

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 52 of 2001

COSMAS LIGAKA AMOI APPELLANT

V E R S U S

EBUNG'ANYA BAPTIST CHURCH

EBUNG'AYA PRIMARY SCHOOL RESPONDENTS

R U L I N G

The parties herein recorded a consent on 4/4/06 through their respective advocates requiring the court to determine the application dated 10/1/06 and deliver a ruling thereon on the basis of the pleadings and evidence or material before it.

The application dated 10/1/06 (“the said application”) was presented to court on 11/1/2006 by Cosmas Amoi Ligaka (“the appellant”) against Ebung’aya Baptist Church (the 1st Respondent) and Ebung’aya Primary School (the 2nd respondent) seeking orders

(a) “that Andrew Atswenje Murambi, Juma Oloo and Jones Etole, the Chairman and Secretary respectively of the Respondents do show cause why the church and school property should not be attached for disobedience of court orders” and (b) “that in the alternative the said Chairman and Secretary respectively do show cause why they should not be committed to prison for a term not exceeding six (6) months for disobedience of lawful court order.”

On 29/5/2001, the Western Province Appeals Committee on Land disputes set up under s.91 of Act 18 of 1990 after hearing a dispute between the applicant and the respondents made a decision that the land known as Butsotso/Indangalasia/888 belongs to the Ebung’aya Church. It was against this decision that the applicant appealed to this court in the appeal herein.

On 15/11/2005 a consent order was recorded by the parties to the effect that an interim order do issue in terms of prayer (II) of the application dated 19/10/05 pending its hearing on 6/2/06. The terms of the consent order in prayer (ii) of the application dated 19.10.05 were couched in these terms:-

“That this honourable court be pleased to order an injunction restraining the Respondents herein by themselves, their agents, servants and/or anybody acting for or on their behalf from interfering with the quiet and peaceful occupation of the applicant on parcel of land better known as L.R. No. Butsotso/Indangalasia/887 pending the hearing and final determination of this application.”

The application dated 19/10/05 came up for hearing on 7/3/06 and was adjourned sine die. Up to now it has not been heard.

On 11/1/06, the applicant filed the said application (dated 10/1/06) seeking the orders aforementioned and on 4/4/06 Mrs. Osodo, learned counsel for the applicant and Mr. Mukavale, learned counsel for the respondents, recorded the aforementioned consent, that a ruling be delivered on the said application (dated 10/1/06) on the basis of the material before the court.

The order of 15th November, 2005 was directed against the respondents, namely, Ebung’aya Baptist

Church and Ebung'aya Primary School or their agents, servants and/or persons acting for or on their behalf. I am not sure that the suit in the lower court could be brought against the respondents in the manner that it was. But no matter. The affidavit in support of the application sworn by Cosmas Ligaka Amoi seeking the orders for committal of the Chairman and Secretary did not show the names of the chairman and secretary of the respondents nor did it name the persons served with the consent order. The affidavit of service sworn by Zablon Ochieng Senge on 16/12/05, a process server, however did. The persons cited, namely Andrew Atswenje Murambi, Juma Oloo and Jones Etole filed affidavits in reply and while Jones Etole denied service of the order on him, the others contended that the constructions they were carrying on were on their (Church's) land No. Butso/Indangalasia/888 and not on land title No. Butso/Indangalasia/887 referred to in the order.

While neither respondent has a legal entity, none of the officials of the church or the school named was named either by name or by office in the application dated 19/0/2005. The order made on 15/11/2005 was directed to these two non legal entities and their unnamed agents. The fact that both counsel are in agreement in the consent as to who the officials of the church and the school are for the purpose of the question they seek to have determined does not alter either the pleadings, or the order said to have been disobeyed which do not reflect the offices or names of officials who are enjoined to obey the order. The order required a person to do or abstain from doing the act in question. A copy of the order required to be served on the legal entity in the manner provided by law and on the officials of the church and of the school. The trustees of the church and the trustees of the school ought to have been the litigants and not the unincorporated bodies which were not capable of being sued or served. Notwithstanding the consent, it is my finding that the order was not capable of being breached by the respondents or the persons referred to in the consent. It is significant that a court order in contempt proceedings against legal persons or bodies must be shown to have been served on the body's officials personally.

I observe that the order exhibited in this case did not contain penal notice as required. For these reasons I am unable to find commission of contempt by either the named church or school or the persons referred to in the consent order. In the circumstances, I dismiss the application dated 19/10/2005. Each party shall bear its own costs.

Dated at Kakamega this 15th day of February, 2007.

G. B. M. KARIUKI

J U D G E