



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 362 OF 2017

BENSON KAMAU MACHARIA.....1ST PLAINTIFF
HENRY WANYOIKE.....2ND PLAINTIFF
BONIFACE NGANGA NGAARA..... 3RD PLAINTIFF
GEOFFREY CHEGE KAMAU.....4TH PLAINTIFF
EDWARD NGUNJIRI.....5TH PLAINTIFF

VERSUS

ANGLICAN CHURCH OF KENYA (DIOCESE OF MOUNT KENYA CENTRAL).....1ST DEFENDANT
THE COUNTY GOVERNMENT OF MURANG'A.....2ND DEFENDANT
NATIONAL LAND COMMISSION.....3RD DEFENDANT
THE HON ATTORNEY GENERAL.....4TH DEFENDANT
BISHOP MAHIA-INI ACADEMY & BISHOP MAHIA-INI MIXED SECONDARY SCHOOL.....5TH DEFENDANT

RULING

1. This opinion is in respect of the Plaintiffs/Applicants' Notice of Motion Application dated 15/10/2020 expressed under Order 11 Rule 3(2) (1) and Rule 5, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks this Honorable Court's orders *inter alia* that; -

a. 'That an order be issued by this Honorable Court for the convening of a Settlement Conference at a date to be given by the Court as provided under Order 11 Rule 5 of the Civil Procedure Rules.

b. That an order be issued by this Honorable Court adopting the Consent entered into by the Plaintiffs and the 1st and 5th Defendants dated 5/2/2019 and filed in Court on even date in the following terms;

“That all that parcel of Land Known as Title No. LOC.11/GAITEGA/345 measuring approximately 21.3 acres be subdivided, demarcated and allocated as follows:

i. The Community of Gituri & Gaitega villages herein represented by the 1st to 5th Plaintiffs shall occupy 13.5 Acres of the Land Title No. LOC.11/GAITEGA/345 on the Eastern side where the 1st Defendant had built a private Secondary School and the Community will thereon establish a Public Secondary School.

ii. The 1st shall continue occupying 7.8 Acres of the Land Title No. LOC.11/GAITEGA/345 on the Western side where there exists Bishop Mahia-ini Academy/Primary School and they shall continue running the said Primary School.

iii. All the Buildings falling on the part of the existing private Secondary School (i.e. within the above said 13.5 Acres) will be taken over and utilized by the Local Community of Gituri & Gaitega villages for the purposes of establishing a Public Secondary School and the existing private Primary School (i.e. within the above said 7.8 Acres) will be retained by the 1st Defendant for their Primary School.

iv. The Land Registrar, Murang'a County with the assistance of the Murang'a County Land Surveyor be and are hereby directed to ensure compliance with the Orders herein by particularly causing and ensuring surveying, subdivision, demarcation and issuance of separate titles for the public Secondary School and the ACK Church's Primary School within thirty (30) days from the date of this order".

2. The Application is premised on grounds on the face of it and Supported by the Affidavit of Benson Kamau Macharia that there is a Consent dated 5/02/2019 and filed in Court on even date between the Plaintiffs and the 1st and 5th Defendants that settles the dispute of the suit property herein namely Title No. LOC. 11/GAITEGA/345 (hereinafter referred to as 'the suit property') after a series of public hearings on the same initiated and determined by the 3rd Defendant herein.

3. That the suit property is registered in the name of the now defunct County Council of Murang'a and reserved for Gituri Secondary School. Furthermore, that the main protagonists, Plaintiffs and 1st and 5th Defendants resolved the dispute in line with findings of the 3rd Defendant and accordingly the said consent was signed and filed. More particularly the Plaintiffs contend that as a consequence of the said Consent, a public Secondary School, St. Luke Gituri has since been registered and assigned a Principal by the Teachers Service Commission.

4. The Application is opposed by the 2nd Defendant/Respondent vide its Grounds of Opposition dated 30/10/2020 faulting the parties for moving the Court to enter a consent agreed by some parties of the suit. The 2nd Defendant further avers that such a move amounts to arm twisting and the application is therefore a sham and an abuse of Court process.

5. Lastly in conceding Prayer 1 of the Application, the 2nd Defendant is adamant that a consent must contain all the parties' signatures to be valid.

6. Naturally, being signatories of the impugned Consent, the 1st and 5th Defendants have not contested the Application.

7. The 3rd Defendant despite service of the Application and hearing/mention notices for diverse Court dates, has not filed any response as well.

8. Similarly, the 4th Defendant is not opposed to the Application.

9. Directions were taken and parties agreed to file their respective submissions in respect of the Application. Both the Plaintiffs and 2nd Defendant simultaneously filed their submissions dated 15/01/2021 and filed on 18/01/2021.

10. On behalf of the Plaintiffs, the Court is urged to adopt the Consent dated 5/02/2019 and mark the matter as settled noting that the parties thereof are the main disputants to the suit property and that in any event the Consent is enforcing the determination by the 3rd Respondent made on 27/01/2017.

11. In outlining the background of the Application, the Plaintiffs acknowledge that the suit property is registered under the now defunct County Council of Murang'a and that the 2nd, 3rd and 4th Defendants are yet to endorse the said Consent. More particularly, the upshot of the 3rd Defendant's determination was that the community Gituri-Gaitega villages (the Plaintiffs') shall have 2/3 of the suit property reserved for the operation of Gituri Secondary School, now in place.

12. According to the Plaintiffs, having settled the dispute touching on the suit property, consequently there are no issues to warrant a full trial and any pending issues can be addressed in a Settlement Conference as envisaged under Order 11 Rule 5 of the Civil Procedure Rules.

13. On the other hand, the 2nd Defendant briefly submitted that a consent is a voluntary yielding to what another proposes and therefore the Orders sought by the Plaintiffs are not tenable as the contents/items in the impugned consents have not been fully agreed to.

14. In my view, the issues for determination by the Court are two fold; whether the Court should order the convening of the settlement conference under Order 11 Rule 5 of the Civil Procedure Rules; In the alternative whether the Court should adopt the consent entered into by the Plaintiffs and the 1st and 5th Defendants as an order of the Court.

15. Order 11 Rule 5 provides as follows;

"With a view to providing an opportunity for settlement in every suit to which this Order applies the Court shall within sixty days of the case conference in the case of a fast track case, and ninety days in the case of multi-track case, convene a settlement conference for the purpose of— (a) settling the case or issues in the case; and (b) providing the parties and their advocates an opportunity to appear before the Court to settle the suit or narrow down the issues. (2) Each party shall at least seven days before the date appointed for the settlement conference prepare and exchange a Settlement Conference brief which should include the following— (a) a concise summary of the facts including the agreed facts and admissions; (b) a concise summary of the issues and the law to be relied upon by each party including their rights and interests; (c) a final list of witnesses and a summary of each witness's statements; and (d) expert reports and the relevant portions of documents relied upon.

16. Order 11 popularly known as pretrial directions/conferences is principally intended for case management and when properly carried out also serves as an instrument in settling a large number of cases either partly or wholly once parties have reduced the real issues in controversy.

17. The main objective of the pretrial conference is to encourage the parties to settle the suit thus avoiding the costs and time taken to conduct a full trial. Another purpose of a settlement conference is that it offers the parties an opportunity to learn about the evidence of the opponent and what documents are required to counter the suit.

18. In this case the Plaintiffs, the 1st 4th and 5th Defendants are in agreement to settle the matter as proposed in the partially executed consent dated the 5/2/2019. This consent has been signed by the Plaintiffs and the 1st and 5th Defendants. Though the 4th Defendant is not opposed to the consent, it is yet to execute the same.

19. It is also to be noted that the matter is yet to be fixed for trial.

20. It has not been explained why the 3rd Defendant who despite initiating the proposed settlement has not executed the same despite evidence of service.

21. That said I am of the view that to progress the matter and to give the parties the opportunity to articulate their views on the consent, Prayer No 1 is hereby granted.

22. In my considered view and having granted prayer No 1, it is premature to grant prayer No 2 in the circumstances. Further there appears to the Court that what is before it is a partially executed consent not capable of any adoption. I will give the parties another opportunity to consider the consent and if it fails the parties are at liberty to fix the matter for full hearing and disposal.

23. I therefore order the Plaintiff to fix the date upon service to all the parties for a settlement conference within a period of 30 days from the date of this ruling in accordance with Order 11 Rule 5 of the Civil Procedure Rules.

24. I make no orders as to costs.

25. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26th DAY OF MAY 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndungu HB for Nganga for the 1st – 5th Plaintiffs

1st Defendant: Absent

Muiru HB for Kimwere for the 2nd Defendant

3rd Defendant: Absent

Kuiyaki/Alex: Court Assistants