REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 6898 of 1991

KAMUTHI FARMERS CO-OPERATIVE SOCIETY LIMITED …PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL …….....…….DEFENDANT

R U L I N G

(1) On the 29th November 1993, just over thirteen years ago to be exact, Aluoch, J entered a consent order in this case in the following terms:

"1. That the parties hereby agree that a formal survey of L.R. No.71/1 be undertaken with a view of sub-dividing the same into two portions of 154.50 acres in favour of the Defendant and 260.50 acres in favour of the Plaintiff respectively.

2. That the parties do agree on a surveyor to undertake the sub-division.

3. That the costs of the surveyors be shared equally among the parties.

4. That the 154.50 acres sub division be on the portion that the Defendant has occupied and erected residential houses.

5. That pending the sub division the Defendant undertakes not to make any new plot allocations.

6. That this matter be mentioned on the 17th day of February 1994 for further orders".

(2) The case was mentioned on the 17th February 1994 and on a number of occasions subsequently but no further orders were made. It would appear that the parties were not able to agree on the manner the survey was to be conducted.

(3) On the 10th November 2005, the Defendant took out a Notice of Motion under section 98 of the Civil Procedure Act seeking an order that the Registrar do execute transfer documents pertaining to the transfer of Plot L.R. No.71/7/1 to the Defendant and to execute all necessary documents conveying ownership of Plot L.R. No.71/7/1 to the Defendant.

(4) These orders are sought on the basis of the consent order made by Alouch, J on the 29th November 1993. In paragraph 5 of the supporting affidavit dated the 7th November 2005 sworn by Mary Ngechi Ng'ethe, the Deputy Town Clerk of the Defendant in charge of Legal Affairs, she deponed that the consent order as recorded settled the matter as between the parties as regards ownership of 154.7 acres. She also deponed that the suit land has been surveyed in accordance with the court order but the Plaintiff

has refused to execute the transfer.

(5) The replying affidavit dated the 20th February 2006 was made by Bernard Kung'u Maina, the Chairman of Kamuthi Farmers Co-operative Society Ltd. (the Plaintiff). It is a very long affidavit of some 25 paragraphs. In it, he says that under the terms of the consent order, the suit land was to be divided into two portions of 154.50 acres and 260.50 acres respectively. That after the survey it has been established that the Defendant has taken some 21.97 acres over and above the 154.5 acres granted by the court. The Plaintiff also complains that in breach of the terms of the order, the Defendant continued to make new plot allocations.

(6) It is clear from the foregoing that there are serious disagreements between the parties over the precise terms of the consent order. Under the terms of the order the Defendant was to get 154.50 acres and the Plaintiff 260.50 acres. The Plaintiff now says that the Defendant has exceeded its acreage by some 21.97 acres. This is in turn denied by the Defendant who maintains that there is no dispute over Plot L.R. No.71/7/1.

(7) A point has now been reached in this case where what was intended to be a consent order has turned out to be a hotly disputed order. Obviously, Aluoch, J had intended that after the survey had been undertaken, further orders would be necessary but this was not to be. There were outstanding matters which the parties were required to deal with and agree on but they failed to do so. The result of that failure is that the Plaintiff is now demanding from the Defendant the sum of K.Shs.45,000,000/= for the 21.97 acres, which obviously cannot form part of the consent order and is completely beyond the scope of the order.

(8) It is clear to me that the Defendant is treating the consent order as a final decree in this case. No copy of any such decree has been produced. If any decree had been issued by the court, I would expect it to have been among the documents placed before me in this application. There is no stipulation in Hon. Lady Justice Aluoch's order that if either party refused to execute a transfer, the Registrar should be asked to do so.

(9) It must also be borne in mind that the application in which the consent order was recorded was the Plaintiff's application for injunction by way of the Chamber Summons filed on the 17th December 1992. That much is clear from the order itself.

(10) The Defendant says it has allocated plots to third parties who have developed them and that the Defendant is now under pressure from these allotees to issue individual titles. That is what happens when one purports to sell what one doesn't have. But that is not an issue I have to take into account in deciding this application.

(11) For the reasons I have given, the Notice of Motion dated the 7th November 2005 and filed on the 10th November 2005 must fail and I order that it be and is hereby dismissed with no order as to costs. Since both parties are represented by learned counsel, I do not need to offer any guidance as regards the way forward. The Advocates must be taken to know what to do with a disputed consent order.

Dated and delivered at Nairobi this Fifteenth day of December 2006.

P. Kihara Kariuki

Judge