



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 27 OF 2001

CHARLES MUTWII MAVULYA & 2 OTHERS ::::::::::: PLAINTIFF

VERSUS

COUNTY COUNCIL OF MWINGI ::::::::::: DEFENDANT

Coram: J. W. Mwera J.
10 Mrs. Nzei Advocate for Applicant
Mulu Advocate for Respondent
C.C. Muli

R U L I N G

The application for consideration under O. 39 rr. 2, 2A, 3 Civil Procedure Rules and S.3A Civil Procedure Act by the plaintiffs was dated 15.2.2001. By it is claimed that the defendant council has interfered with the plaintiffs' unsurveyed land situated in a place called Mivukoni in Mwingi District. That the interference is by way of parceling out the subject land of about 650 acres with a view to allot plots to 20 people and by that act the plaintiffs houses and developments have been exposed to damage. That this is the land the plaintiffs have always lived on.

Relying on the grounds in the body of the application, the affidavit in support thereof plus the annexures this court was told that the defendant county council was purporting to proceed by way of the Trust Land Act (Cap.188) to dispossess the plaintiffs of their land rights but contrary to the laid down procedure set out under that law and other enabling laws to set apart or take trust land. That the defendant by succession could access 350 acres set aside in 1952, and properly so for a school, market, government camp and dispensary at Mivukoni and not interfere with the plaintiffs 650 acres. Much literature, minutes, government notices dating from 6.12.51 were placed before this court and the same were carefully perused Mrs. Nzei's case is thus condensed.

Mr. Mulu had a contrary view that the council properly got 350 acres in 10 Mivukoni area and that is part of the land it is parceling out with a view to sell to deserving allottees. That after providing land for the market, dispensary, government camp etc as per the GAZETTE NOTICE NO. 1017 of 15.9.52, some remained and that is what his client was dealing with. That it was not one and the same as that claimed by the plaintiffs. However, that if the plaintiffs without authority have trespassed over the land the defendant council has due authority to deal with, they never had any rights there since by 1951 the land was marked as having no previous owner.

This will be a very interesting case when it comes up for hearing. It will involve the Constitution of Kenya, the Trust Land Act and several other Acts which must be viewed together when trust land is to be alienated either by the central government or the local authority. If parties care to look at those pieces of legislation, not only is the process of taking the land set out but also the purposes. Careful reading may reveal that trust land should not be alienated for sale of plots but to reap rents to be applied to the good and benefit of those generally resident in the area of a given county council. Be that as it may.

The court is inclined to issue the injunction sought because, one, the parties seem to have a tussle over two different parcels of land but the map produced could not resolve that or in any way show how each party's case stood. The defendant council exhibited one KKM 10 dated 9.2.2001 and not the one deposited with the District Commissioner's office Kitui on 15.9.52 (see GN 1017 KKM3). It was not shown that the two maps are related or in substance refer to one and the same land. If KKM 10 is used to deny the plaintiffs a temporary injunction and the proof went the other way, the plaintiffs can rightly claim that their homes, properties and whatever were destroyed and other parties have firmly occupied their land. Money can be computed for compensation but to what good with a land owner now pushed to live by the roadside? Very little. Two, it shall have to be resolved by evidence who is occupying which land or who has right over which land. This point may sound as if it is covered by the issue of maps (above). Third, it will not be academic to consider if the county council desires to alienate even the land it has authority over, in the manner and purpose set out by the law.

On the whole the injunction to issue. Each party to hear its own costs. The suit may move to trial.

Orders accordingly.

Delivered on 6th June 2001.

J. W. MWERA

JUDGE