



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 8 of 1997

NELSON NAMASWA & SEVEN OTHERS.....PLAINTIFFS

V E R S U S

JAMES WANYAMA & 3 OTHERS.....DEFENDANTS

(ELDORET H.C.C.C NO.167 OF 1989)

R U L I N G

The application before me was brought by way of a Notice of Motion, pursuant to Sections 3, 3A, 34 and 80 of the Civil Procedure Act, as read together with Order 44 rule 1 of the Civil Procedure Rules. It seeks two substantive reliefs, being;

- (i) *Suspension of the Decree issued on 25/11/2005; and*
- (ii) *The recall and review of the Decree, as there was a mistake or error apparent on the face of the record.*

According to the applicants, the learned trial judge had ordered for the subdivision of the two properties which were the subject matter of the suit, in such manner as would give to each of the nine families cited, a total of 114.09 acres. Five other persons were also given portions of the said properties, but in varying sizes, as particularized in the judgment of the court.

More significantly, the applicants say that the learned trial judge did order that a total of 15 acres would be set aside for public utilities, in the following proportions;

- (a) *School - 10 Acres*
- (b) *Roads – 4 Acres; and*
- (c) *Cattle Dip – 1 Acre.*

Whilst each allottee was to pay his/her own survey fees, the court ordered that the costs for the survey of the public utilities were to be shared equally by members.

In order to facilitate the process of survey, the defendant was supposed to surrender the original title documents. However, the applicants complained that the defendant had not complied with the order of the court, requiring him to surrender the title documents.

Secondly, the applicants complained that in the Decree issued by the court, there was no provision for the public utilities. Therefore, if the process of survey were to proceed to finalization, the applicants submit that that exercise would constitute an illegality, as it would be tantamount to a contravention of the judgment of the **Hon. Nambuye J.**

None of the defendants filed any affidavit in reply to the application. Also, there were no grounds of opposition. In effect, the issues of fact, raised by the affidavit of Joash Kisiang'ani Wanyonyi, were uncontroverted.

Furthermore, although the date for the hearing of the application was fixed with the consent of the said defendants, neither of them attended court on the material day. Accordingly, no submissions were made to counter those of the plaintiffs.

But, in any event, I have perused the judgment which was delivered on 2/11/2004, by the **Hon. Gacheche J.**, on behalf of the learned trial judge. It is clear from the said judgment that although there had been a suggestion that 11 acres be set aside for public utilities, the court exercised its prudence, and increased the acreage to be set aside for the public utilities to 15 acres. In so doing, the court observed that there was need to allow room for the expansion of the school. Accordingly, the school was given 10 acres, whilst the road was given 4 acres, and the cattle dip was allocated 1 acre.

Clearly, as the Decree issued on 25/11/2005 does not make provision for the public utilities, it is not an accurate formal expression of the judgment of the court. For that reason, the application is well merited. Perhaps, it was because the defendants did appreciate that fact that they decided not to contest the said application.

In the result, the Decree issued on 25/11/2005 is hereby recalled and cancelled, on account of the error apparent on the face thereof. The parties are to draw up an appropriate decree, which they will then forward to the learned Deputy Registrar for issuance. In the event that the parties are unable to agree on the wording of the Decree, the court will draw up the Decree, in accordance with the Civil Procedure Rules.

The cost of the application are awarded to the plaintiffs.

Dated and Delivered at Kitale, this 29<sup>th</sup> day of October, 2007.

**FRED A. OCHIENG**

**JUDGE**