REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

-

Civil Case 235 of 1992 (1)

NDUME NTUIRU

WILLIAM NTHENGE

IBRAHIM KITHAKA & 53 …………………..………. …. PLAINTIFF

VERSUS

CATHOLIC DIOCESE OF MERU ……………..…. 1ST DEFENDANT

GATUNGA CATHOLIC MISSION ………….....… 2ND DEFENDANT

RULING OF THE COURT

The application before me is the Notice of Motion dated 30.10.2002 brought under Order XLV Rule 17(2) of the Civil Procedure Rules (CPR) and sections 3 and 3A of the Civil Procedure Act (CPA) and all other enabling provisions of the law. Though the application was filed under certificate or urgency, it has taken a whole two years to be canvassed. In the application the applicants seek three main orders as per prayers 2, 3 and 4 of the application, namely:-

2. There be a stay of execution of the ex-parte orders of 1st October 2002.

3. The ex-parte orders of 1st October 2002 be set aside.

4. All the proceedings in this matter after the award was confirmed on 14th December 1995 be declared a nullity and be set aside.

The application is premised on the grounds that the dispute herein was, on 19th January 1995 by consent referred to the arbitration of the District Commissioner Meru District sitting with four elders two appointed by the parties a piece and secondly that the Arbitrator's award was filed in court and read to the parties. Finally, that the said award was confirmed as a judgment of the court on 14th December 1995 and an appropriate decree issued.

The application is also supported by the affidavit made and sworn by Fr. Chrispine Agunja Omoga the father-in-charge Mukothima Catholic Parish, within Gatunga Catholic Mission. In the affidavit the deponent avers that the dispute herein was by consent referred to arbitration as set out in the grounds on the face of the application. That the reference was done on 14th April 1994 and the dispute was heard by the arbitrator with the assistance of elders and the award made thereat was read in court on 22nd June 1994. That on 19th January 1995, the said award was by consent of the parties set aside as same had not been signed by the elders and secondly because its chairman was the DO and not the DC as earlier agreed. That on same 19th January 1995, the parties again by consent agreed to refer the dispute to the

elders once again and the reference was heard under the chairmanship of the District Commissioner, Meru District. That after the award was read, the plaintiff's/respondents applied to have the award set aside but application was refused by the ruling of Justice C.O. Ongudi dated 12th November 1995. As the plaintiffs/respondents took no action to challenge the ruling of Justice Ongudi dated 12th November 1995, the defendants/applicants applied for judgment in their favour in terms of the arbitrators' award and thereafter a decree was duly extracted. That in view of the provisions of Order XLV Rule 17(2) no further proceedings could be taken in this matter and therefore that all the proceedings taken after 14th December 1995 are per incuriam and should be declared null and void, and especially the orders of 1st October 2002.

The application is also supported by a supplementary affidavit made and sworn by Fr. Andrew Mbiko the Administrator of the Catholic Diocese of Meru and that he has the authority of the father in charge Gatunga Catholic Mission to make and swear the same. Fr. Mbiko has annexed to his affidavit annexture "AMI" – being copy of consent dated 10th February 1994 referring the dispute to the elders and requiring that the District Commissioner chairs the reference. He has also annexed "AM3" – which is a copy of the order dated 12th February 1995 that refused the application by the plaintiffs/respondents to set aside the award. Annexture "AM4" is a copy of the decree dated 14th December 1995 in which judgment was entered in favour of the applicants in terms of the arbitrator's award. Annexture "AM5" is a copy of the court orders dated 26th June 1997.

The application is opposed. The respondents filed a replying affidavit made and sworn by one NDUME NTUIRU, the first plaintiff/respondent herein on 4th December 2002. In the affidavit he depones that the suit was finalized by the court on 26th June 1997 and that the said ruling granted ownership of the portion of land measuring 98.82 acres to the plaintiffs/respondents while the defendants/applicants were granted their portion measuring 82 acres. That the applicant's application dated 5th May 1998 seeking to review the orders of 26th June 1997 was dismissed and that on 1st October 1997, the plaintiffs/respondents fixed the matter for mention for an order marking out the boundaries pursuant to court's order of 26th June, 1997. That there was nothing irregular or unprocedural for substantive orders to be made on a mention date. That in effect, the applicants' application has no merit and should be dismissed for to allow it would cause hardship to more than fifty (50) families living on the land which the applicants seek to have. By a supplementary replying affidavit made and sworn by Ndume Ntuiru on 2nd November, 2004, the deponent avers that the applicants have not come to court with clean hands and that instead of appealing against the orders of 26th June 1997, the applicants have sat on their rights only to come back to court with this present application that seeks to destabilize the peace and tranquility that has existed since the matter was put to rest on 26th June 1997.

The facts of this case are well known to both parties since the case has been going on since 1992. The three plaintiffs herein filed this case on 17.7.92 suing on their own behalf and behalf of 53 others who were said to have an interest in the matter. It was averred in the plaint that the three plaintiffs and all the other 53 people live and occupy the parcel of unregistered land at Marindi Village Gikungi sub-location measuring 300 acres or thereabouts and bordering a parcel of land owned by the defendants but controlled and administered by the Gatunga Catholic Mission. That the plaintiffs were entitled to the land through adverse possession. It was alleged at paragraph 5 of the plaint that during the month of September 1991 and again in June 1992, the 1st defendant ordered the 2nd defendant to enter onto the plaintiff's land and to fence the same and that indeed the 2nd defendant mobilized its workmen/agents and did fence off the parcels of land owned by the plaintiffs thus blocking all the access to and from the plaintiff's parcels of land. That in the process of fencing off the plaintiffs' parcels of land, the defendants also destroyed the plaintiff's crops whose value would be determined at the hearing. The plaintiffs averred that the defendants' acts were unlawful, wrong and had occasioned loss and suffering to the plaintiffs and their families and that despite loud objections and protestations from and by the plaintiffs the defendants had started putting up buildings on the plaintiffs' land. The plaintiffs sought an order of permanent injunction to restrain the defendants by themselves, their agents from interfering with the plaintiffs' parcels of land, order for general damages and costs of the suit. The suit was filed by the firm of MURANGO MWEND & CO. ADVOCATES.

The defendants filed their defence through the firm of MAITAI RIMITA & CO. ADVOCATES on

7.8.92 denying the plaintiffs claims of adverse possession. At paragraph 7 of the defence, the defendants averred that 165 acres of land was donated to them by the Antua-Mbugi clan and that the same was demarcated and fenced, the acreage being 300 acres. The defendants also averred that they had extensively developed the said land by putting up a church, a dispensary, staff houses and a water project and that they were in the process of putting up a bigger church, a big hospital, staff houses, a technical school and had also started a bigger water project. The defendants prayed for dismissal of the plaintiffs' suit with costs.

It is not in dispute between the parties that several applications have been filed in court since then. It is also not in dispute that the case was referred to a panel of elders for arbitration on more than one occasion and as evidenced by the awards, the verdict was always in favour of the defendants. On 11.2.94, the parties filed a consent in court referring the suit to the Meru District Commissioner for arbitration with the assistance of four elders, two appointed by the plaintiffs and two by the defendants. It was agreed the arbitration was to be done within 90 days and award was also to be filed within that same length of time. On 25th April, 1995 the arbitration panel, under the chairmanship of Mr. J.K. Korir District Commissioner read their award and their award/judgment was in these words:-

"In the light of these facts, it is the opinion and decision of the panel members that the land in question as marked on the ground by the elders belongs to the Gatunga Catholic Mission of the Diocese of Meru. The persons squatting therein farming or grazing, should move out so as to enable the Diocese go ahead with their development plans for the benefit of the community, the plaintiffs included………."

The panel proceeded to name the developments which included Mukothima Water Project which they said had stalled because of the dispute, the Mukothima Health Centre which was partially operational and other anticipated projects being a polytechnic, school for the physically and mentally handicapped and a primary/secondary boarding schools.

After this award of 25th April, 1995, the plaintiffs applied to set aside the award, but the application was dismissed on 12th October 1995 and on 14th December 1995, the award was confirmed as a judgment of the court.

The defendants/applicants then filed another application on 13.3.96 seeking an order of eviction against the plaintiffs/respondents from the parcel of land described as Mukothima measuring 300 acres by virtue of the confirmation of the elders award as judgment of the court. The application was not opposed when it came up for hearing on 20th August 1996 and Mr. Justice A.G.A. Etyang allowed the same and issued an order of eviction against the plaintiffs/respondents so as to give the defendants/applicants the benefit of the judgment. The plaintiffs then filed another application for review of the eviction orders issued on 20th August 1996. The same application contained a prayer for stay of execution of the eviction order, which prayer the learned judge granted on 22nd August 1996 and further ordered that the status quo was to be maintained until the hearing and determination of the application. From the records, on 8th October 1996, the parties' advocates appeared in court and recorded a consent in terms of prayer (b) of the Notice of Motion application dated 20th August 1996 and Justice Etyang's order was in these words:-

"(1) By consent, the application by Notice of Motion dated 20.8.96 is granted in terms of prayer (b) thereof. The District Surveyor be guided, in his survey and mapping out of the acreage of the disputed land, by the elders' findings that the land in question is as marked on the ground by the elders in 1958.

2. The District Surveyor to file his report within 60 days from today. Mention on 12.11.96. Costs in the cause."

Prayer (b) of the Notice of Motion application dated 20.8.96 and brought by the plaintiffs was for an order,

"(b) THAT this court to issue an order directing the Meru District Surveyor to mark the

boundaries as marked on the ground and to determine the acreage."

The award of the elders in favour of the defendants was that the land in question as marked on the ground by the elders rightly belongs to the Gatunga Catholic Mission of the Diocese of Meru. No actual acreage was thus given. Consequent upon the consent order of 8th October 1996, the District Surveyor went to the ground and filed his report dated 2nd January 1997. Following some disputes between the parties' advocates concerning the actual acreage occupied by the plaintiffs and the defendants, the District Land Surveyor was summoned to court to clarify the issue and he did give evidence on oath concerning his report dated 2nd January 1997. After the surveyors testimony, the learned advocates asked the court to determine the acreage of the parcels occupied by the plaintiffs and defendants respectively. In his ruling delivered on 26th June 1997 Mr. Justice Etyang made the following orders:-

> **"(1) That the order of eviction would only be against any plaintiff who is living on part of the 80 acres of land computed by the surveyor as being presently occupied by the defendants.**
>
> **(2) That the Notice of Motion dated 20th August 1996 be and is hereby dismissed save for prayer (b) as directed above.**
>
> **(3) That each party bear its own costs."**

Following the orders of 26th June 1997 an application for review was filed on 5th May 1998. The grounds for the application were that the orders made on 26th June 1997 were at variance with the decree/judgment of the court given on 14th December 1995. The defendants/applicants also sought an order evicting the plaintiffs from the disputed land measuring 180.82 acres as shown and indicated by the surveyors report. It is worth noting that the elders award dated 25th April 1995 and which award was confirmed as judgment of the court on 14th December 1995 did not contain details of the acreage of the parcels/portions owned by the plaintiffs and defendants respectively, and it was because of this lack of detail that led to the consent order of the parties' advocates on 20th August 1996 requesting the District Surveyor to survey and map out the acreage of the disputed land. That application for review was dismissed by D.K.S. Aganyanya, J on 1st February 2000. The reasons for dismissing the application were that no grounds had validly been cited to warrant the order of 26th June 1997 by Mr. Justice Etyang being reviewed. The learned judge also agreed with Mr. Justice Etyang that the actual acreage on the ground was 180.82 acres and that the defendants were occupying 82 acres while the plaintiffs were occupying 98.82 acres.

Yet another application by the defendants was filed on 27th February 2002. The same was brought under order 21 Rule 22(1) of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. The applicants sought an order of stay of the orders given by Justice D.K.S. Aganyanya on 1st February 2000 pending the hearing and determination of the applicants'/defendants' intended appeal to the Court of Appeal. The grounds upon which that application was premised were that the applicants were aggrieved by the said ruling and that they were busy preparing the records of appeal. The application was dismissed with costs as being unmeritorious and on the ground that the defendants/applicants had failed to comply with rule 82 of the Court of Appeal Rules. There have been other applications, one such application being the Notice of Motion dated 8th January 2001 filed on behalf of the plaintiffs seeking the following orders:-

> 1. That this honourable court be pleased to make an order directing the District Land Surveyor Meru South District/Tharaka Nithi District to revisit the suit land at Marindi Village within Gatunga Location in Tharaka District and to accurately re-survey the same, clearly boundarymark on the ground to ascertain the land to be occupied and/or owned by the plaintiffs/applicants and that occupied or owned by the defendants/respondents.
>
> 2. That the surveyor to determine and or to ascertain the boundary thereto strictly going by the ruling of this honourable court dated the 26th June 1997.

3. That once the boundary of the suit land is ascertained and/or determined such determination do determine the dispute of the suit land once and for all.

From the records, that particular application has not been prosecuted todate and then there is also this application dated 30.10.02. I have considered the submissions by learned counsels and perused the entire record and shall now deal with each of the three substantive prayers sought by the defendants/applicants.

As regards prayer 2, seeking an order of stay of the order of 1.10.2002, the record shows that on 25.11.2002, Mr. Mbaya for the plaintiff's and Mr. Arithi for the defendants appeared before Hon. Mr. Justice Kasanga Mulwa who had made the orders of 1.10.2002 and they recorded the following order:-

> **"By consent the orders of 1.10.2002 be stayed. Parties to file further affidavits and reply if need be. Service to be effected on Mr. Ondari. Hearing on 10.12.2002."**

During the ex-parte mention on 1.10.2002, Mr. Mbaya for the plaintiffs informed the court that the matter was finalized and that he was asking for the District Surveyor to mark the boundary in accordance with the court ruling dated 26.6.97. If indeed, the said exparte substantive order of 1.10.2002 had not been stayed earlier. I would have granted the applicant's prayer for stay on the strength of the Court of Appeal decision in Civil Appeal No. 28 of 2001 between ATTORNEY GENERAL and SIMON OGULA where the learned judges of the Court of Appeal held that:-

> **"We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no business determining on that date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties which he did not do and moreover gave no good reasons for adopting such a procedure which is repugnant to the administration of justice".**

I wish to note here that the fact that counsel for the defendants/applicants has proceeded to ask for an order on an issue which the record shows has been dealt with would seem to suggest to me that learned counsel is either not conversant with the file and the facts thereon or alternatively wants to come to court for the sake of doing so, thus being vexatious and abusing the process of the court.

After due consideration of the entire record, I would agree with counsel for the applicants that the orders of 1/10/2002 which have since been stayed serve no useful purpose on the record and should be set aside. The record is clear that what that order sought to do was to require the District Land Surveyor to go back to the suit land, carry out a fresh survey and mark the boundaries as per the courts ruling of 26/6/97. The District Surveyor carried out the survey following the consent of the parties advocates on 8/10/1996 and he duly filed his survey report dated 2/1/97. Further than that, the surveyor appeared before Hon. Mr. Justice A.G.A. Etyang and gave evidence on oath verifying his report which showed that his findings on the ground confirmed that the defendants/applicants occupied 82 acres out of the suit land while the plaintiffs/respondents occupied 98.82 acres. That was the desire of the parties, to have the acreage on the ground confirmed so that it could give meaning to the elders award of 25/4/95 which was confirmed as judgment of the court on 14/12/95. For these reasons, I set aside the order of 1/10/2002, which I agree with learned counsel for the applicants was per incuriam. Evidence had been taken and a final decision had been made based on that evidence.

The applicants also seek an order declaring that all the proceedings in the matter after 14/12/95 when the elders award was confirmed be declared a nullity. The applicants have been a party to each of those proceedings except on 1/10/2002 when the case came up for mention and exparte orders which were later stayed and which I have set aside were made. What those proceedings have done is to clarify issues which the parties brought to court, but in the result those proceedings have not changed the judgment of the court in any way. The only issue that has really come up is the one concerning actual acreage occupied by the parties respectively. The applicants were party to the consent order of 8/10/96 by which order the parties sought the assistance of the District Surveyor in surveying and mapping out the actual acreage of

the land in question as marked on the ground by elders. The applicants have not given any valid reasons why those proceedings should be declared a nullity. They have not even told the court that they were party to those proceedings. For that reason, I decline to grant an order to the applicants in terms of prayer (4) of the Notice of Motion dated 30/10/2002

In the result, prayer 2 of the Notice of Motion is incapable of being granted as the order sought to be stayed had already been stayed. Prayer 3 of the application is allowed. Prayer 4 of the application is dismissed. Each party shall bear their own costs.

This is an old case that should be put to rest. Unless any of the parties takes the matter to the Court of Appeal, the parties should be left in peace to enjoy their lives and carry out whatever development activities they may wish to carry out. I also wish to make a comment on the ruling by Justice A.G.A. Etyang dated 1/8/2000. After dismissing the defendants/applicants application dated 27/2/2000, the learned Judge observed: -

> **"There is nothing to stop the Catholic Church of Meru and the Plaintiffs to hold joint consultative meetings with the aid of the Provincial Administration, so that the Church can be given more land by the plaintiffs for further development activities. If this is the wish of the parties then the court can always facilitate it. For this purpose I ask the two advocates to take instructions from their respective clients and to report to court of 19th September 2000. I therefore fix this case for mention on 19th September 2000; before the Resident Judge Meru for further orders".**

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.

It is so ordered.

Dated and delivered at Meru this 20th day of December 2004.

RUTH N. SITATI

AG. JUDGE

20.1.2005