



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 168 OF 1995

KAMAU KAMUNYURU

GITARAGA FARM LTD.....PLAINTIFF

VERSUS

MACHARIA MONGO & 6

OTHERS.....DEFENDANTS

R U L I N G

This is an application by the plaintiffs by way of Notice of Motion under order 50 Rule 1 of the Civil Procedure Rules, sections 3A 99 and 100 of the Civil Procedure act for two basic orders. These are:

“2 THAT the decree given by this Honourable Court on the 12th day of march, 1996 and issued on the same date be amended so as to include parcel L.R. NO. 9835.

3 THAT the subsequent order given by this Honourable court on the 1st day of April 1998 and issued on the same date be amended so as to include parcel Number L.R. No. 9835”

There are three grounds set out in the application upon which the above prayers are founded. These are:

“1. THAT parcel no. L.R. No. 9835 is the main subject of the suit herein.

2. THAT parcel L.R. NO. 9835 was in advertently left out in the court order dated and issued on the 1st day of April, 1998

3. THAT the defendants have now leased the said parcel of land namely L.R. no. 9835 to third parties unknown to the plaintiffs/applicants harvesting trees therefrom to the detriment of the plaintiffs herein.”

There is also an affidavit sworn by one Kamau Kamunyuru described as the first plaintiff as well as a director and the Chairman of the 2nd plaintiff in support of the application. A further affidavit was also subsequently filed by the same deponent.

The said application is opposed by the defendants and their learned counsel has filed grounds of opposition and a replying affidavit. Both learned counsel have also made their respective submissions which I have on record.

Sections 99 and 100 of the Civil Procedure Act provide as follows:-

“99 Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties. 100. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

The above provisions of the law being what the plaintiffs relied on in their application, had to be shown to be applicable to the present case.

It is true that on 12th March, 1996 this court gave judgment in favour of the plaintiffs “on the evidence on record.” In the plaint dated and filed on 19th January, 1995, the pleadings related to parcels of land known as “L.R. Nos. 9836 and 7142/3 within Nanyuki.”

During the hearing of the main suit, Mr Kamau Kamunyuro the first plaintiff gave evidence in support of the pleadings he produced three exhibits but none of those included L.R. No. 9835 which is the subject of this application.

There is evidence that the said Mr. Kamau Kamunyuro applied for and obtained letters of administration of the estate of the late Heinrich Julius G. Laube who is said to have been the registered proprietor of suit properties including the disputed L.R. NO. 9835. Exhibit 1 is the certificate of confirmation of the said grant wherein the several parcels of land have been set out. Conspicuously absent is the L.R. NO. 9835.

The succession cause NO. 1372 of 1993 has featured all along in these proceedings. Indeed it is the grant made and confirmed therein that the plaintiffs lay a claim upon L.R. no. 9835. After the arguments by counsel in this application, I considered it my duty to call for and inspect the original record relating to that grant. I did so under order 13 Rule 6 of the Civil Procedure Rules.

It is true that Mr Kamau Kamunyuro was the applicant therein. He obtained the grant and applied to have the same confirmed. In the affidavit in support of the application for confirmation of the grant there is no mention of L.R. No. 9835. The only logical conclusion is that the said parcel of land was never part of the estate of Heinrich Julius G. Laube. The original certificate of Grant was therefore in conformity with the contents of the supporting affidavit.

In his further affidavit sworn on 9th November, 1999, the same Mr. Kamau Kamunyuro has annexed several documents, among them a copy of the certificate of confirmation of grant which includes L.R. NO. 9835. It does not require an expert to see that L.R. NO. 9835 was added to the original list in the said certificate. In fact the original succession file will show that spirited efforts were made after the grant was confirmed to have the said L.R. 9835 added thereto. Unfortunately, documentary evidence was and still is against that more.

A party is bound by his pleadings. L.R. NO. 9835 was never pleaded and was never part of the subject matter of the suit. A decree flows directly from the pleadings and the judgment. There is no way L.R. NO. 9835 can be slotted into the decree when in the first place it was not in the pleadings and even in the evidence adduced before the court.

This is not a situation envisaged by sections 99 and 100 of the Civil Procedure Act which have been cited in support of this application. To allow this application would be an endorsement of abuse of process of the court.

Accordingly, this application is hereby dismissed with costs to the respondents.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of February, 2000

A. MBOGHOLI MSAGHA

JUDGE