



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC SUIT NO. 317 OF 2015

PAUL KIBET LABOSO.....1st PLAINTIFF/APPLICANT

PETER KAPOLOMAN.....2nd PLAINTIFF/APPLICANT

KIPKOSKE ARAP TANGUS.....3rd PLAINTIFF/APPLICANT

JOHN CHERUIYOT MILAGO.....4th PLAINTIFF/APPLICANT

**(All suing on their own behalf and on behalf of Ndakisal farmers Group,
incorporating Salangena and Ndarawetta farmers)**

VERSUS

NEW GATUNDU MIXED FARMERS.....1st DEFENDANT/RESPONDENT

TIMOTHY KIMUTAI MOSONIK.....2nd DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 20th October 2020 filed pursuant to the provisions of Section 1,1A, 3 and 3A of the Civil Procedure Act, and Order 51 of the Civil Procedure Rules as well as any other enabling provisions of the law, the Applicant s herein sought for the following orders;

i. Spent

ii. That as per the orders issued by consent on 13th December 2011, the Respondent be compelled to transfer the land parcel known as LR No. Narok-CIS Mara/Ololulunga/349 to the Applicants herein.

iii. That the Respondents herein be compelled to provide an extra 40.02 acres to the Applicant and/or an amount equivalent to the current market value for 40.02 acres of land in the area where LR No. Narok-CIS Mara/Ololulunga/349 is situated.

iv. That costs for the survey work conducted be refunded by the Respondents to the Applicants.

v. That costs of this application and suit be provided for.

2. The said application is premised on the grounds on the face of it as well as the sworn affidavit of Mr. **Kipkoske Arap Tangus** the 3rd Applicant herein sworn on the 22nd October 2020.

3. On the 16th February 2021 when the matter was before court for inter parte hearing, there was no appearance for the 2nd Defendant/Respondent. Counsel holding brief for Counsel for the 1st Respondent however informed the Court that although they were not ready to proceed for the inter parte hearing, yet they sought leave that the said application be disposed of by way of written submissions which was agreeable to Counsel for the Applicants.

4. The court obliged the parties and granted leave to both Defendant/Respondents to file their responses to the application giving them a time line of 14 days. Parties were also directed to file their written submissions within 14 days of service.

5. The matter was then mentioned on 26th May 2021 and 22nd July 2021 to confirm compliance. None of the Defendant/Respondents had complied despite the court's direction and service and by the time I write this ruling, only the Plaintiff/Applicants have complied and filed their written submissions.

Plaintiff/Applicants' Submissions.

6. The Plaintiff/Applicants gave a brief history of the matter in question being that in the early years of 1990s, they had purchased 930 acres of land No. Narok-CIS Mara/Ololulunga/349 from the 1st Defendant. That instead of the 1st Defendant/Respondent transferring the suit property to the Applicants, he had sold part of the same to the 2nd Respondent prompting the Plaintiff/Applicants to file suit.

7. Subsequently parties have settled the matter out of court wherein they had recorded a consent to that effect vide a court order dated 13th December 2011 herein annexed. In the said consent, the 1st Respondent had agreed to transfer 930 acres of land to the Applicants and also pay the District Surveyor.

8. That the 1st Respondent failed to pay the District Surveyor as directed by the court forcing the Applicants to make the said payments of Ksh. 47,620/= (as per the annexure KAT 2). The surveyor conducted a survey in presence of the representative of both parties wherein it was observed that the suit property measured 889.98 acres instead of 938 acres and therefore there was a deficit of 40.02 acres. The 1st Respondent promised to refund the Applicants for the survey work and compensate them for the deficit of 40.02 acres but have failed to do so.

9. The Applicants raised their issues for determination as follows:

- i. Whether the 1st Respondent should be compelled to transfer the suit property Narok-CIS Mara/Ololulunga/349 to the Applicants.
- ii. Whether the 1st Respondent should be compelled to provide a further 40.02 acres of land or equivalent current value to the Applicants.
- iii. Whether the 1st Respondent should refund the amount of Ksh 47,620/= paid to the District Surveyor.

10. On the first issue for determination, it was the Applicants' submission that the consent to which parties had agreed that the parcel of land known as Narok-CIS Mara/Ololulunga/349 was to be excised and 930 acres was to be registered in the name of **Ndakisal farmers Group, which incorporates Salangena, Ndarawetta and Kimagata farmers Groups, was entered into almost 10 years ago but the 1st Respondent had continuously frustrated the efforts of the Applicants to have the property transferred as agreed and should therefore be compelled to do so.**

11. That pursuant to the order dated 13th December 2011, there was 930 acres to be transferred to the Applicants, however pursuant to a survey carried out and a surveyor's report dated 10th August 2020 on land parcel No. Narok-CIS Mara/Ololulunga/349, there had been a deficit of 40.02 acres as the land had measured 889.98 acres only. The 1st Respondent should therefore not only be compelled to transfer the suit property to the Applicants, but to also make good of the deficit acreage by providing 40.02 acres within the same locality or making compensation of the said acreage at the current market value.

12. On the last issue for determination, the Applicants submitted that the 1st Respondent had specifically been directed to pay the District Surveyor by the consent order of the court of 13th December 2011. That the 1st Respondent did not make the said payments thus forcing the Applicants to dig into their pockets to make the payments which amounted to Ksh 47,620/=. They submitted that the 1st Respondent had no excuse for failing to comply with the consent order. They sought that their application be allowed as prayed with costs both for the application and the main suit.

Determination.

13. I have considered the Application herein as well as the written submission by the Applicants and also the fact that neither of the Respondents filed either a response or written submissions to the Application. The issue for determination therefore is whether the orders sought by the Applicants should be allowed.

14. The gist of the matter in question being that vide a Complaint dated the 5th December 2007, the Plaintiff/Applicants sought for an order of permanent injunction restraining the Defendants/Respondents and their agents, servants from dealing in any way with the suit parcel No. Narok-CIS Mara/Ololulunga/349 and Narok-CIS Mara/Ololulunga/11534 as well as an order of specific performance compelling the 1st Defendant/Respondent to transfer the said parcel of land to the Plaintiff/Applicants.

15. Subsequently on the 21st November 2011 both Counsel for the parties recorded and signed a consent which was adopted as the order of the court dated 13th December 2011 to the effect that;

*'By consent the parcel of land known as Narok-CIS Mara/Ololulunga/349 be exist where all for 930 acres will be registered in the name of **Ndakisal farmers Group, which incorporates Salangena, Ndarawetta and Kimagata farmers Groups.***

That the district commissioner Narok South do provide security and supervise the exercise of the said subdivision.

That the Narok South district surveyor do carry out the said subdivision within the next sixty (60) days and that parties be at liberty to appoint their own surveyor should they wish to have them work with the district surveyor.

The parties to pay their own surveyors and that the 1st Defendant do pay the district surveyor.

16. Subsequently the matter was fixed for mention for the 5th March 2012 and 10th May 2012 wherein parties then went to sleep and the same was dismissed on 23rd September 2014 pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules. Thereafter, an application dated 9th July 2020 was filed and the same having not been opposed, the suit was re-instated thus giving rise to the filing of the current application.

17. It is not in dispute that the Applicants herein filed suit against the 1st and 2nd Defendants on the 5th December 2007 seeking orders as aforementioned to which parties sought for an out of court settlement which culminated into a consent dated the 21st November 2021 and adopted via an order of the court dated the 13th December 2011.

18. Thereafter, it has not been challenged that the Applicants set in motion the execution of the consent agreement to which **the 1st Defendant/Respondent failed to pay the District Surveyor as ordered, for the survey work done on the suit land prompting the Applicants to dig into their pockets and to make the payments of Ksh 47,620/=.**

19. That further from the survey conducted on parcel of land No. Narok-CIS Mara/Ololulunga/349, the same measured 889.98 acres only thereby causing a deficit of 40.02 contrary to consent agreement of 13th December 2011. It also evident from the consent recorded by the parties that the **Narok South District Surveyor was to carry out the subdivision within the next sixty (60) days.**

20. The *Consent Orders* were binding on all parties unless vacated. As far as this court is concerned, the same have not been vacated and neither has the court been informed that there is a competent Appeal filed.

21. *I also find that there has been no circumstances shown to exist that suggest that there was fraud or collusion in the consent entered into by the parties herein. Indeed all material facts were known to the parties, who consented to the compromise in terms as clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.*

22. The 1st Respondent is neither keen nor intent to pursue the agreement but has purposefully delayed to effect the terms of the consent order to deny the Applicants the fruits of their Judgment. The Respondents have not disputed the factual dispositions in the Applicants' Application nor tendered any evidence to controvert the Applicants' application.

23. The Court of Appeal in the case of **Fred Matiang'i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government –vs- Miguna Miguna & 4 Others [2018]eKLR**, stated the following with regard to Orders of the court: -

“...When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities...”

24. In the case of **Republic v Principal Secretary, Ministry of Defence Ex-Parte George Kariuki Waitthaka [2018] eKLR**, G. V. Odunga J, observed correctly as follows:

“...It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal...”

25. The 1st Respondent has proved to the court that they have no regard to obeying orders as issued by it and the due process of the law. It then follows that the orders of 13th December, 2011 should be complied with within the next 30 days in the terms granted by the court.

26. The application dated 20th October 2020 has merit and is hereby allowed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF SEPTEMBER 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE