



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 11 OF 2001

ENOSOKON GROUP RANCH.....APPLICANT/APPELLANT

AND

MAKUYUNI FARMERS CO. LTD.....RESPONDENT

VERSUS

SAMWEL MALAKEN & 53 OTHERS.....OBJECTORS

RULING

The application argued before me and to which this ruling relates seeks three substantive prayers and an alternative prayer as follows:

1. that pending the hearing of the application *interpartes*, there be a temporary stay of execution of the decree herein
2. that pending *interpartes* hearing of the application, the court issues a temporary stay of execution of the warrant to the Bailiff to give possession issued on 17th April, 2009
3. that orders of 22nd October, 2010 be reviewed
4. in the alternative, that all the warrants to the Bailiff to give possession of the land dated 30th September, 2005, and 17th April, 2009 as well as the order to the OCPD, Narok to provide security to the Bailiff dated 17th April, 2009 be set aside and finally,
5. that the eviction order be set aside.

The reliefs sought in (i) and (ii) have been spent, leaving (iii), the alternative prayer and (iv).

In support of those prayers, the applicant has averred that there is an error on the face of the record, namely that the court in dismissing the applicant's application dated 23rd November, 2009 failed to note that the execution of the decree sought to be lifted was infact issued in this very file (the appeal file). The second error on the face of the record is to the effect that the applicants were not parties to Nbi. H.C.Misc. Civil Case No.195 of 2004 and were indeed not even aware of its existence. The applicant's application dated 23rd November, 2009 was dismissed on the grounds that:

1. the orders of stay granted in Nbi. H.C.Misc. Civil Case No.195 of 2004 have not been shown to have been lifted
2. the application dated 23rd November, 2009 was not brought in the suit in which the application for attachment was made
3. the application was brought on the same grounds as those relied on in Nbi. H.C.Misc. Civil Case

No.195 of 2004

4. there is no evidence that Nbi. H.C.Misc. Civil Case No.195 of 2004 has been determined
5. there is no evidence that the respondent has taken or is taking steps to execute
6. the issue of the dissolution of the group ranch (the appellant herein) was dealt with in Nbi. H.C.C.C. No.1352 of 2004
7. the applicant cannot disown the group ranch (the appellant herein) having made the reference to the tribunal, filed the appeal to the Appeals Committee and instituted this appeal.

I have now looked at these matters afresh and even though they do not qualify to be a basis for review on the ground of a mistake or an error on the face of the record, they form a basis for review of my orders on the ground of *“for any other sufficient reasons.”* All the grounds upon which the earlier application was dismissed have been clarified. Indeed the applicant’s main contention has all along been that the dismissal of the appeal for want of prosecution did not give the respondent the licence to evict the applicants as it has purported to do. It is important to go back to the decision of the Appeals Tribunal which gave rise to this appeal in order to appreciate the applicant’s persistent concern. In its decision rendered on 10th January, 2001 upholding the Tribunal’s award, the Appeals Committee ordered as follows:

“The Appeals Committee elders do hereby order that the boundaries of plot Cis/Mara/Ololunga/110 belonging to appealing Enosoogon Group Ranch be as it was before sub-division to 3188-3409 which was entered on 3rd September, 1998.

Plots Cis/Mara/Ololunga/198 and Cis/Mara/Ololunga/157 belonging to Mukuyuni Farmers Company Limited (respondents) be established by department of survey as delineated (sic) by the survey map and sheet No.132/III, 146/1 and 131/IV.

These details are contained in the survey map marked (stamped) by the Provincial survey records office dated 14/4/2000.

The elders finally do hereby reaffirm that the original plot No. Cis/Mara/Ololunga/110 belongs to Enosoogon Group Ranch.

The plots No. Cis/Mara/Ololunga/157 and Cis/Mara Ololunga/198 belongs to Mukuyuni Farmers Company Limited both according to the above named map in the original form. Survey map and sheet No.132/III, 146/I and 131/IV.”

An order in these terms was subsequently drawn. Enosoogon Group Ranch was aggrieved and filed this appeal (Nkr. H. C. Civil Appeal No.11 of 2001) on 28th January, 2001 and amended the Memorandum of Appeal on 21st March, 2001.

On 8th February, 2005, the respondent, Mukuyuni Farmers Company Limited sought to have the appeal dismissed for want of prosecution, which application was allowed. A decree was drawn in the following terms:

“DECREE

.....

.....

IT IS HEREBY ORDERED:

1. **The appeal herein be and is hereby dismissed for want of prosecution**
2. **that the costs of this application be borne by the appellant.....”**

Arising from this, a warrant to the bailiff to give possession of land under **Order 21 rule 30** of the **Civil**

Procedure Rules was issued on 30th September, 2005 followed by an order of 17th October, 2005 to the O.C.P.D. Narok to provide security to the plaintiff in execution of the decree.

It should be clear that resulting from the dismissal of the appeal for want of prosecution, the respondent could only revert to the decision of the Appeals Committee, which I have set out in the preceding paragraph, to the effect that:

1. Cis/Mara/Ololunga/110 belongs to the Enosoogon Group Ranch
2. The boundaries of Cis/Mara/Plolunga/110 be re-established as it was before the sub-division into 3188-3409
3. Cis/Mara/Ololunga/157 belongs to the respondent, Mukuyuni Farmers Company Limited
4. Cis/Mara/Ololungas/198 and 157 be established by the Department of Survey as delineated by the survey map and sheet No.132/III, 146/1 and 131/IV.

There was no final decree as there were certain actions to be taken by the Survey Department in order to ascertain the actual extent of the three parcels, namely Cis/Mara/Ololungas/110, 157 and 198. Evictions can only be carried out after that exercise has been undertaken and only upon establishment of encroachment by the applicants. Otherwise it was premature to issue eviction order and order the police to provide security during such eviction

For these reasons, my orders of 22nd October, 2010 dismissing the applicant's application dated 23rd November, 2009 are reviewed with the result that that application is allowed. Execution based on the decree of 29th April, 2005 and subsequent orders are stayed pending compliance with the decision of the Appeals Committee.

For avoidance of doubt, it is further directed that the parties in this appeal move expeditiously to have the survey conducted and report filed within thirty (30) days from the date of this order.

Costs to the applicants.

Dated, Delivered and Signed at Nakuru this 31st day of January, 2011.

W. OUKO

JUDGE