REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 475 of 1995

Mikululo Ranching & another……...…….....……PLAINTIFF

Versus

District Commissioner Makueni District & 2 others…….....…….....RESPONDENT

RULING

On 9th February 2000 the 3rd Defendant lodged a chamber summons of the same date under 06 rr 13, 16 and S 3A Civil Procedure Act for orders that the suit herein be struck out forthwith with costs to the Applicant / Defendant 3. Other prayers for vacating an injunction dated 23rd May 1997 and issuing eviction orders were abandoned at the hearing on the basis that they stood overtaken by events.

The grounds relied on were to that the suit did not disclose a sustainable cause of action against the 3rd Defendant and that the subject land was made part of Chyulu National Park by way of a gazette notice – which course thepresent suit could not challenge; that the Plaintiff had not shown a prima facie case of ownership of the land in question and that it did not come to court with clean hands. And that the suit constituted an abuse of the process of court – hence the prayers. Mrs Owino argued in the same vein, of course with explanations and references to provisions of law and relevant annextures. Mr Makundi opposed this application. What both sides said appears in the determination to follow.

The case whose history is well known to all, involved concerns a certain tract of land lying in an area near/in Makindu Division of Makueni District. While the plaintiff company claims that it has rights over it, the 3rd Defendant in particular avers that this land is part of Chyulu National Park and that the Plaintiff with /or its shareholders are squatters thereon. That they ought to be evicted.

Both sides are agreed that Chyulu National Park is located in the area of Makindu and that by gazette notice NO 180/1995 the said park was extended by 76.0 sq km. It is this area which the 3rd Defendant says the Plaintiff occupies illegally and should vacate. In turn the Plaintiff, at least that is what Mr Makundi said in his submission, insists that its land is far away from the 3rd Defendants area and so the 3rd Defendant should not attempt to evict it plus its members from its rightful land at all. Mr Makundi added that his clients are ready to move out of the park land if a (further) surveys reveals that they are infact within the park land.

From the record, what Mr Makundi desires now, was thought the proper course to adopt as early as 14th November 1997. On that day this court recorded a consent order:

“Ct: By consent the land registrar and district surveyor (Makueni) to visit the land in dispute to be shown the boundaries on the ground whereupon the 2 public officers using their maps determine the dispute there. A report to be filed within 60 days.”

Apparently that order was not extracted and forwarded to those public officers to act on on time. And so the time to do so was extended on 14th August 1998.

At this juncture it may be prudent to remark that earlier on 24th November 1995, the Plaintiff company had sought and obtained what appears to be a temporary injunction issued on 28th November 1995 against the 1st Defendant then, the District Commissioner Makueni who was about to evict the Plaintiff and its members from the subject land. Later when pleadings were amended and the 3rd Defendant was brought in, it is the party now evicting or has evicted the Plaintiff company, whichever the case.

Back to the progress of obtaining a report from the ground by a local registrar and surveyor, the court learned on 23rd October 1998 that, after those officers were served with the court order to visit the land, mark boundaries etc and report back, they had not gone onto the site for some reason or another. It then became imperative to summon them to come to court and enlighten it on the problem. It was not until on 20th November 1998 Mr Joshua Obaye the Makueni Land Registrar appeared in court. He presented a report of 14th May 1998 on the dispute. He explained that the Makueni district surveyor and the district physical planning officer visited the scene and made the report. That the order of court requiring them to carry out that exercise did not add that the litigants be present and so they had not been summoned to the site. Mr Mbithi then acting for the Plaintiffs expressed a view that that exclusion of his clients prejudiced them. Fair enough, the court ordered the Plaintiff to meet the costs and expenses of the said public officers to carry out the exercise again and this time round in the presence of the Plaintiff, if not all litigants. That was done and a report dated 27th January 1999 was availed and read to the parties on 5th March 1999. All this time the Plaintiffs were enjoying the benefit of the orders of 28th November 1995 by which they were to remain on the land in issue.

Then some application of 24th March 1999 was filed. Litigants agreed by consent to set aside the report of 27th January 1999 (by the physical planner and surveyor). That report gave the history of the area as having once been a game reserve where grazing was allowed. But in the 1990 people began to settle and cultivate there. The area had tourist attraction sites which the 3rd Defendant desired to include in Chyulu National Park. Referring to maps and lines marking the extension, the report said that local Kambasa and Maasai herders began to fight over grazing in the area. So gazette notice No 180/95 was put in place. The government then put in place machinery to settle those who had settled in the reserve, now a park, in 1990's in the settlement scheme, adjacent tot he park. Well. NO more needs be said because the parties decided to set aside this report which in essence meant that there were people in the (extended) park who were to be moved out to a nearby settlement scheme. After that setting aside the court ordered the parties to prepare the suit for trial. They attempted settlement. It fell through hence this application by the 3rd Defendant to strike out the suit: There were several adjournments on application by the Plaintiffs when this application came up for hearing. That conduct brought the court to the conclusion that the delaying tactics apparently being employed by the Plaintiff, including ignoring to pay court adjournment fees ordered by the court, was because the Plaintiff was comfortable with the status quo orders of 28th November 1995. They were then vacated on 7th April 2000 to put urgency in the proceedings. Indeed it can be said that the Plaintiff so far has done nothing to move this suit to trial! The court then heard that with the injunction orders gone, the 3rd Defendant moved and evicted the Plaintiff and its members from Chyulu National Park. That hit the Plaintiffs from their sleep and fresh agitation of the case came alive.

Mrs Owino prays that the suit be dismissed because no prima facie case is established by the Plaintiff that either it owns land in the area in dispute or that its suit will produce any relief to it. That no title deed or grants of title, maps etc had been placed before this court as evidence that a sustainable cause exists which this court will ultimately be called upon to determine.

In this court's view at this stage of interlocutory proceedings, the Plaintiff or indeed any party cannot be called upon to produce evidence to support its pleadings and prayers. Striking off a suit is such a drastic measure that it should only be taken in the clearest of cases. This court is not prepared to say so at this point. It may only remark that what Mrs Owino has said ought to be viewed seriously by the Plaintiff at

the time of presenting its case if and when it will decide to do so.

Mr Makundi prayed that another survey be taken on site and if his clients be found living within the national park they will surely quit.

This court in giving a review of this case has alluded to such a report- dated 27th January 1999.

It is said in its penultanate paragraph:

"The squatters are to be settled in a scheme currently under demarcation. When the survey is completed they will be involved in the scheme."

In this court's view, the squatters referred to are those who began moving onto, settling and cultivating part of the game reserve in the early 1990's. They must have come from somewhere.

Should this court again order another survey that Mr Makundi seems to ask for? Will it not be a repeat exercise which will again come to nought?

The way out looks like this: The parties to file agreed or separate issues for determination in the next 30 days so that an early date of trial is set. This suit shall not be struck out as prayed but all matters falling for final determination must now be so determined. Mention in 30 days to fix hearing date. Any party wishing to amend its pleadings to do so and serve in 14 days from now. Each party to bear its costs.

Orders accordingly.

June 15, 2000

Mwera,J