



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 89 of 2002

MUE KYAU'S FAMILY LAND DISPUTE Thro' CHARLES MUE.....APPELLANT

VERSUS

MAKAU MUE.....RESPONDENT

JUDGMENT

1. The genesis of the dispute before me can be traced to certain proceedings before the Kitui Central Land Disputes Tribunal involving the late Mue Kyau's family. The proceedings were initiated by the District Officer, Matinyani Division of Kitui District after a meeting with the family and the Tribunal on 28/11/2000. Thereafter the Tribunal in its "**judgment**" dated 29/5/2001 decided as follows:-

"After hearing and going through the statements and evidences produced, this Board concurs with the Clan's decision of 24th and 25th November, 2000 which a copy is hereby attached. We also attach a map showing the parcels of land and a letter appealing for tough measures against Mr Makau Mue who had uprooted the sisals planted to mark the boundaries.

This Board therefore recommends that the clan's ruling be followed viz:-

- i. Makau Mue vacates land parcel No.156 and goes to land parcel No. 560 or 574 whichever suits him. This should be done before or on September 2001.**
- ii. That Makau Mue replants the sisal boundaries he had uprooted.**
- iii. That Makau Mue stops threatening other family members.**
- iv. That the Mue family calls the Land Registrar to sub-divide parcel 156 and transfer the portions to the two wives as earlier mentioned. Parcel No.557 be transferred to Kathuka Mue, one of the two wives."**

2. On 2/8/2001, M.N. Gicheru, Esq, Principal Magistrate read the award to parties and adopted it as a judgment of the court and granted parties 30 days right of appeal to the Provincial Appeals Committee. An application seeking stay of execution of the award was dismissed by the same learned magistrate on 26/4/2002 and there was a further order that the award be obeyed as framed by Makau Mue giving vacant possession to the Respondent namely, "**Mue Family Land Disputes.**" I will return to that entity shortly. I note from the record that Makau Mue did institute an appeal to the Embu Provincial Appeals Committee on 14/8/2001, in any event.

3. On 5/8/2002 parties represented by advocates appeared before Mr Gicheru aforesaid to argue an Application dated 26/7/2002 for orders as follows:-

i. That the court may be pleased to find that the Plaintiff/Respondent in this case is not a legal entity capable of suing or be sued.

ii. That execution in this case was illegal, unlawful and a flagrant abuse of law and procedure.

iii. That the court reviews its order dated 18th July, 2002 and any other order made prior thereto as same were erroneous on the face of the record and the applicant has sufficient reasons and desires same to be reviewed.

iv. That the court makes such other or further orders as the ends of justice may require.

v. That costs of this application be provided for.

4. For avoidance of doubt the orders of 18/7/2002 related to a warrant to M/S Rapid Process Auctioneers directing them to **“put the Plaintiff into possession of (land parcel) number Matinyani/Kalindilo/156”** and to use all necessary force necessary in the circumstances to give active possession to the Plaintiff.

5. On 9/8/2002, the learned magistrate agreed with the Applicant, Makau Mue and in his Ruling rendered himself partly as follows:-

“I find that there are good grounds for reviewing the orders of 18th to be almost a vexatious litigant and has previously failed to comply with court orders as to payment of costs, the fact that he is being evicted from land that he has occupied for long before he has exhausted all avenues available to him is in my view unjust.”

6. The decision dated 9/8/2002 is the subject of this Appeal and at the hearing I posed the question, who or what is **“Mue Kyau’s family Land Disputes”** said to be the Appellant? I also asked **“how did Charles Mang’uye Mue come to be the representative of the so-called Appellant”** when nowhere in the record does he appear as a representative although he swore some affidavits in interlocutory proceedings? These questions are important because they formed part of what was to be determined when the Application dated 26/7/2002 was listed for hearing.

7. The present Appeal in any event is premised on three grounds of appeal viz:-

1. “The Learned Magistrate erred in law and fact by going on appeal on his own order of 18/7/2002, which was based on his own unreviewed ruling of 26/4/2002.

2. The Learned Magistrate further erred in law and fact by issuing two co-current decrees, one dated 21/6/2002 and issued 26/4/2002, and another dated 9/8/2002 and issued 20/8/2002, although reviewing the order of 18/7/2002.

3. That the decree dated 9/8/2002, is not a review of the previous one dated 26/4/2002, and is itself incompetent and bad in law.”

8. I have taken into account submissions by advocates for the parties and I think that the first issue to resolve is the status of the Applicant. I have elsewhere above said something about how the proceedings were initiated. No party specifically filed a claim as is expected under the Land Disputes Tribunals Act. The District Officer, Matinyani did so and in the proceedings before the Tribunal, there is no Claimant or Respondent but certainly there was a dispute relating to the land parcels in the names of the late Mue Kyau. When the matter however went to the Magistrate’s Court the Plaintiff was registered as **“Mue Kyau’s Family Land Dispute”** and the Defendant as **“Makau Mue”**. I have elsewhere above reproduced the **“judgment”** of the Tribunal which was more coherent than the titles of the Plaintiff (now Appellant). Order 1 of the Civil Procedure Rules which is applicable upon an award being brought for enforcement by court presupposes that parties to any suit are **‘legal persons’** and that is a basic requirement in any litigation. In this case, there is no legal personae called **“Mue Kyau’s Family Land Dispute.”** The anomaly cannot in any event be cured by introducing Charles Mang’uye Mue as representative of the dispute at the appeal stage only. Having so said I am well aware of the provisions of Order 1 Rule 10 which provides as follows:-

“10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

9. Having set out the background to the proceedings and mistake, I think that the justice of the matter demands that I should not strike out the Appeal for that reason alone because clearly the mistake was innocent. The answer would lie in accepting that **“Charles Mang’uye Mue is the Appellant as representative of the family of the late Mue Kyau.”**

10. The other matter to consider is whether there were good reasons to review the orders dated 9/8/2002. Review is provided for by Section 89 of the Civil Procedure Act which provides as follows:-

“80. Any person who considers himself aggrieved-

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

11. Order XLIV Rule 1 (1) of the Civil Procedure Rules then specifies the grounds for seeking a review as:-

i. discovery of new and important matter or evidence, which, after exercise of due diligence, was not within the Applicant’s knowledge or could not be produced by him at the time when the decree was passed or the order made;

ii. mistake or error apparent on the face of the record;

iii. any other sufficient reason.

12. I have perused the Application dated 26/7/2002 together with the Supporting Affidavit sworn on the same day by Makau Mue. Although (i) above was specifically relied upon I see no evidence at all of that issue but at paragraph 16 thereof the said Makau Mue depones as follows:-

“That the orders made in this case leading to the purported eviction ought to be reversed and set aside in the interests of justice.”

13. I would take it that the Respondent was invoking (iii) above to argued that there is sufficient reason to review the order of eviction of the Respondent. Nyarangi J.A. in **Kimita vs Kibiru (1985) KLR 317** took the view following **Sadan Mohamed vs Chasan Singh (1959) E.A 793** that there “was ...no reason why other sufficient reason need be analogous with the other grounds in (Order XLIV Rule 1 (1)) because clearly Section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words **“for any other sufficient reason”** need not be analogous with the other grounds specified in the order...”

14. If that expresses the approach to the issue, the reasons given for the order of review were that there were orders in **PM’S Succ. Cause No.97 of 1998** granting the suit land to the Respondent and three others and therefore the Tribunal or the subordinate could not grant other orders to supersede those orders. That the Respondent stood to suffer irreparably if the eviction order was executed. Are these reasons sufficient to have led to the review of the order of eviction?

15. The Appellant as now described argued that there were in fact no orders capable of being reviewed because a **“warrant”** is not an order. That if at all, the order to be reviewed was the order issued on 26/4/2002 and which led to

the warrant being issued. I have considered that issue and my mind is as follows:-

Section 80 of the Act and the rule relevant to the issue refer to review of “**a decree or order from which an appeal is allowed “or” a decree or order from which no appeal is allowed.**” “**Order**” is defined in Section 2 of the Act as “**the formal expression of any decision of a court which is not a decree, and includes a decree nisi.**” “**Decree**” on the other hand, is defined to mean the “**formal expression of an adjudication, which...conclusively determines the matters in controversy in the suit...**” and includes a judgment whether final or preliminary. It is indeed true that what was sought to be reviewed in this case was a “**warrant.**” Is a “**warrant**” an order? A warrant to give possession of land is issued pursuant to Order XXI Rule 30 of the Civil Procedure Rules and is in form No.9 in Appendix D to the Rules. It is a direction to the bailiff to put effect to a decree issued in a matter and is in that sense not a formal expression of a decision of the court and is not an order of court for that purpose. I say this because so far as I know one cannot appeal against a warrant per se but against the order or decree that gave rise to the warrant. It is therefore quite right to argue that the Application for review before the subordinate court was incapable of leading to an order for review. Having so said there is one other matter; the prayer for review was worded as follows:-

“That the court reviews its order dated 18th July 2002 and any other order prior thereto.”

16. Can the addition of the words “**any other order prior thereto**” save the situation? I think not. In this case there were more than three orders made prior to the warrant. Which one was being sought to be reviewed? I cannot speculate and the Application was incapable of being addressed at all in light of that ambiguity.

17. I should say something else; suppose the warrant was capable of review, and I have said it is not, what happens to the order of 26/4/2002 which specifically ordered eviction of the Respondent. Without addressing that order, the purported review of the warrant was still ludicrous when the specific order giving effect to it remained alive.

18. I have attempted to show that the Appeal has merit but whatever orders I will make must bring the dispute before me to some lawful conclusion. I say so because I have been pointed to two different proceedings which may or may not have been concluded. There is the Appeal by the Respondent to the Provincial Appeals Committee. I would want evidence about its status before I give further orders in this Appeal. There is also the **PM’S Succ. Cause No. 97/1998 (Kitui)**. I would equally require evidence as to its status before I can conclude this Appeal. I am making these orders pursuant to Section 78 of the Civil Procedure Act.

19. Pending the final judgment therefore, I will order evidence as above and in the meantime status quo to be maintained.

20. Orders accordingly.

Dated and delivered at Machakos this 22nd day of **September** 2008.

ISAAC LENAOLA

JUDGE

In presence of: Appellant in person

Respondent in person

ISAAC LENAOLA

JUDGE