



REPUBLIC OF KENYA

High Court at Meru

Environmental & Land Case 355 of 1990

PAUL THURANIRA.....PLAINTIFF

VERSUS

GITONGA KIRIMI.....1ST DEFENDANT

FRANCIS KINYUA.....2ND DEFENDANT

SAMUEL MARANGU.....3RD DEFENDANT

COMBINED RULINGS (1) Application by the Plaintiff dated 12.7.2012

(2) Application by the Defendnt dated 26.11.2012

This ruling concerns two applications. The first one was filed by the plaintiff and was dated 12th July 2012.

It sought orders that:

- (a) The hounourable Court be pleased to hear this application ex-parte in the first instance.**
- (b) The Honourable Court be pleased to order the O.C.S. Kariene Police Station to provide security to the applicant during the fixing of the boundary between L. R. No.Abothuguchi/Katheri 560 and 565.**

The second application was dated 26th November, 2012 and the Defendants sought the following Orders:

- 1. That this application be certified urgent and be heard ex-parte in the first instance.**
- 2. That this Honourable Court be pleased to stay execution of its orders dated 22.11.12 until this application is heard interparties.**
- 3. That this Hon. Court be pleased to REVIEW Its orders dated 22.11.2012 and set the same aside.**
- 4. That the consequent to prayer (3) above, the Honourable court do order the application dated 12th July to be heard on (merit) interparties for the interest of justice.**
- 5. That the Respondent/Plaintiff do bear the costs of the application.**

In this suit a judgment of the Court, following an arbitration award was entered by Hon. Justice S. O. Oguk on 28th November, 1990. The order for judgment was made by consent of the parties. On 16th

December 1997, the Hon. Justice A. G. A. Etyang held that a valid judgment of the Court as entered by Hon. Justice Oguk was still extant and ordered that the Respondents/Defendants be evicted from land parcel No. Abothuguchi/Katheri/565 forthwith. He also ordered that the OCS, Meru be served with the order for its enforcement as prayed.

On 22nd November, 2012, this Court gave an ex-parte order that the OCS, Kariene Police Station do provide Security during the fixing of the boundary between Land Parcel No. Abothuguchi/Katheri/560 and Land parcel No. Abothuguchi/Katheri/565. In issuing this order, the court noted that this was an old case whose judgment had been made, by consent of all parties, twenty two years earlier.

On 29th November, 2012, Mr. Ogoti for the defendants vide his application dated 26th November, 2012 was heard by the Court. His application was certified urgent. As Mr. Muriuki, the plaintiff's advocate was in Court, it was agreed by consent that both applications be heard on 6th December 2012. On 6th December the two applications were heard by the court.

Mr. Muriuki started with his application dated 12th July, 2012 and argued that it had not been opposed and added that there was no replying affidavit. He also argued that his application was merely meant to order the OCS Kariene to provide security for fixing of boundaries between 2 parcels of land pursuant to a Court decree dated 9th March, 1994. He also felt that the opposition to his application was superfluous as the application was meant to simply effect implementation of a Court decree.

Mr. Ogoti in reply termed the allegation that he had not opposed the plaintiff's application as misplaced as he had done so. He then claimed that there were no court orders dated 9th March, 1994. He claimed that the boundary between the two pieces of land Nos. Abothuguchi/Katheri/560 and 565 had always been there. He then withdrew his grounds of opposition numbers 2 and 5.

He stated that the defendants did not own parcel No. 565 and that they were sons of the owner of parcel number 560. According to him section 45 of the Law of Succession Act was applicable and as such the plaintiff's application dated 12th July, 2013 amounted to intermeddling with the free property of a deceased person. This intermeddling could attract a fine of ten thousand shillings or a term of imprisonment to a term not exceeding one year or both. Mr. Ogoti then sought for the dismissal of the application dated 12th July, 2012. He also asked the court to uphold his application dated 26th November 2012. He then concluded that what he had said was sufficient to oppose the plaintiff's application dated 12th July 2012 and to support his application dated 26th November, 2012.

Mr. Muriuki for the plaintiff denied that his application dated 12th July, 2012 amounted to intermeddling as intended by Section 45 of the Law of Succession Act. It simply wanted the boundaries between Parcel Numbers Abothuguchi/Katheri/560 and 565 be defined. As the prayer was provision of security by the OCS Kariene during the fixing of the boundaries between the two parcels of land, pursuant to a Court order, the order was innocuous. He prayed that the defendant' application dated 26th day of November be dismissed with costs. I have carefully evaluated the submissions of the parties in relation to the two applications and arrived at the following conclusions.

Application by the plaintiff dated 12th July, 2012

The application had basis. It was meant to effect the implementation of a Court Order. It is not true as claimed by Mr. Igoti that there were no Court Orders. There were. The decree dated 9th March, 1994 arose out of the Judgment of Hon. Justice S. O. Oguk dated 28th November, 1990. On 16th December 1997, Hon. Justice A. G. A. Etyang, in his ruling reiterated that the said judgment was valid.

I find that the application does not intermeddle with any free property of a deceased person as intended by Section 45 of the Law of Succession Act. I allow the application. I award costs to the Plaintiff/Applicant.

Application by the defendants dated 26th November , 2012

The arguments by the defendants were similar to those made in opposition to the application by the plaintiff dated 12th July 2012 and were made concurrently. To me, the invocation of Section 45 of the Law of Succession Act, as done by the defendant is not only tendentious but also veritably spurious.

I dismiss the defendant's application dated 26th November, 2012.

I award costs to the plaintiff who is also the respondent in this application.

Dated and Signed at Meru this 28th day of January, 2013.

P. M. NJOROGE
JUDGE

Delivered in Open Court at Meru this 12th day of February 2013

Present:

P. M. NJOROGE
JUDGE