REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 1011 OF 1998

JOHN KIRAITHE MUGAMBI …….....
…….PLAINTIFF/APPLICANT

VERSUS

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT…….……..1ST DEFENDANTRESPONDENT

DISTRICT LAND ADJUDICATION OFFICER, NYAMBENE……...…….2ND DEFENDANT/RESPONDENT

CHAIRMAN, KIANJAI LAND ADJUDICATION COMMITTEE…….....…..3RD DEFENDANT/RESPONDENT

BERNARD MWENDA……...……...…….....……..4TH DEFENDANT/RESPONDENT

RULING

The plaintiff's Chamber Summons dated 19th July, 2000 and filed on 24th July, 2000 was brought under Order VI, rule 13(1)(b),(c) and (d) of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21). The prayers in this application are for orders as follows:

(i) that, all the defendants' defences be struck out as being scandalous, frivolous, vexatious and an abuse of the process of the Court;

(ii) that, interlocutory judgement be entered in respect of general damages, costs, incidentals and interest at bank rate of 35% calculated on a daily basis until payment in full;

(iii) that, the suit be set down for formal hearing and for the purpose of assessing damages.

The basis of the application is the plaintiff's suit of 4th May, 1998 in which he prays for -

(a) stay of the implementation of land consolidation provisions;

(b) orders that the demarcation of land parcel No. 115 Kianjai belonging to the 4th defendant in the plaintiff's ancestral land while the area comprising parcel No. 115 was fragment gathered from other areas is unconstitutional, contrary to the Judicature Act (Cap. 8) and the Land Consolidation Act (Cap.283), and null and void;

(c) orders that the defendants jointly and severally remove the demarcation of parcel number 115 where it is, and re-demarcate it at any other place in Kianjai

The plaintiff/applicant's grounds in support of the application run to 22 paragraphs, and cover a length of 10 close-print pages This inordinate length is to be deprecated; for it is, I believe, well-recognised that the purpose of grounds in support of an application is no more and no less than to specify the general rationale upon which the application is premised. Therefore, I will state as a matter of legal principle, that whereas every application will have its unique requirement as to the format of the supporting grounds, the applicant is in all cases under duty not to obscure the general foundation of his motion through prolixity in the specification of supporting grounds. These grounds must be stated in a broad and general-enough mode, to show clearly the basis that justifies the application. The statement of grounds must not degenerate into confounding issues at that stage with evidentiary matter (which can only properly come from a deponent), or with the submissions of counsel which can only come at a subsequent stage when the Court has taken the depositions into account.

Upon a careful scrutiny of the lengthy grounds stated in this application, I have come to the conclusion that they are no more than an elucidation of the prayers set out in the plaint of 4th May, 1998. The applicant advances as a ground the assertion that all land, piror to land consolidation and adjudication, is held under the common law and under customary law, and that such prior land-holding is valid and protected under sections 75, 115 and 116 of the Constitution, for the benefit of "persons who are ordinarily resident in the area"; and therefore the process of land adjudication and consolidation relating to Land Parcel No. 115 Kianjai, by pushing the plaintiff into alien and inhospitable areas, was unconstitutional, being contrary to the protections of ss.75, 115 and 116 of the Constitution. It is stated that the Constitution of Kenya (ss.75, 115 and 116), the Land Adjudication Act (Cap. 283) and the Land Consolidation Act (Cap. 284) require that the customary law on land be followed, and the Department of Land Adjudication has no discretion to depart from that prescription of the law.

In the supporting affidavit of John Kiraithe Mugambi sworn on 18th July, 2000 it is deponed that Land parcel No. 115 Kianjai, belonging to the 4th defendant had been measured in Mbututia, a swampy area, and then re-constituted elsewhere on dry land, where it displaced another parcel, No. 4685 to a different area, a Njuri Ncheke oath area. It is averred that Parcel No. 115 Kianjai displaced Parcel No. 4685 belonging to the plaintiff, shifting it to part of the Nthenge Oath area which the plaintiff was customarily not allowed to occupy; with the consequence that the said land is of no use to the plaintiff.

The deponent avers that the Land Adjudication Officer had on 2nd October, 1991 heard Objection No. 1972; and it was ordered that the 4th defendant's Land Parcel No. 115 be moved out of the plaintiff's land and be demarcated elsewhere. Objection No. 799 against the 4th defendant was dismissed on 3rd February, 1995 for the reason that the earlier decision (of 2nd October, 1991) had determined that he be relocated to another land. But the earlier objection (No. 1972 of 2nd October, 1991) was then re-heard on 7th April, 1995; and the outcome was that the 4th defendant's Parcel No. 115 Kianjai was returned to the plaintiff's land. It is the outcome of this re-hearing, the deponent avers, which led to the suit herein. It is further deposed that the 4th defendant was, on 11th June, 1996 summoned by the Land Adjudication Committee to attend a hearing in connection with the demarcation of Parcel No. 115 but he declined to attend. On 6th September, 1996 the Director of Land Adjudication authorised the District Land Adjudication Officer to issue a letter of consent to have this land demarcation dispute settled in a Court of concurrent jurisdiction where the 4th defendant can be compelled to attend Court. And on 4th November, 1996 the plaintiff was issued with the Land Adjudication Officer's letter of consent to file suit in the High Court for the determination of the issues in dispute – and this to enable the plaintiff to escape the customarily acknowledged harm that may flow from the Njuri Ncheke oath. The deponent stated his prayer that the Court do order Land Parcel No. 115 to swap places with Land Parcel No. 4685 because the 4th defendant is not a party to the Nthenge Oath and can comfortably live on the parcel of land currently demarcated as Land Parcel No. 4685.

Prior to the fixing of a hearing date for the Chamber Summons of 19th July, 2000 the plaintiff had won interlocutory judgements against the 3rd and 4th defendants (13th August, 1998), and against the 1st and 2nd defendants (24th February, 1999); but these were set aside by Mr. Justice Amin (1st February, 2000) who, on 29th January, 2001 recorded a consent that the Chamber Summons be listed for hearing. This was restated in orders by Mr. Justice Visram on 25th April, 2001 and 7th June, 2001. A consent order was recorded on 7th June, 2001 that: "As there is no replying affidavit, defence counsel will [make

submissions] only on points of law." The matter was on that occasion stood over generally "parties had recognised that there may be possibilities of resolving [the] matter." Settlement, however, did not take place; and on 25th January, 2002 the date 4th March, 2002 was fixed for a hearing. It was later re-listed for 19th June, 2002 when hearing took place before Mr. Justice Mbito.

In his submissions learned counsel for the plaintiff, Mr. Ritho, urged that the customary law which upheld the Ntenge Oath must be upheld in land adjudication, and so it was wrong in law to relocate the plaintiff's land to an area subject to that oath. He sought to rely on s.3(2) of the Judicature Act (Cap. 8) which stipulates that:

> The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

Counsel also invoked s.7(2)(c) of he Land Consolidation Act (Cap.283) which provides that the Adjudication Officer may declare adjudication sections (s.7(1) and in that event, he (s.7(2)(c))

> "shall fix a period ….within which any individual person claiming any right or interest in any land within the adjudication section is required to present his claim thereto to the Committee, either in person or by representation according to African customary law…."

Mr. Ritho submitted that the customary belief regarding Nthenge Oath land and the injury which would come to the plaintiff if he used land falling thereunder, was in no way repugnant to justice and morality. He urged that this principle was the foundation of the plaintiff's case, to which the defendants had no valid defence.

Learned counsel for the defendants, Ms. Odingo and Mr. Muciimi-Mbaka urged that a defence could only be struck out if it was scandalous or would embarrass the fair trial of the suit; it was contended that the plaintiff had not satisfied the requirement of this test. Ms. Odingo noted that the bare fact of the filing of the defences, and there being a reply to the same, entailed that issues had been well and truly joined, and the rational course was nothing but the full trial, with oral evidence being adduced in Court. The fact that copious documentation had been annexed to the application indicated that factual positions were not obvious until oral evidence had been produced.

Learned counsel, Mr. Mbaka, was in agreement with Ms. Odingo, that the defences did raise triable issues. Mr. Mbaka submitted that since the plaintiff's case was founded on customary law, which was required to be proved as fact, it followed that this case was not for terminating at the threshold, through a striking out of defences; an opportunity must be created in normal hearing, for oral evidence to be adduced in proof of he customs relied on. He urged that the application be dismissed with costs, and the suit fixed for hearing.

My brother Judges before me have consistently taken the position that the suit herein is one to be heard and determined in the normal manner, and even interlocutory judgements favouring the plaintiff entered at the beginning were set aside.

I am giving the instant ruling by virtue of Order XVII, rule 10(1) of the Civil Procedure Rules which provides:

> "When a judge is prevented by death, transfer or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down … as if such evidence had been taken down by him or under his direction… and may proceed with the suit or application from the stage at which his predecessor left it."

From the documentation on file and from the record taken by the several Judges before whom this

matter came (***Amin, Aganyanya, O'Kubasu, Mulwa, Ole Keiwua, Visram, Ombija, Hayanga, Mbito and Lenaola, JJ***) it is clear that fundamental justifications for moving the Court are lodged in constitutional rights and in customary law. Claims founded in the Constitution are for ever controversial, liable to be strongly contested and, without doubt, not the matter in most cases for disposal in limine. The position with customary law claims is not any different. For it is now part of the jurisprudence of Kenya's superior Courts that customary law propositions must be proved by evidence. Such evidence – and I am here in agreement with learned counsel for the respondents – can only be adduced during full trial. It follows that a party such as the plaintiff herein, who makes claims founded on the Constitution and on customary law, is for practical purposes under obligation to look to the full trial as his real forum of redress; which is fair enough, as it serves both plaintiff and defendant.

Against this background of analysis, I must dismiss the plaintiff's Chamber Summons application of 19th July, 2000,.and specifically make orders as follows:

1. The plaintiff's prayer that the defendants' defences be struck out as scandalous, frivolous, vexatious and an abuse of the process of the Court, is refused.

2. The plaintiff's prayer that interlocutory judgement be entered in his favour, is refused.

3. The plaintiff's prayer that the suit herein be set down for formal proof, is refused.

4. The plaintiff shall bear the defendants' costs in this application, in any event.

5. The plaintiff shall set down the suit for full hearing within 30 days of the date hereof, and a date shall be given on the basis of priority, failing which the defendants have the liberty to apply as necessary.

Orders accordingly.

DATED and DELIVERED at Nairobi this 7th day of October, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Ritho, instructed by M/s. S.K. Ritho & Co. Advocates

For the 4th Defendant/Respondent: M/s. Mbaka, instructed by M/s. Kamundi Mbaka & Co. Advocates; The hon.The Attorney General