



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 29 of 2010

OSMAN MAHAT MUHUMED.....1ST PLAINTIFF

DUBEY MUHUMED GODAD.....2ND PLAINTIFF

VERSUS

NORTHERN WATER SERVICES BOARD.....1ST DEFENDANT

THE COUNTY COUNCIL OF TANA RIVER.....2ND DEFENDANT

ORDER

On 22.02.2010, upon consultations between Counsel inter se and the court giving guidance and directions it was mutually and harmoniously agreed between the parties through their Counsel as follows:-

” 1. That the Orders of injunction obtained ex parte on 22.01.2010 and on 3rd February 2010 and subsequently extended are hereby discharged, vacated and suspended for the period up to 10.3.2010 upon the following terms:-

- (a) The 1st Defendant and the plaintiff (i.e. the parties) shall carry out a survey and determine the location and acreage of land that the 1st Defendant requires from each plaintiffs allocated portion of lands respectively.**
- (b) The 1st Defendant to carry out valuations of the identified and determined portions of land by the Government Surveyor from the plaintiff's respective portions for purposes of compensation. Each plaintiff is at liberty to carry out his/her own valuation for purpose of comparison/ascertainment if necessary. These valuations shall be done within the aforesaid 14 days and the valuations reports be exchanged and submitted in court by 10.03.2010.**
- (c) Mention on 10.3.2010 for further directions and/or orders.”**

On 10.3.2010, the Counsel appeared before me but there had been no settlement of the issues in respect of acreage, valuations and compensation. Instead there was an acrimonious exchange in Court revealing serious differences and conflicting views on the matter. The submissions showed that the parties were suspicious of each other and there was no atmosphere of trust. In fact, there was even some disagreement on the construction/interpretation of the consent orders that were made herein.

With regard to acreage the 1st Defendant's surveyor found that the area for acquisition was 88.843 HA. in respect of Fatuma Subane Abdille and 78.403 HA for Osman Mahat and Muhumed & Dubey Muhumed Godad. He proposed compensation of Shs.4,390,620/- and 3,843,680/- respectively. There was no indication of how this figure was arrived at.

To demonstrate the serious differences, the surveyor for the plaintiff in HCCC No. 15 of 2010 said that the area encroached upon was about 33.2 ha or 82.2 acres. For the plaintiff in HCCC 29 of 2010 the acreage was said to be 29.9 Ha or 74 acres.

For the compensation proposed were Kshs.4,920,000/- and Kshs.4,440,000/- respectively.

From the foregoing, I think that there are serious disparities and differences. I see no chance of a mutual and fair settlement in this matter without the parties' consensus. The differences appear insurmountable. The court is unable to narrow the gap without a hearing of the application on its merits. It would appear that the Applicants are only ready to negotiate on encroached land while the Respondent is seeking to acquire almost the entire portions of land claimed by the Applicants which it believes is necessary for its project and which it was allocated by the County Council of Tana River which has itself insisted on "no acquisition without compensation" acceptable to the Applicants.

In view of the foregoing, I do order that the respective applicants and the Respondents do proceed to hearing on merit on a date convenient to the parties and the court.

In the meantime, in view of the failure to reach a wholesome and mutually accepted compromise and the fact that there would be no consideration for the sustenance of the orders of 22.02.2010, I do hereby discharge and set aside the orders of 22.02.2010. As a result the respective orders of injunction granted ex parte are hereby reinstated and shall be in force as before pending the inter partes hearing of the respective applications in this suit and HCCC No. 15 of 2010.

For the avoidance of doubt this means that the 1st Defendant the Northern Services Board shall cease all its activities and operations on the disputed portions and which they entered upon. The said 1st Defendant shall vacate the said portions of land and the position shall revert to the position as on the date each ex parte order was served.

Dated at Mombasa this 23rd day of March 2010.

M. K. IBRAHIM
J U D G E