REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 1506 OF 2000

PAUL ETEMESI

SEPHANIA AKHONYA

JAMES MABINDA

ZAEBEDEE OSABWA

RODA ATANA

AURTHUR MUMANYI

MOSES NDENGU

DAVID ONG'ANYI

DANIEL AMOUNDO

JOSECK AWANI

MILKA MALENYA

BEN MUMANYI

(SUING OF THEIR OWN BEHALF AND ON BEHALF

OF THE MEMBERS OF THE LOCALCONGREGATION

OF BURUBURU COMMUNITY CENTRE CHURCH OF GOD

IN EAST AFRICA (KENYA).....PLAINTIFFS

VERSUS

1. THE EXECUTIVE COUNCIL CHURCH

OF GOD IN EAST AFRICA (KENYA)

2. THE RT REV. DR BYRUM MAKOKHA

3. THE CHURCH COMMISSION.....DEFENDANTS

RULING

1. This matter was heard by Honourable Onyancha J (as he then was) on 4th May 2015 who set the date for ruling on 18th June 2015. However, the Honourable Judge(now retired) was transferred to Kabarnet High Court and while this matter was pending writing of the ruling, there was also pending in the High Court a suit wherein the learned Judge was challenging his retirement at the age of 70 years.

2. During the hearing of the said suit, the learned judge had been advised by the Office of the Chief Justice not to hear any matters. Accordingly, this matter remained in abeyance until the learned Judge formally retired is when the file among other files, were availed to the presiding Judge for distribution among Judges of the Civil Division to conclude the Judicial process.

3. Regrettably, as soon as I received this file for writing of a ruling in an application that I did not have the opportunity to hear or see the parties' advocates as they canvassed its merits and demerits, I was deployed to the Judicial Review Division of the High Court. I needed time to peruse and appreciate the material in the file hence the delay in delivering this ruling, coupled with the urgent voluminous work that has to be handled in the Judicial Review Division.

4. I have unreservedly tendered my apologies to the parties on behalf of the court as a whole as no one individual is responsible for this delay, which was not foreseen.

5. Back to the matter for determination is the notice of motion dated 23rd October 2014 seeking that :

> 1. Land Reference No. Nairobi/Block 79/820 (suit property) is delivered to the defendants and any person bound by the decree who refuses to vacate the land be forcefully evicted there from.
>
> 2. Geomatics Services Ltd, a licensed surveyor be ordered to carry out survey work and establish the boundaries and/or beacons defining property to wit, LR Nairobi/Block 79/820 (Church of God in East Africa (K) Registered Trustees) and confirm that the same exists and are in place as indicated on the original survey plan for the area.
>
> 3. The commanding officer, Buruburu Police Station does supervise and provide ample security for the two exercises.
>
> 4. Costs of the application are provided for.

6. The application is predicated on the affidavit sworn by Reverend Patrick Musungu Maina and the grounds that:

> a. The court has decreed that the defendants are the rightful owners of property, to wit, LR Nairobi/Block 79/820 Church of God in East Africa (K) Registered Trustees)
>
> b. The defendants/applicants are not in possession of the suit land.
>
> c. The plaintiffs/respondents have refused to give vacant possession.
>
> d. The defendants/applicants are being denied the fruits of this judgment.
>
> e. The defendants/applicants are unable to use or develop their property.

7. In the supporting affidavit sworn by Reverend Patrick Musungu Maina, he deposes that on 26th May 2014 the court dismissed the plaintiff's suit for want of prosecution in essence handing back ownership and control of LR Nairobi/ Block 79/820 to the defendants.

8. That since that dismissal order as per the annexed decree, the defendants have not been able to take possession and control of their property because the plaintiffs/respondents and their agents are in occupation; that efforts by the respondents/applicants to take possession of the property have been thwarted and frustrated by the plaintiff/respondents or their agents and the police are unwilling to assist in their absence of a court order in that behalf.

9. That the plaintiffs/respondents have refused to give vacant possession of the land there by denying the defendant/applicants herein lawful enjoyment of their property, which they lawfully own, as shown by copies of certificate of lease and search certificate.

10. The application was opposed by the plaintiffs/respondents who filed a replying affidavit sworn by Robert Oyando Omenya on 10th November, 2014 deposing that he was he Chairman of the Centre Council BuruBuru Community Church of God, Nairobi.

11. According to the plaintiffs/respondents, the defendant's application is an abuse of the court process since the matter is *Resjudicata*, given that parties entered and recorded a consent way back in 2000 after deliberations and that the said consent was adopted and extracted as a final order of the court as shown by an annexed copy recorded before Honourable Justice Mr Visram, then Commissioner of Assize on 1st December 2000, settling the suit. That after recording the above consent, parties disagreed and they returned to court for terms of implementing the said consent, which application was heard and determined by Honourable Kasanga Mulwa J (as he then was), culminating into the ruling delivered on 11th November 2004 annexed to the affidavit in reply.

12. That in view of the settlement of the matter, parties who are aggrieved can only apply for setting aside of the consent and not to seek to relegate the matter which is in essence seeking this court to sit on its own appeal.

13. That the purported decree dismissing the suit for want of prosecution is a nullity.

14. That the defendants have deliberately misinterpreted the said decree to mean that they are the true owners of the land on which the church sits, despite the fact that the ownership and title thereof was never in dispute in the instant proceedings.

15. That such a decree has no legal standing or at all, the suit having been conclusively settled between the parties.

16. The defendant/applicant filed a further affidavit on 19th November 2015 sworn by Patrick Musungu Maina on 17th November 2014 contending that the deponent of the replying affidavit had no capacity to swear that affidavit as he was not a party to the suit.

17. The defendant/applicant maintained that as far as they know, this suit came to conclusion on 26th May 2014 when this suit was dismissed for want of prosecution.

18. Further, that the consent of 1st December 2000 did not close this matter as the parties continued litigating the matter as shown by copy of ruling made on 2nd January 2005 by Honourable P. Kihara Kariuki J (as he then was).

19. The defendants/ applicants denied that they misled the court into issuing the decree dismissing the matter for want of prosecution.

20. Further, that even if the suit was settled in 2000, nothing prevents the applicants from using

their property since the respondents have not exhibited anything to show that they are the registered owners of the suit property and that they have not claimed ownership of the suit property hence they should not prevent the defendants from taking possession of their property.

21. Parties filed written submissions to dispose of the application. The defendants/applicants filed their submissions dated 2nd February 2015 on 3rd February 2015 whereas the plaintiff's/respondents filed their submissions on 19th March 2015. It is dated 11th February 2015.

22. The parties advocates appeared before Honourable Onyancha J on 4th May 2015 for highlighting of their submissions but as explained above, the learned Judge left the station and the bench before writing this ruling.

23. The parties' advocates agreed that this court proceeds to write and deliver the ruling. I have therefore invoked the provisions of Order 18 Rule 8 of the Civil Procedure Rules which allows another Judge to continue with the case or application previously heard or evidence taken by another judge.

24. In their written submissions as highlighted by counsel, the defendants/applicant's counsel submitted that the orders made or issued on 1st December 2000 were a temporary injunction. Further, that the original injunctive orders were for the opening of gates to the Church on the suit premises and not to interfere with the plaintiff's worship and use of the Church.

25. Further, that the defendant's guards were also removed. In addition, it was submitted that the said injunctive orders were obeyed since 2000 until the suit was dismissed for want of prosecution on 26th May 2014, after which the defendants went back to repossess their suit property measuring 4.722 acres but that the plaintiffs resisted, as shown by the letter dated 22nd October 2014 from the plaintiff's advocates to the defendants warning the latter not to try and interfere with the land, while also claiming that they have a tenant on the land who should not be disturbed by the defendants.

26. Counsel for the defendant/applicant further submitted that the land in issue was at all material times registered in the name of the defendant from 1977 and that albeit the plaintiffs were aware that the suit had been dismissed, they still referred to injunctive orders originally obtained by them and threatening the defendants not to interfere with them.

27. That the plaintiffs had never taken any steps to reinstate the suit or to file an appeal and that they were instead arguing that the injunctive orders comprised the whole dispute and the defendant's rights on the land which was not the case; since injunctive orders only held during the existence of the suit.

28. The defendant's counsel further submitted that the suit is the one that would settle the dispute and that since the hearing of the suit never took place, the dismissal of the suit for want of prosecution vacated all the interlocutory orders of injunction.

29. The defendant's counsel also submitted that even after being served with an application for dismissal of the suit for want of prosecution, the plaintiff's never defended that application.

30. That the plaintiffs have never claimed ownership of the suit and on which the Church stands but that they only claim for rights as members of the Church to use the Church for worship.

31. It was further submitted that the court has jurisdiction to determine land rights and all that pertains to the use of the land. Reliance was placed on Section 34 of the Civil Procedure Act which gives this court jurisdiction by providing that even after a decree has been passed and questions arise between the parties relating to execution, the court that passed the decree can determine any matter arising without the necessity of filing a separate suit. Further, those proceedings in the suit will enable the court to settle the effects (sic) of the dismissal of this suit.

32. Further reliance was placed on Sections 1A and 1B of the Civil Procedure Act which allows the court to grant the orders of eviction because it arises directly as a result of the dismissal of the suit and the rights the plaintiffs had sought.

33. In response, the plaintiffs/respondent's counsels submitted opposing the application to the effect that both parties to this suit are worshippers of the same Church and that the suit herein was compromised by the consent of 1st December 2000 hence this court cannot relitigate matters which are settled by mutual agreement.

34. Further, that from the record, the consent entered into on 1st December 2000 is a judgment which cannot be set aside other than in the manner provided for setting aside a contract, where there is fraud or mistake as was held din **Flora Wasike Vs Jestimo Wamboko [1982-1988] 1 KLR 625 CA.**

35. Counsel relied on **Hiram Vs Kassam [1952] 19 EACA 131** per Hancox JA, as cited with approval in **Mrs Charity Kamana V East Africa Building Society [2004] e KLR** that an order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them…….and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court…….or if the consent was given without sufficient material facts, or misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.

36. The plaintiff's/respondent's counsel submitted that as far as they were concerned, the suit herein was fully settled and that when the defendant applied for the dismissal of the suit, it must have been in error since the suit had long been fully marked as settled and therefore the order arising there from cannot have any legal effect since it amounts to a nullity.

37. Further, it was submitted that any decree emanating from the dismissal cannot have any legal effect especially when the dismissal order does not even mention or refer to the issue of title to the land.

38. It was also submitted by the plaintiff/ respondent's counsel that the dismissal order could not create rights or title to land and that Section 34 of the Civil Procedure Act cannot provide the remedy to lack of jurisdiction of this court to handle title to land issues as that issue can only be competently handled by the Environment and Land Court as contemplated by Article 162(2) (b) of the Constitution.

39. Further, that the dispute never concerned title to land but access to the Church for worship purposes.

40. on the whole, the plaintiff's counsel urged the court to dismiss the defendant's application with costs as Section 1A of the Civil Procedure Act are inapplicable since the defendants are seeking to reach title to land of the suit plot through the backdoor.

Determination

41. I have carefully considered the application herein dated 23rd October 2014, the grounds, supporting affidavit, further affidavit and all the annextures thereto. I have given equal consideration to the plaintiff's/respondents' replying affidavit and annextures. I have also considered the parties' advocates rival submissions and authorities and legal and constitutional provisions relied on. In my humble view, the following issues flow for determination.

1. ***Whether this court has any jurisdiction to hear and determine any dispute relating to title to land***

2. ***Whether this court has any jurisdiction to determine the application herein.***

3. ***Whether the suit herein was settled by the consent of 1st December 2000 and therefore whether there was any suit capable of being dismissed for want of prosecution***

4. ***Whether dismissal of a suit for want of prosecution gives rise to a decree capable of being executed and therefore whether Section 34 of the Civil Procedure Act is applicable.***

5. ***What orders should this court make?***

6. ***Who should bear costs of this application?***

42. The first two issues are preliminary points of objection which must be dealt with first as they go to the jurisdiction of the court.

43. On the first issue of whether this court has jurisdiction to hear and determine disputes relating to title to land or occupation of land, the Constitution of Kenya 2010 in Article 162(2) (b) contemplates the establishment of the specialized court, which is the Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

44. Sub Article 3 thereof empowers Parliament to determine the jurisdiction and functions of the courts contemplated in Article 162(2) (a) and (b).

45. In 2011, Parliament enacted the Environment and Land Court Act and Section 13(1) therefore confers jurisdiction on the court to hear disputes referred to in Article 162(2) (b) of the Constitution.

46. In addition, Article 165(5) of the Constitution expressly bars the High Court from hearing and determining disputes relating to matters falling within the jurisdiction of the courts contemplated in Article 162(2).

47. With the above clear provisions of the law, it is trite that the High Court has no jurisdiction, with effect from 27th August 2010, to hear and determine disputes reserved for the courts contemplated in Article 162(2) of the Constitution and these are the Employment and Labour Relations Court and the Environment and Land Court.

48. The other issue is whether this court has jurisdiction to hear and determine this application. To answer that issue, there are ancillary questions. But first, I must revert to the application as framed. The application dated 23rd October 2014 seeks the orders that:

1. ***This Honourable court may be pleased to issue an order that property to wit, LR Nairobi/Block 79/820 Church of God in East Africa (K) registered Trustees decreed to the defendants/applicants be delivered to them and any person bound by the decree herein who refuses to vacate the property be removed/evicted.***

2. ***That Geomatic Services Ltd, a licensed Surveyor be offered to carry out survey work and establish the boundaries and or beacons defining property on LR Nairobi/Block 79/820 (Church of God in East Africa (K) registered trustees) and confirm that the same exists and are in place as indicated in the original survey plan for the area.***

3. ***That the Commanding Officer Buruburu Police Station does supervise and provide ample security for the two (2) exercises.***

4. ***That costs*** of ***this application be provided for.***

49. No doubt, the prayer No. 1 presupposes that there is a decree issued by this court ***to the defendants/applicants to be delivered to them the suit property and that any person bound by the decree herein who refuses to vacate the property be removed/evicted.***

50. And if there is any decree issued by this court, nothing prevents this court from executing its own decree since where there is a decree, then the issues in the dispute are settled and therefore there would be no issue for determination relating to title to land or occupation of land.

45. I say so without hesitating and I am fortified by the transitional provisions of the Constitution as stipulated in Schedule six pursuant to Article 262 of the Constitution. The relevant provisions of the Transitional and consequential provisions are Section 22 on ***judicial proceedings and pending matters which stipulates***:

> ***" All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this constitution or as directed by the Chief Justice or the Registrar of the High Court."***

51. Section 30 of the Environment and Land Court Act, 2011 also echoes the above for Constitutional transitional and consequential provisions relating to administration of justice.

52. This court observes that this case was instituted in court in the year 2000 before the effective date of the Constitution. The suit was not instituted post 27th August 2010. That being the case, and the matters being litigated upon being those that arose prior to the promulgation of Articles 162(2) (b) and 165(5) b of the Constitution and therefore this court was under a constitutional duty to conclude any pending matter in order to ensure effective administration of justice as contemplated by the principles espoused in Articles 159 of the Constitution as well as Article 10 of the Constitution among others, that in exercising judicial authority, the courts and tribunals shall be guided by the following principles.

> *a.* ***Justice shall be done to all, irrespective of status;***
>
> *b.* ***Justice shall not be delayed.***
>
> *c.* ***……..***
>
> *d.* ***Justice shall be administered without undue regard to procedural technicalities.***
>
> *e.* ***The purpose and principles of this Constitution shall be protected and promoted.***

53. Under Article 10 of the Constitution, the National Values and principles of governance which include the rule of law, human rights among others bind the courts as a state organ and all persons whenever any of them applies or interprets any law, or makes or implements public policy decisions.

54. Access to justice is one of the fundamental human rights and freedoms; as stipulated in Article 48 of the Constitution; and as contemplated by Article 159 of the Constitution, justice shall not be delayed. It is for that reason that the transitional and consequential provisions of the Constitution as contemplated in the Sixth Schedule Section 22 on proceedings pending before court, does permit continuance and conclusion of those proceedings so as not to delay or obstruct access to justice.

55. Those transitional and consequential provisions of the Constitution are not subsidiary provisions to the Constitution. They were enacted together with the substantive Articles of Constitution and with full knowledge of Articles 162(2) and 165(5) (b) of the Constitution that vests in different court's jurisdiction to hear and determine disputes relating to Employment and Labour Relations and material to this matter, Environment and the use of and occupation of land and title of land.

56. Therefore, noting that this application is part of the suit that arose prior to 27th August 2010, I have no doubt in my mind that this court retained the residual jurisdiction by dint of the transitional and consequential provisions of the Constitution to conclude any pending issues, if at all, between the parties.

57. On the third issue of whether the suit herein as instituted was settled by the consent of 1st December 2000, and therefore whether there was any suit capable of being dismissed for want of prosecution, this issue will be resolved together with issue No. 4 on whether dismissal of a suit for want of prosecution gives rise to a decree capable of being executed and therefore whether Section 34 of the Civil Procedure Act is applicable.

58. On the first limb, the defendant/ applicant claims that the consent of 1st December 2000 only determined the interlocutory application for injunction and that in any case, the matter continued being litigated upon even after that very consent of 1st December 2000 hence the suit remained alive until it was dismissed.

59. On the other hand, the plaintiff contends that the suit was fully compromised with the endorsement of the consent of 1st December 2000 and that therefore this court has no jurisdiction to reopen the suit. It was further contended by the plaintiffs/ respondents that the parties having consented to a settlement, the court can only set aside that consent by another consent or if the consent was laced with fraud or mistake. In addition, it was contended by the plaintiffs/respondents that the application herein is therefore ***Resjudicata***.

60. I must however note that there is no application before me for setting aside the consent of 1st December 2000 which is not denied by the defendants/applicants.

61. Further, issues of ***Resjudicata*** can only be raised in a suit where there was another (separate) suit similar to the present proceedings and which was determined on merits.

62. Resjudicata doctrine cannot be raised in the same suit or proceedings. That is why the wordings of Section 7 of the Civil Procedure Act are clear that:

> ***" No court shall try any suit in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and had been heard and finally decided by such court."[Emphasis added].***

63. The said Section in the explanatory note makes it clear that:

> ***" Former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it."***

64. Accordingly, issue of ***Resjudicata*** is inapplicable in this matter.

65. Back to the question of whether the consent on 1st December 2000 settled this suit fully or not, I must revert to the consent in question which was recorded by and signed by both parties' advocates on 30th November 2000 and adopted by the court in the following terms on 1st December 2000:

> ***"In chambers on the 1st December 2000 before justice Mr Visram Commissioner of Assize:***
>
> ***Order- This matter coming up for mention on 1st December 2000 before Justice Mr Visram, Commissioner of Assize and upon reading consent letter dated 30th November 2000;***
>
> ***IT IS HEREBY ORDERED BY CONSENT***
>
> *1.* ***THAT this suit be and is hereby marked as settled in the following terms;***

a. ***That the parties to this suit be and are hereby agreed that the church premises for Buruburu church be re-opened for normal church activities.***

b. ***That the defendants do make appropriate arrangements with the relevant government authorities to re-open for normal activities as soon as possible.***

c. ***That once the Buruburu church is reopened for normal church activities, the plaintiffs and other members of the Church of God wanting to worship thereat be allowed access to, and use of, the church subject however to adherence to the code of conduct enshrined in the constitution of the Church of God in East Africa.***

d. ***That the plaintiffs for themselves and on behalf of the other persons whom they represent in this suit hereby undertake not to cause or participate in any acts of the church intended to, or which may cause violence, the description of church activities and a breach of peace.***

e. ***That the plaintiff for themselves and on behalf of the other persons whom they represent in this suit hereby acknowledge and undertake to respect the lawful authority and power bestowed upon the General Assembly and the Executive Council of the Church of God in East Africa by the Constitution of the said Church.***

f. ***That parties to this suit hereby acknowledge the existence of appropriate provisions in the said Constitution for the resolution of conflict, and other church matters, and will adhere to the same at all times.***

g. ***That the General Assembly and Executive Council of Church of God in East Africa being mindful of the need to facilitate reconciliation and in order to promote a fresh start at the Buruburu church, hereby undertake to exercise their constitutional power to re-deploy the pastor currently ministering at the Buruburu Church elsewhere and to identity and to deploy to the said church a suitable replacement as soon as possible."***

GIVEN UNDER my hand and seal of this court on the 1st day of December 2000.

ISSUED at Nairobi this 15th day of December,

M.J. BHATI

DEPUTY REGISTRAR

HIGH COURT OF KENYA

AT NAIROBI"

66. That particular consent order which was adopting the parties' advocates consent letter to court dated 30th November 2000 was also served and received by all parties' advocates on 18th December 2000 and also served upon the Church at Buruburu Community Centre on 19th December 2000.

67. The record clearly shows that after the above consent was recorded, a dispute arose as to its interpretation and implementation and that dispute prompted the parties to return to court vide an application dated 22nd January 2001 as the church had not been reopened despite the consent entered into on 1st December 2000.

68. By a ruling delivered on 29th March 2001 at 2.30 pm, Honourable Justice Kasanga Mulwa (as he then was) ordered that:

1. ***The Church will open as agreed by the parties without further delay in any event before 15th April 2001.***

2. ***The registration of members by the defendants is hereby stopped until the Church has reopened and thereafter the registration can be carried out by the consent of all the parties and if such consent is not arrived at either party will be at liberty to apply to the court for further orders on the issues;***

3. ***A cleansing ceremony can take place before reopening of the church provided that the parties agree on how it shall be done, if no agreement it shall not be carried out;***

4. ***The other conclusions in the consent order shall be complied with and in particular paragraph 8 of the Order.***

5. ***Each party shall bear its costs for this application."***

69. After the above orders were made by Honourable Justice Kasanga Mulwa, the said orders were allegedly never complied with and so an application for contempt of court was made to court but when parties appeared in court on 17th July 2001 they agreed on a conciliator as per their consent order signed by the advocates dated 11th July 2000, which conciliators would facilitate the implementation of the court orders.

70. The record shows that court then proceeded to record and adopt the consent order as follows:

" The matter will be referred to Bishop Horace Etemesi of the Anglican Church of Kenya and Reverend Dr Jesee Kamau, Moderator of the General Assembly of PCEA as joint conciliators to facilitate compliance by the parties of the consent order of 1st December 2000 and thereby normalize activities at Buruburu Church. There will be a mention to assess progress on 1st October 2001."

71. At one point, Reverend Patrick Musungu Maina appeared in court in person on 4th January 2002 before Honourable Justice R. Kuloba (as he then was) seeking for orders which the learned judge did not grant. The reconciliation report was however finally filed in court and on 18th February 2002 Honourable Justice Githinji (as he then was) recorded as follows:

"Reconciliators have filed the report. It suggests that the parties be given one or 2 months to resolve remaining issues. <u>The file is closed as the suit was already been marked as settled</u>. It has taken….to have the consent judgment complied with. There is no need for a further mention. Any party should be given liberty to execute the consent judgment in the manner they deem fit. If the consent judgment is not executed within 30 days. If the consent judgment is not (sic) entered on 15th January 2001 is not complied with within 30 days s any party is at liberty to apply for execution of the consent judgment."

72. At this point I must pause and remark that the dispute herein has been handled by so many judges- more than 10 probably including myself. At one point on 13th February 2003 Honourable Justice Hayanga (as he then was) committed one of the parties for contempt on the face of the court due to the physical fights that occurred in the court room between Mr Asiba and Mr Moses. Mr Asiba was given suspended sentence of 3 months for engaging in physical fight during the hearing of contempt of court proceedings, following violence that broke out in the Church premises leading to destruction of Church property and ejecting of pastors staying within the Church compound.

73. After Honourable Justice Hayanga completed the hearing of contempt of the court proceedings and setting the matter for ruling on 2nd December 2003, another judge Ransley J (as he then was) and F.A. Ochieng J took over the conduct of the matter. Ransley J then on 16th November 2004

directed that the matter be placed before Honourable P.K. Kihara (as he then was) for directions on the working of a ruling which was eventually delivered on 21st January 2005 dismissing the application for contempt of court filed on 11th September 2002 with no orders as to costs. In the said ruling , Honourable Justice P. Kariuki (as he then was) reproduced the consent of 1st December 2000 and stated that ***" those were the terms of the consent order on the basis of this suit was settled***. Further, the learned judge recorded that "***As the subsequent events were to prove, the consent order became the subject of fresh disputes between the parties with each accused the other of breaching the terms of the settlement."***

74. The learned judge in dismissing the said application for contempt of court observed that ***" in the present case, however, the applicants have proved only that the parties cannot agree on the interpretation of the terms of the consent order. Such inability, and the consequent disagreement, cannot, in my judgment, constitute disobedience of the order."***

75. From the above analysis of the proceedings and record, it is clear to me mind that what was settled by the consent of 1st December 2000 between the parties was the whole suit herein and therefore although there were subsequent proceedings in the matter, the same related to the implementation or enforcement of the said consent and that is why contempt proceedings were initiated to enforce compliance with the consent.

76. The first order in the consent clearly states that ***"1. THAT this suit be and is hereby marked as settled in the following terms."***

77. ***The consent never talked of settling the interlocutory injunctive application*** filed by the plaintiff, as alleged by the defendant/applicant herein. And as correctly pointed out by Justice P.K. Kariuki (as he then was) in his ruling in the contempt proceedings, it had taken so much time and consultation between the parties before they arrived at that consent. In addition, Honourable Justice Githinji also marked the file as closed ***as the suit was already marked as settled and that there was no need for a further mention and that any party was at liberty to execute the consent judgment in the manner they deemed fit.***

78. In my humble view, if the above observations by the two learned judges who handled this matter quite competently were in error, then nothing prevented the defendants/applicants herein from appealing against the decisions thereof to get a different view of this matter as far as the consent order of 1st December, 2000 was concerned at that stage.

79. Accordingly, I have no doubt and I do not hesitate in finding that the suit herein was settled by the consent of 1st December 2000 and that the subsequent proceedings were enforcement proceedings since the issues in the suit had been reduced into the consent of 1st December 2000 which was and has never been set aside.

80. Having so found that the consent of 1st December 2000 settled this suit as between the disputing parties, the other question and issue is whether there remained any suit capable of dismissal for want of prosecution and whether dismissal of a suit for want of prosecution gives rise to a decree capable of being executed and therefore whether Section 34 of the Civil Procedure Act is applicable in this case.

81. First and foremost is that the suit having been settled by consent of the parties on 1st December 2000 there was no suit or issue left for determination on merit as regards the dispute, other than implementing or enforcement of the consent, and therefore, to that extend, there was absolutely no suit capable of being dismissed for want of prosecution.

82. Although the applicant/defendant claims that the plaintiffs/respondents was served with the application for dismissal of the suit for want of prosecution, and that they did not appear in court or even oppose that application, and although the plaintiffs have not come to court to unsettle that

order of dismissal of the suit for want of prosecution, in my humble view, that order of dismissal of a nonexistent suit for want of prosecution was made by Honourable Justice Waweru ***per incuriam.***

83. A decision given ***per incuriam*** means that the decision was given through ignorance of or forgetfulness of certain relevant facts.

84. In my humble view, had the learned judge, Honourable Waweru J had the benefit of the best arguments that both parties to this case could provide at an interpartes hearing of the application for dismissal of the suit for want of prosecution, the learned judge could not have arrived at such a demonstrably wrong decision of dismissing a suit which was long settled.

85. On the other hand, I have no doubt in my mind that the defendants were very mean with information leading to the dismissal of the suit that had been settled between the parties for want of prosecution. I say ***'mean'*** because I have examined the notice of motion that sought for the dismissal of the suit for want of prosecution. It is dated 15th November 2013 and supported by 8 skeletal grounds and a supporting affidavit sworn by George Kirumba Mbiyu on 3rd November, 2013 which affidavit makes no disclosure of the consent order of 1st December 2000 and which affidavit simply states in paragraph 3 ***that " this suit was last fixed for hearing on 24th January 2004*** and in paragraph 4 ***that " on that date the matter was not heard, it was adjourned generally"*** and paragraph 5 ***that " since then the plaintiffs have never set down the suit for another hearing."***

86. In my humble view, the learned judge, in dismissing the ***'suit' for want of prosecution*** must have been influenced by the skeletal grounds and supporting affidavit of the defendants, in my humble view, were misleading. Had the Honourable Judge perused the file he would have seen the consent made on 1st December 2000 which was a relevant factor, and he would not have made the order dismissing the suit for want of prosecution since there was no pending suit but proceedings for implementation of the consent made on 1st December 2000 are the ones that had led to the last date of 24th January 2004.

87. Where a suit in the execution process, it cannot be dismissed for want of prosecution, unless there is a specific application pending in the execution proceedings which is not prosecuted and which the court would be right in dismissing for want of prosecution.

88. I reiterate that the consent order of 1st December 2000 finally settled the main dispute between the parties herein although as observed by Honourable Justice Githinji J (as he then was) who even closed the file and directed enforcement of the consent subsequently recorded, ***parties appeared to have a deep routed dispute whose solution may not even lie in the litigations in court since it appears that not even the conciliation process ever helped them to resolve their differences***.

89. But that observation does not mean that the parties are free to resuscitate the case which was finally and completely determined unless, as correctly submitted by the plaintiff's /respondent's counsel, the parties apply to set aside the consent orders which are validly on record.

90. Having found that there was no pending suit capable of being dismissed, I must determine whether that order of dismissal should remain on record. In my humble view, this court has the inherent jurisdiction which is unlimited to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The court in dismissing the suit for want of prosecution when there was no pending suit for dismissal was mislead by the applying party.

91. Invoking the inherent jurisdiction of the court to the circumstances of this case, I would in the circumstances vacate that order dismissing a suit that was long settled, as that order of dismissal was made in vain. This is not to sit on appeal of the decision of Honourable Waweru J. I am fortified by the English case of **Macfoy Vs United Africa Company Ltd [1961] 3 ALL ER 1169 at 1172** where the court held that:

"If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so."

92. In the present case, I can only conclude that ***the " dismissal of the plaintiff's suit"*** herein and therefore the order thereof was of no legal effect since there was no suit capable of being dismissed for want of prosecution, the suit having been settled by the consent order of 1st December, 2000.

93. In other words, an order marking the suit was settled in itself is a decree and once there is a decree which finally settles the case, unless set aside varied or reviewed either by the same court or on appeal, it remains a decree. A decree cannot therefore be dismissed for want of prosecution. And neither can another decree issue subsequent to a decree save on appeal.

94. And as there was no suit capable of being dismissed for want of prosecution, it follows that Sections 34 and 91 of the Civil Procedure Act are not available to the defendants/applicants herein, seeking for possession of their land through eviction of the plaintiffs/respondents from the said land.

95. I reiterate that the applicants/defendants herein cannot use a decree in form of a dismissed suit that is a nullity to evict the respondents from the Church land or premises. They can only use any other known lawful means.

96. Furthermore, a perusal of the pleadings does not show any claim or counterclaim for occupation, title to and or ownership of land. The dispute between the parties hereto was around the right to access and worship from the Church of God OF East Africa situate in BuruBuru area of Nairobi County by two different factions of the same Church, and not over ownership of or proprietary rights over the land or buildings.

97. Consequently, what the applicants/defendants are asking from this court is for this court to convert the claim as settled by the consent order of 1st December 2000 into another fresh dispute between the parties which dispute if any can now be safely disposed of through the implementation of the consent order of 1st December 2000 or if that is not sufficient enough to dispose of the feuds, parties shall be at complete liberty to institute appropriate proceedings relating to ownership , title to or occupation of land before the court of competent jurisdiction which is the Environment and Land Court as stipulated in Article 162(2) (b) of the Constitution, as well as Section 13(1) of the Environment and Land Court Act 2011.

98. The upshot of the above analysis is that this suit came to a final determination on 1st December 2000 through a consent which was reduced into an order and decree of the court and what these feuding parties ought to be enforcing is that order settling the suit as per the consent of 1st December 2000.

99. This court cannot recall and or nullify a judgment which was validly entered into by consent of the parties and d by a court or competent jurisdiction.

100. I then proceed to determine whether the decree can issue on a suit which is dismissed for want of prosecution. This question must be answered for reasons that the defendant/applicant is using an extracted *'decree'* which I have nonetheless declared a nullity, to urge this court to make very sustentative orders of evicting the respondents/plaintiffs from the Church premises, in order to give vacant possession of the Church premises to the defendants/applicants, which premises are undisputedly wholly owned by the defendants, for their exclusive enjoyment.

101. In **Nguruman Ltd Vs Shompole Group Ranch & Another [2014]eKLR,** the Court of Appeal stated:

"……An order for dismissal for want of prosecution cannot fall into the category of orders granted in finality in any matter as the merit aspect of the particular matter affected is never interrogated before the court makes such an order. Such orders are therefore usually made purely on technicalities."

102. Based on the above decision which is binding on this court, I have no reason to depart from it and I therefore find that no decree arises from dismissal of a suit for want of prosecution, even assuming that there was any such pending suit for determination as at the time Honourable Waweru J ordered for its dismissed for want of prosecution.

103. But as I have stated herein, to attempt to find that there was a suit pending determination and therefore capable of being dismissed for want of prosecution after the consent of 1st December 2000 is tantamount to reopening doors to all and sundry to jump onto the band wagon and flood the court with past litigation that was settled by final orders of a competent court and in the process, transgress on the rule of finality in litigation; and to fail to provide safeguards against absurdities.

104. Section 2 of the Civil Procedure Act defines 'decree' as:

" Decree means the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in a suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 of Section 91 but does not include:

a. ***Any adjudication from which an appeal lies as an appeal from an order; or***

b. ***Any order of dismissal for default, provided that for the purposes of appeal, 'decree' includes judgments, and judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.***

105. From the above elaborate interpretation Section of the Civil Procedure Act, a decree is a formal expression of a judgment of the court which conclusively determines rights of the parties to a suit with regard to all of or any of the matters in controversy in the suit.

106. In a dismissal of a suit for want of prosecution under Order 17 of the Civil Procedure Rules, the court makes an order. It does not enter judgment for the defendant. in my humble view, and as exemplified in the Nguruman Ltd (supra) case by the Court of Appeal, an order of dismissal of suit for want of prosecution cannot conclusively determine the rights of the parties to the suit with regard to all or any of the matters in controversy in the suit.

107. I find that the ***'default'*** contemplated in the definition of 'decree' in Section 2 of the Civil Procedure Act is default or failure to take action or to prosecute the suit as contemplated in Order 17 of the Civil Procedure Rules, where no step or proceeding has been taken thereby occasioning unnecessary delay, contrary to the overriding objectives of the law as stipulated in Section 1A and 1B of the Civil Procedure Act and Article 159 (2) (c) of the Constitution which stipulate that justice shall be administered without undue delay.

108. In the end, I find that dismissal of this suit which had nonetheless been settled by consent of the parties was an act of nullity and I therefore find that the application by the defendants, which is not grounded in law or on any judicial determination lacks merit. The same is hereby dismissed.

109. As the feuding parties, despite a consent order of this court settling the original dispute have refused to agree to enforce their own consent to resolve their issues, I shall order that each party bear their own costs of the application dated 23rd October 2014, hoping that good conscience shall guide and override them.

Dated, signed and delivered in open court at Nairobi this 8th day of December 2016.

R.E. ABURILI

JUDGE

In the presence of:

Miss Mutindi h/b for George Mbiyu for the defendants /applicants

N/A for the plaintiffs/respondents

CA: Lorna