



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO. 509 OF 2011

KALLISTSE LIMITED.....PLAINTIFF

VERSUS

BAKARI BENDERA & 77 OTHERS.....DEFENDANT

RULING/DIRECTION

I. Introduction

1. On diverse dates of 18th November, 2021 and 20th January, 2022 respectively, this matter was scheduled for Pre – trial conference and fixing for full hearing. Nonetheless, at this juncture, the attention of this Honorable Court was drawn to the existence of a consent and which was ostensibly recorded between the Plaintiff and by some of the Defendants and in exclusion of others in this matter on 3rd December, 2012. As a result of the said Consent, Court was informed that a decree dated 16th April, 2013 was granted and issued on 2nd May, 2013 thereof in the matter. Upon this development there remained some other Defendants who were determined on proceeding on with the case to its logical conclusion. Pursuant to that, the Parties were concerned that as the state of affairs stood, towards the end of the case, naturally there would be yet another Decree to be drawn and wondered what would be the legality of such a situation. Therefore, Court was requested to assess the situation and provide direction on the efficacy and legal position as regards the multiplicity of Decrees likely to occur in one single matter. Purposely, that is the gist of this direction hereof.

II. Analysis and Determination

2. As a result of this, the Honorable Court was sought with regard to two issues:-

(a) What is the effect of the duly executed and filed consent dated 3rd December, 2012 thereof to this matter?

(b) What is the legal connotation of a Decree and the efficacious effect of two or more decrees in one suit including the dated 16th April, 2013 and issued on 2nd May, 2013 in one suit?

(c) What directions does the court provide to enable the matter proceed on to its logical conclusion without encouraging any hindrances?

ISSUE No. (a) What is the effect of the duly executed and filed consent dated 3rd December, 2012 thereof to this matter?

Brief Facts:-

3. Before embarking on to a detailed analysis of the above framed issues, this Honorable Court feels it imperative it expounds on the brief facts to the case therefore. From the pleadings, the suit was instituted by the Plaintiff vide a Plant dated 16th September, 2011 and filed in court on the even date against the 78 Defendants hereof. The Plaintiff is a limited liability Company incorporated in accordance with the Provisions of the Companies Act Chapter 486. The Plaintiffs claim be to the absolute and registered proprietor and all that property known as Land Reference No. 984/V/MN measuring approximately 1, 572 HA (approximately 3, 884.4 acres). (Hereinafter referred to as the Suit Property). The Defendants are both male and female adults whom it was alleged without authority encroached on to the suit property. The Plaintiffs had on several occasions attempted to remove the Defendants in vain. The Plaintiff prayed for an order of eviction from the suit land and permanent injunction.

4. From the Pleadings there is a filed statement of Defence dated 26th October, 2011 vide the Law firm of Messrs. Appolo Muinde & Associates for some of the Defendants and another the Defence dated 16th December, 2011 through the Law firm of Messrs. Jengo

Associates for the 7th, 12th, 14th, 16th, 17th, 18th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 31st, 32nd, 34th, 38th, 39th, 42nd, 43rd, 46th, 47th, 48th, 49th, 50th, 53rd, 55th, 57th, 59th, 61st, 63rd, 64th, 66th, 67th, 70th, 71st, 73rd, 74th, 75th, and 77th Defendants. All the Defendants asserted that they had been in occupation of the suit land for over 12 years and hence if there had been any proprietary interest that the Plaintiff may have held and/or acquired in the said property had been extinguished by effusion of time as the aforesaid Defendants had acquired it by adverse possession. They emphatically held that the purported alleged sellers only held the title in trust for them. Some of the Defendants had no interest to the property at all and that they were not part to the alleged sale agreement and hence they could not be bound by it and in any event of the Plaintiff entered into an agreement purporting to purchase the Defendants the same was illegal.

5. On 16th April, 2013 as stated above when the matter came up for mention and upon hearing the counsel for the Plaintiff and for the 1st - 40th Defendants in the absence of counsel for the 41st to 77th Defendants there was a consent recorded. This was by both Counsels for the Plaintiffs and the Counsel for the 1st to 40th Defendants. From the contents of the said consent, it holds that that the 1st to 40th Defendants had received full compensation of their houses or structures standing on the suit land and they had no other claims against the Plaintiff. Further, the consent hold that the said Defendants undertook and authorized the Plaintiff to demolish any of their structures standing on the suit property which the said 1 to 40th Defendants could not remove for fear of being attacked by their neighbors. Finally the Plaintiff's suit as against the 1st – 40th Defendants was marked as settled. As a result of this state of affairs a lot of confusion has occurred particularly where there exists a Decree while the suit is still subsisting certainly which will lead to a second Decree upon the conclusion of the suit eventually.

6. Now having provided the brief facts I wish to turn to the issues under this sub-heading. On 3rd December, 2012, my understanding was that the consent by parties removed all the 40 Defendants from the suit property and hence the suit but leaving behind 38 Defendants. The Honorable Court has learnt that the said consent never involved all the counsels in particular Mr. Jengo who represents some of the Defendants and his clients. The handwritten was never executed by him. Its claimed that part of the Decree has been executed.

ISSUE No. (b) What is the legal connotation of a Decree and the efficacious effect of having two or more decrees in one suit in addition to the one dated 16th April, 2013 and issued 2nd May, 2013 in one suit?

7. I have decided to spend some considerable time on the definitions to some of the crucial legal terminologies before proceeding further herein. According to the Black Law Dictionary “Decree” means “*Traditionally, a Judicial decision in a Court of equity, admiralty, divorce or probate – similar to a judgment of a Court of Law – in favour of the will’s beneficiary it’s a courts final judgment.*”

Under the provision of Section 2 of the Civil Procedure Act, Cap 21, it is defined as:-

“a formal expression of an adjudication which, so far as regards the court expressing it, conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final it includes the striking out of a Plaint and determination of any question within Section 34 or Section 91 of the Civil procedure Act 21 by does not include.

(a) Any adjudication from which an appeal lies as an appeal from an order or.

(b) Any order of dismissed for default.

Provided that, for the purposes of appeal “Decree” includes judgment and a judgment shall be appealable notwithstanding the facts that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.

There are many types of decrees. These include (a) “Agreed decree” – a final judgment whereby the terms are agreed to by the parties (b) “Consent decree” – a court decree or order that all parties agree to (c) “Custody Decree” – a decree awarding or modifying child custody.

“Order” means the formal expression of any decision of a court which is not a decree and includes a rule nisi.

8. Based on the above legal definitions, a suit can and should only have one decree. A situation that leads to more than decree is a nullity as it could be mis-constrained to mean that there were multiplicity of suits in one and may create confusion on their execution thereof.

In the instant case, and as stated there is already a decree dated 16th April, 2013 and issued on 2nd May, 2013 following a consent entered on 3rd December, 2013. Based on the facts of the case there ought to have been an order of the court but certainty not a Decree as from the facts the suit which involves numerous Defendants has not yet been concluded and/or finalized against some of the Defendants particularly the ones represented by Mr. Jengo. To allow the situation to persist it will mean upon hearing and final determination of this suit, there will be two (2) Decrees in one suit which definitely will be great legal misnomer and an error to boot. This situation must be avoided from the onset. As they say the need to cut from the bud, it must be cured at the earliest time possible.

9. Additionally, this court has taken judicial notice that the Decree has certain misleading information and hence a major mix-up whereby for example, the order of the ostensible names of the Defendants are totally different from how they appear in the filed statement of Defence for instance the 1st Defendant Bakari Bendera and so forth are not the ones listed from the consent signed on 27th November, 2012 and filed on 3rd December, 2012 and hence the Decree of 16th April, 2013. Instead, it bears other names and order whereby the 1st name is that of Samson Muturia. This is a major defect and needs to be rectified.

10. In the given circumstances, it is this courts preposition that these defects need to be rectified by the same parties who signed the consent

by them moving court under the Provisions of Sections 80 of the Civil Procedure Act, Cap. 21, Orders 8 Rules 3, Order 12 Rule 7 and Order 36 Rule 10, Order 45 (1) and (2) of the Civil Procedure Rules, 2010 for amendments, review vary and/or setting aside of the said Decree to remain as a court order and correct the error apparent on the face of the record thereof.

Conclusion and Disposition

Arising from the above detailed analysis, this Honorable court do proceed to provide the following directions:-

- a) **THAT** there can and should be only one decree by Court issued by Court in one matter. Taking that this suit is still subsisting there will be two Decrees in one suit. Therefore the Decree of 16th April, 2013 and issued on 2nd May, 2013 following a consent by the Law Firm of Messrs. Joseph Munyithia & Company for the Plaintiffs on the one hand and Messrs. Appollo Musinde and Associates for the 1st to 40th Defendants is defective and a nullity.
- b) **THAT** the aforesaid Decree of 16th April, 2013 and issued on 2nd May, 2013 should and has to be rectified forthwith by the Plaintiff and the Advocates for the 1st to 40th Defendants who were parties to the said consent by moving court formally under the Provisions of Section 80, Order 8 and 45 (1) and (2) Order 12 Rule 7 and Order 36 Rules 10 of the Civil Procedure Rules, and also aligning all the names of the 1st to 40th Defendants to be in tandem with those in the filed two (2) Defence dated 26th October, 2011 and 16th December 2011 respectively.
- c) **THAT** unless otherwise, stated the subsisting matter over the suit land/property and one between the 7th, 12th, 14th, 16th, 17th, 18th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 31st, 32nd, 34th, 38th, 39th, 42nd, 43rd, 46th, 47th, 48th, 49th, 50th, 53rd, 55th, 57th, 59th, 61st, 63rd, 64th, 66th, 67th, 70th, 71st, 73rd, 74th, 75th and 77th Defendants only should be set down for hearing forthwith.
- d) **THAT** for expediency sake the pending matter should be fixed for hearing within the next ninety (90) days from this date hereof.
- e) **THAT** there should be a mention of the matter on 24th May, 2022 for Pre-trial conference session, and further direction and fixing a hearing date.

IT IS SO ORDERED ACORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OF MARCH 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna, Court Assistant;

M/s. Kinuva Advocate for the Plaintiffs

Mr. Appollo Muide Advocate for some of the Defendants.

Mr. Jengo for some of the other Defendants.