



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Case 252 of 1983

KAMAU NGURE.....PLAINTIFF

Versus

MWANGI GATHAIYA.....1ST DEFENDANT

MBUTHIA KAHIGA.....2ND DEFENDANT

MURIMI NJOROGE3RD DEFENDANT

RULING

The subject matter of this ruling is the summons dated 17th July 2000 in which the defendants applied to be issued with the following orders;

1. That the Decree of this Court dated 1st October 1999 be set aside.
2. That execution proceedings in this case based on the District Surveyor's letter dated 9th March 1989 be set aside as being an abuse of the process of the court, injustice to the Defendants and contrary to the court order of 13th July 1988.
3. That the Director of land Adjudication and settlement and the Director of survey be ordered to put into effect the Court's order dated 13th July 1988 as contemplated in that order.
4. That the plaintiff, whether by himself, his family members, his servants, agents or in any way whatsoever be restrained by injunction from interfering with the Defendants' peaceful enjoyment of their respective parcels of land the subject matter of this suit until the final orders of this court pursuant to 'c' above.
5. that this honourable court do then issue fresh decree after the Director of Land adjudication and settlement and the Director of survey have reported back to it pursuant to 'c' above.

The summons is supported by the affidavit of Mwangi Gataiyu sworn on 17th July 2000. Kamau Ngure, the plaintiff herein opposed the summons by filing a replying affidavit he swore on 20th February 2001.

It is the submission of Mr. Lombo, learned advocate on the part of the defendant that they face imminent eviction from the land which they claim they are entitled to as allottees of the settlement fund trustees. And on the basis of their occupation of over 30 years unless this court's decree of 1st October 1998 stayed. Secondly, it is also argued that the decree was irregularly obtained contrary to the express provisions of order xx rule 7(2) and (4) of the Civil Procedure Rules. It is further argued that the aforesaid decree was obtained on the basis of a letter by the District Land Surveyor dated 9th March 1989 which

was alleged to be a culmination of the plaintiff's efforts to defeat the court's order of 13th July 1988.

Mr. Wachira, learned advocate for the plaintiff, urged this court to dismiss the summons on the basis of the facts deponed in the replying affidavit. It is stated that the application has been overtaken by events in that the decree was executed on 29th December 1999 hence there is nothing to be stayed. It is further argued that the decree was not irregularly obtained because the plaintiff managed to convince the Deputy Registrar of this court to approve the decree when the defendants refused to approve the draft submitted to them under Order XX rule 7(2) of the Civil Procedure rules. Mr. Wachira further averred that the application is being argued too late in the day. He is of the view that the same is being made in bad faith to frustrate the final court orders of 1st October 1998.

I have keenly considered the submissions of both learned counsels. I have also taken into account the grounds set out on the face of the summons and the facts deponed affidavits for and against the application. There is no dispute that this court issued the decree of 1st October 1999 which in following terms:

1. The Parcel of land Loc.17/Maragwa Ridge/50 measuring approximately 44 acres belongs exclusively to the plaintiff.
2. The defendants, their families, servants and or agents be evicted from parcel number Loc.17/Maragwa Ridge/50 2 3. M/S Matson Auctioneers and court bailiffs are hereby authorized to evict and or remove the said defendants their families, servants agents or anybody claiming interest under them and remove/demolish any moveable or immovable properties belonging to them and put the plaintiff therein.
4. This order to be served upon the officer commanding police station, Maragwa to ensure its enforcement and offer security.

It is the submission of Mr. Lombo that the decree was not approved by the defendants hence the one extracted was irregularly. With great respect, I do not think Mr. Lombo is entirely correct in view of the averments made by the plaintiff which is to the effect that a draft decree was sent but the defendants refused to approve. This averment is not controverted by the defendants. In the absence of any approval from the adversary, the law gave the Deputy Registrar of this court the mandate to approve the decree under order XX rule 7(2) of the Civil Procedure rules. The record clearly shows that the defendants filed a similar application dated 27th January 1990. There is also the pending application dated 15th June 1999 in which the defendants sought for similar orders like those being applied for in the current application. On the basis of these facts I find this application to be vexatious and frivolous. The applicants have been unable to explain why the application has been pending since the year 2000. In paragraph 4 of the replying affidavit of Kamau Ngure, it is specifically deponed that the decree has been executed hence there is nothing to stay. This averment is not controverted by another affidavit. I have no reason to doubt to the averment. I am consequently convinced that the decree of 1st October 1998 was executed. This application therefore is frivolous meant to vex the plaintiff and to engage the court in endless unnecessary court battles.

In the end I see no merit in the summons. It is dismissed with costs to the Plaintiff.

Dated and delivered this 5th day of February 2010.

J.K. SERGON

JUDGE.

In open court in the presence of

Mr. Wachira for Respondent

N/A for Mr. Lombo with notice.

J.K. SERGON

JUDGE.