



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 235 of 1992

NDUME NTUIRU & 53 OTHERS PLAINTIFFS

VERSUS

CATHOLIC DIOCESE OF MERU

& GATUNGA CATHOLIC MISSION DEFENDANTS

RULING OF THE COURT

The application before me is the Notice of Motion dated 14.3.2003. The same is expressed to be brought under Order 50 Rule 1 and Order 20 Rule 7 of the Civil Procedure Rules, Sections 3, 3A, 99 and 100 of the Civil Procedure Act, and all enabling provisions of the law.

The application seeks an order of stay of the execution of the decree herein; an order amending/correcting the decree herein and such other further orders as the court may deem fit. The applicant prays that the defendants/respondents do bear the cost of this application.

The application is premised on five grounds on the face thereof, namely:-

- (a) The decree as drawn by the defendants' advocates is defective and misleading.
- (b) The decree as drawn is invalid and of no effect as the same was not drawn in accordance with the provisions of the law.
- (c) The decree as drawn is not enforceable as the same is not a true reflection of the outcome herein. (d) The defendants have sought to enforce the said decree to meet their selfish ends at the detriment of the plaintiffs.
- (e) The decree as drawn well (may be meant is a well.....) calculated move to defeat the ends of justice.

The court could not make out what ground (e) above means, nor did counsel for the applicant endeavour to shed some light on it during the hearing of the application.

There is also a supporting affidavit made and sworn by Ndume Ntuiru on his own behalf and on behalf of the other plaintiffs. In the said affidavit, it has been deponed that the suit herein is substantially finalized. That the defendants and/or their advocates have proceeded to extract a misleading decree as per annexure marked "NNI" in that the said decree is not a true reflection of the outcome of the suit. That the defendants have gone ahead and used the defective decree to have the applicants forcefully evicted with the help of the OCS Gatunga Police Station. That following the reference of this case to the DC Meru, for

arbitration, an award which was read and confirmed in court on 27.4.95 and 14.12.95 respectively became judgment of the court. That the award which was made was ambiguous, thereby leading the parties to the consent dated 8.10.96 for the District Land Surveyor to confirm the actual measurements of the land on the ground, which confirmation showed that the plaintiffs occupied 82 acres. That subsequent court rulings were clear that eviction of the plaintiff's would be with regard to the 82 acres only and not the entire parcel of land and that a fresh decree should be drawn to reflect the ruling of the court dated 26.6.97 so as to avoid abuse.

From the outset, I would like to point out that this is a matter that has been canvassed many a time before the court. My last ruling in the matter was given on 20.1.2005. In that ruling I made the following remarks as I concluded the ruling:-

“Record shows that on the subsequent mentions, it was recorded that parties were unable to agree. My own reading of the learned judge’s comments after he had dealt with and determined the application before him is that those comments were not meant to affect the judgment of the court on the actual acreage found to be occupied by the parties when the survey was done. Those remarks should therefore not be seen to suggest that the suit was open to or for fresh hearing.

The parties’ advocates are therefore urged to let this matter rest unless one is moving to the court of appeal.”

Yet, before the coals have gone out over that ruling, the parties are once again before me.

As the applicants have rightly stated this matter is concluded. I did set out in considerable detail the facts of this case in my ruling dated 20.1.2005, and it is my view that it is not necessary to do so again at this stage.

The applicants’ application is opposed vide the replying affidavit sworn by Fr. Andrew Mbiko who is the Administrator of the Catholic Diocese of Meru and who has deponed that he is well versed with the facts of this case and is also duly authorized by the father in-charge of Gatunga Parish to make and swear the affidavit. It has been deponed that the applicants’ present application is an abuse of the court process on the ground that the arbitration award dated 25.4.1995 found that the 180 acres of land all belonged to Gatunga Catholic Mission of the Diocese of Meru. He has deponed further that the decree issued on 26.8.1997 by this honourable court squarely and properly reflects the confirmed award and that there are no ambiguities in the said decree.

I have carefully considered all the pleadings in this case and the many orders that have been made herein subsequent to the orders of 14.12.1995. I will refer particularly to the consent orders of the parties dated 8.10.1996 which led to the surveyors report filed in court on 2.1.1997. It is a fact that when the surveyor appeared before Hon. Mr. Justice Etyang after the filing of the survey report on 2.1.1997, the surveyor confirmed to the court that his findings on the ground were that the defendants occupied 82 acres out of the suit land while the plaintiff’s occupied 98.82 acres. In my ruling dated 20.1.2005, I made a finding that the parties consent order of 8.10.96 and the subsequent surveyors report filed on 2.1.1997 was to give meaning to the award by the elders

dated 25.4.1995, which award was confirmed by the court on 14.12.1995. It was on that basis, that I set aside the order of 1.10.2002, thereby paving the way for the consent order of the parties dated 8.10.1996 at fortified by the surveyors report filed in court on 2.1.1997.

In essence therefore, it is not true that the Gatunga Catholic Mission of the Meru Diocese owns the whole of the 180 acres comprising the suit land. The record clearly shows that the defendants own and occupy 82 acres out of the total while the plaintiff’s own 98.82 acres. In this regard, I find that Fr. Mbiko’s affidavit does not reflect the true position of the orders of this court made subsequent to 14.12.1995. The defendants were parties to those subsequent orders.

Secondly, I find that because of the misconception held by the defendants as reflected by the contents of Fr. Mbiko's affidavit the decree as drawn does not reflect the position as contained in the surveyor's report duly filed in court on 2.1.1997. The orders made subsequent to the filing of that report cannot be ignored.

In the result, I would allow the applicants' application dated 14.3.2005 in terms of prayer (3) thereof to the extent that the decree dated 26.8.1997 be amended to show that any persons squatting, farming or grazing on the 82 acres belonging to the Gatunga Catholic Mission should move out so as to enable the diocese to go ahead with their development plans for the benefit of the community. The record is clear that 98.82 acres of the suit land belong to the plaintiffs.

I make no order as to costs. The revised decree should be approved by both parties.

It is ordered accordingly.

Dated and delivered at Meru this 28th day of July 2005

RUTH N. SITATI

JUDGE

28.7.2005