Ridge/262, Maragua/Ridge/263, Maragua/Ridge/264, Maragua/Ridge/265, Maragua/Ridge/266, Maragua/Ridge/267, Maragua/Ridge/268 and Maragua/Ridge/269. The plaintiff's advocates have obtained orders of eviction in respect of land parcel number Loc.17/Maragua Ridge/50 and has threatened to evict the defendants from their land using that court order. They further claim that the decree of this court does not cover the defendant's land and therefore the plaintiff has no right of claim on the land in dispute hence the plaintiff's actions are illegal and unconstitutional and likely to cause the the defendants stand to suffer irreparable damages.

The application is supported by the affidavit of Mwangi Gathaiyu whose import is that the plaintiff brought this suit against them claiming that they had encroached on his land parcel No.L.R.7/Maragua Ridge/50. That they denied having encroached on the plaintiff's land as they were settled in the then plot

number 39A in Maragua Ridge.

That Plot number 39A in Maragua Ridge was later sub-divided into; Maragua/Ridge/259, Maragua/Ridge/260, Maragua/Ridge/

261, Maragua/Ridge/262, Maragua/Ridge/263, Maragua/Ridge/

264, Maragua/Ridge/265, Maragua/Ridge/266, Maragua/Ridge/

267, Maragua/Ridge/268 and Maragua/Ridge/269.

The applicants are not contesting the decree herein but the assertion by the plaintiff that their lands are within his plot number 50. The defendants claim that after judgment, the plaintiff started engaging in unorthodox means of incorporating their land in his which prompted them to file in this court another suit being High Court Civil Suit No.222 of 2012.

They obtained orders in the latter suit restraining the defendants from evicting them from their land. He also said the latter suit came for hearing on 14/3/2013 when it was discovered that the defendant who is the plaintiff herein died on 25/2/2013 and the matter was stood over to another date and interim orders therein extended.

That after they had obtained orders in the later suit the defendant's sons started demanding that they vacate from their plots which prompted them to file an application to enjoin them in the suit which application is coming for hearing on 30/5/2012. On 16/3/2013 he was summoned by the officer commanding police station in Maragua who informed him that he has been ordered to supervise their eviction.

He then consulted their advocates who informed the police officer in writing that they are not in parcel No.50. The police officer adamantly informed him that he will evict them by Thursday the 21st March 2013 as he would be shown their homes by the plaintiff's sons.

That their pleas to have a registered surveyor to ascertain boundaries of parcel No.50 before eviction have born no fruits and they are apprehensive that they will be rendered homeless before their suit is heard.

He stated they are still the registered owners of the land they are claiming although the plaintiff has attempted to interfere with the green card to show that their lands had been annexed by his. That the plaintiff's sons wants to circumvent the order in the later case and evict them before the same is heard.

He prays that this court should order the Government Surveyor to ascertain boundaries of plot No.50 and their plots before this court's order dated 18/2/2013 and issued on 27/2/2013 is executed.

And claims that they have never been on plot No.50 hence stand to suffer irreparable damages unless orders sought herein are granted. He said they intend to change advocates in this matter and their previous advocates have no claim against them. Infact they have given them their file of documents.

The applicants do not understand who is giving instructions to the plaintiffs advocates, auctioneers and the police since the plaintiff is dead and no grant of letters of administration of his estate and substitution has been done.

The respondents through Kebuka Wachira & Co. advocates filed a replying affidavit whose import was that the application dated 18th March 2013 had been read and its contents explained to him by his advocate on record.

According to him this suit is over but the applicants have chosen to defy the decree of this court to vacate the land. The plaintiff filed this suit seeking to evict the defendants from his land reference

No.Maragua/Ridge/50. He stated the defendants denied the claim and stated that they were occupying their own land No.Maragua/Ridge/39. That the dispute was referred for arbitration before the District Officer Kigumo Division, and since the bone of contention was whether the defendants were occupying the plaintiffs land or theirs the District Surveyor was sent to ascertain the position. The District Surveyor filed his report which stated that the plaintiff's land measured 44 acres and he did not find any land for the defendants. That in effect the District Surveyor concluded that the defendants were occupying the plaintiff's land. He said the Honorable Court entered judgment in terms of the award and a decree followed.

He stated the decree stated clearly that the plaintiff's land LOC.17.MARAGUA/RIDGE/50 measured approximately 44 acres and was exclusively his. The defendants were ordered to vacate the land or they be evicted by a court bailiff.

The defendants filed an application dated 15th June 1999 to stay execution of the decree and to set it aside but the same was dismissed on 5th February 2010 and an application filed in the Court of Appeal on 14th September 2011 for stay of the superior court orders was equally dismissed on 5th July 2012. That in the meantime, the plaintiff executed the decree by having the defendants evicted from his land.

However, when the court bailiff was half way in executing the decree, the defendants pleaded with him to give them some few days to remove their property which he did. That instead of vacating the land the defendants brought more people to the land and went to construct more structures. The plaintiff was forced to file the application dated 13th September 2012 which was allowed on 18th March 2013 and these are the orders the defendants want stayed. The application is seeking stay of the orders without stating the steps they intend to take.

He said this is the second application for stay in this court, the same is Res judicata. That apparently the defendants admit that the decree of the court is still valid and they are not intending to challenge it. The land is situated in a settlement scheme that the settlement fund trustees allocated to landless people and nobody was given more than one parcel of land. That the plaintiff was given LOC.17/MARAGUA/RIDGE/50 measuring 44 acres and paid Kshs.1,600/- for the same. That the defendants were given their own land and settled there.

He stated that around 1978 the defendants moved from their land alleging they were prone to flooding and occupied the plaintiff's land. That when the plaintiff sought for their eviction from his land they colluded with the officials of the settlement fund trustees and excised a portion of the plaintiff's land measuring 11.6 acres and gave it No.LOC.17/MARAGUA/RIDGE/39A. That this execution was done illegally because it was meant to reduce the size of the land the plaintiff was allocated and paid for.

He said after the settlement fund trustees discovered the machinations of its officials it ordered the cancellation of these new numbers. The plaintiffs original number and acreage have been restored and therefore the defendants should go back to their land because they are not entitled to own two parcels of land in one settlement scheme. He claims that the defendants have no documents to show that they owned the alleged LOC.17/MARAGUA/RIDGE/39A or the resultant 11 portions and in fact the government has corrected mistakes that were committed by its officials. He submits that this application is intended to entrench these illegal dealings and the same should be dismissed with costs.

The genesis of this dispute is the court order made on 1/10/1999 whose import is that the parcel of land LOC.17/MARAGUA RIDGE/50 which measures approximately 44 acres, belongs exclusively to the plaintiff. The defendants, their families, servants and/or agents be evicted from the parcel of land LOC.17/MARAGUA RIDGE/50 and that M/s Matson Auctioneers and Court Bailiffs were authorized to evict and/or remove the said defendants, their families, servants, agents or anybody claiming interest under them and remove/demolish any movable or immovable properties belonging to them and put the plaintiff in possession.

The defendants are not contesting the decree herein but are claiming that the plaintiff is incorporating their land in his and therefore want this court to make an order for resurvey.

The plaintiff in response to this issue states that the dispute was referred to the arbitration of the District Officer Kigumo Division and since the borne of contention was whether the defendants were occupying the plaintiffs land or theirs, the District Surveyor was sent to ascertain the position. He did so and filed his report which stated that the plaintiff's land measured 44 acres and he did not find any land for the defendants. In effect to District surveyor concluded that the defendants were occupying the plaintiff's land. The court entered judgment in terms of the award and a decree followed.

This court finds that after judgment was entered in terms of the award, it became *functus officio* and *no appeal* was filed on grounds that the decree was in excess of the award or not in accordance with the award.

I agree with Mr. Kibuka Wachira that the whole matter is *res judicata* and misconceived as it intends to review through the back door a decree issued in 1998 as the *parties are the same* ,the *properties in dispute are the same, the court is the same* and that there was *finality in the courts decision*. I do find that the surveyor has already done his job and there would be no grounds for ordering him to re-do the same and therefore the application is an abuse of the process of court. The application is dismissed with costs to the plaintiff.

Dated, signed and delivered at Nyeri this 20th day of June 2014.

A. OMBWAYO

JUDGE