



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 481 of 1986**

**BONIFACE WAMBUA KIVINDA & OTHERS.....APPLICANT**

**-VERSUS-**

**MUKA MUKUU FARMERS CO-OPERATIVE**

**SOCIETY LTD.....RESPONDENT**

**RULING**

The matters giving rise to the chamber Summons application dated 27<sup>th</sup> April 2007 stem from an arbitration award rendered on 17<sup>th</sup> July 1986. The applicants Boniface Kivinda and others applied to the court for entry of judgment in terms of the award which was duly entered.

The parties before the arbitrator were B. W. Kivinda, J. Kimeu kanyeti, Mumbua Mwangi and Mutiso Kamandu as Claimants and Muka Mukuu farmers Cooperative Society Ltd as the Respondents. The award decreed Plot No. 12045 to Boniface W. Kivinda, interestingly the claimants vide an application for execution of decree filed in court on 21<sup>st</sup> August 2000 sought the eviction of Esther Munanye Kithumbi and Richard Kawinzi from Plot No. 12045 and Plot No. 12091. Upto this point there is no evidence that Esther Munanye Kithumbi and Richard Kawinzi had participated in the proceedings.

It is apparent from a review of the court record that there has been confusion in regard to the representation of parties in this suit. The Hon. Justice Khamoni (as he then was) on 2<sup>nd</sup> May 2007 put the issue of representation in context when he revisited the order he had made on 6<sup>th</sup> March 2007 authorising the OCS Machakos Police Station to provide security to the court bailiff while executing the eviction orders of 25<sup>th</sup> July 2002. As Justice Khamoni pointed out on 6<sup>th</sup> March 2007, Mr. Thangei was appearing for the applicant and Mr. Murithi was appearing for the respondent, presumably Muka Mukuu Farmers Coop. Society Ltd yet the eviction order was directed at other parties who were not parties in the suit.

On 2<sup>nd</sup> May 2007 when the matters came before Hon. Justice Khamoni, Mr. Muli appeared for the applicants in the application dated 27<sup>th</sup> April 2007 while Mr. Thangei appeared for the plaintiffs. There was no appearance by Mr. Mureithi who had earlier appeared for the Respondent. It dawned on the Hon. Justice Khamoni that indeed Mr. Mureithi was not representing the respondents who were to be affected by the eviction orders. The judge elected to disqualify himself in the face of the apparent confusion.

The matter next came up before Hon. Justice Aganyanya on 29<sup>th</sup> May 2007, who also observed that it appears to have been proceeding without ascertaining who the real parties to ***“It are and how some were enjoined to the dispute. The court cannot proceed with the matter in the light of this confusion”***

The matter after a lapse of nearly 5 years was next listed before the Hon. Justice Khaminwa on 3<sup>rd</sup> May 2012 when the judge made the following orders:-

1. Orders for Michael Nzioka Kithumbi is granted to join as a party in capacity of defendant.
2. Order is granted for temporary stay of execution for a period of 14 days from today.
3. Hearing of the application for orders number 3 is fixed on 22<sup>nd</sup> May 2012.

The application was not heard on 22<sup>nd</sup> May 2012 as the judge indicated she required to study the file record to discern what the real problem was but that was not to be and the matter was listed before me on 13<sup>th</sup> November 2012 for the hearing of the application dated 27<sup>th</sup> April 2007 and like the judges before me who handled the matter I required to peruse the record to understand what the issue were and the genesis of the same and the parties agreed that the court could review the record and the application and make its ruling on the basis of the material on record.

I have reviewed the file record and the chamber summons application dated 27<sup>th</sup> April 2007 and the affidavit sworn in support and the replying affidavit by Alex Ngatia Thangei sworn on 18<sup>th</sup> May 2012 in opposition of the application. From the record it is quite apparent that Esther Munanie Kithumbi who also states to have been an allottee of Plot No. 12045 from Muka Mukuu Farmers Coop. Society Ltd and was in physical and actual occupation and had developed the plot was not involved in the arbitral proceedings that gave rise to the judgment and decree that the decree holder sought to execute. Muka Mukuu farmers coop society Ltd had as per annexure 'MNK1' page 10 and 15 allocated plot No. 12045 to Esther Munanie Kithumbi and the Latter ought to have been a substantive defendant and given a hearing during the arbitration proceedings. Hon. Lady Justice Khaminwa on 3<sup>rd</sup> May 2012 made an order for Michael Nzioka Kithumbi to be enjoined as a defendant following the death of his mother the said Esther Munanie Kithumbi and from his affidavit (Michael Nzioka Kithumbi) in support of the application he depones that his family have been resident on this plot No. 12045 since 1964 and that their mother subscribed for a share in 1968 in the defendant society and was allocated the same plot where they had developed in 1982.

The family of the late Esther Munanie Kithumbi had a right to be heard substantively on their claims to plot No. 12045 and not merely at the execution stage when the claimants sought to have them evicted from the plot. Under Article 159 of the Constitution the court is required to ensure substantial justice is meted out to all the parties without undue regard to procedural technicalities.

Article 159 (2) of the constitution provides thus:

***“In exercising Judicial authority, the Courts and Tribunals shall be guided by the following principles:-***

***(a) Justice shall be done to all irrespective of status;***

***(b) Justice shall not be delayed.***

***(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3 );***

***(d) Justice shall be administered without undue regard to procedural technicalities; and***

***(e) The purpose and principles of this constitution shall be protected and promoted”***

I am not satisfied that the applicants in the application dated 27<sup>th</sup> April 2007 were afforded an opportunity to ventilate their rights and interest in the plot the subject matter of this suit as they did not participate in the arbitration proceedings. Muka Mukuu Farmers Cooperative Society Ltd who were the substantive

defendants at the arbitration were not to be directly affected by an order affecting Plot No. 12045. The rules of natural justice required that the occupants of the said plot who claimed to have been allocated the plot and therefore entitled to the plot to be heard on merits. This did not happen.

The fact that the applicants (application of 27<sup>th</sup> April 2007) had constructed and had been residing on the property for a long period of time was a relevant factor to be considered and perhaps and may be if all the facts were placed before the arbitrator the findings may have been different.

From the record the application for execution was filed on 21<sup>st</sup> August 2000 in which the names of the parties are given as follows:

**Boniface W. Kivinda & others vs. Esther Munanie & Richard kawinzi** and the decree was ought to be executed against **Esther Munanie Kithumbi and Richard Kawinzi** yet when the award was filed in court the parties were shown as follows:

**B. W. Kivinda and 3 others vs. Muka Mukuu Farmers Coop Society Ltd.**

The Deputy Registrar on 24<sup>th</sup> October 1986 issued notice to **B. W. Kivinda and others and Muka Mukuu Farmers Coop. Society Ltd** notifying them of the filing of the award and inviting them for the reading of the award on 3<sup>rd</sup> November 1986. No such notice was sent to Esther Munanie and Richard kawinzi and yet it is against them it is sought to execute the decree. Indeed the main issue during the arbitral proceedings ought to have been who between the claimants and the family of Esther Munanie was entitled to plot No. 12045. The arbitrator decided the matter without giving Esther Munanie the opportunity to be heard and in my view, it would be contrary to the tenets of natural justice to allow the arbitrator's decision to stand.

In the premises therefore and in exercise of the inherent powers of the court to do justice having regard to all the facts and circumstances of the case as buttressed under section 1B and 3A of the civil procedure Act Cap 21 Laws of Kenya I hereby order stay of execution of eviction and set aside the eviction issued on 25<sup>th</sup> July 2002. As I have also found that the proper parties did not participate in the arbitration proceedings I in the interest of justice set aside the award and all the consequential orders thereof.

I make no orders as to costs in regard to the application dated 27<sup>th</sup> April 2007 and each party will bear their own costs.

It is unfortunate that a matter that commenced as an arbitration 25 years ago is yet to be resolved. The court would in the circumstances of this case and in the spirit of article 159 (2) (c) of the constitution implore the parties to seriously consider settlement of the dispute by use of alternative dispute resolution considering that the parties may have to commence the proceedings afresh.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF FEBRUARY 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Applicants

..... for the Respondents