



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2766 OF 1976

FRANCIS MWANGI GITONGA & 9 OTHERSPLAINTIFFS

VERSUS

VINCENT NYINGI NDIRITU & ANOTHER.....DEFENDANTS

RULING

On 1.12.93 Mr Gaturu on behalf of the 10 plaintiffs herein filed a chamber summons under o 39 r 2, s 3A and o 21 r 22 and any other enabling pieces of legislation. He prayed for orders against the two defendants herein.

1. That the defendants either themselves, their servants and or agents be restrained from subdividing, surveying, demarcating or interfering in any way whatsoever with the suit premises herein viz: Nyandarua/Njabini/656, 129, 58, 56, 62, 65, 125, 99, 127, 131, 57 pending the hearing and final determination of an intended appeal and suit No 4699 of 1992 (OS).
2. That there be a stay of execution of the judgment of 13.5.1992 until the determination of the plaintiffs' appeal hereof to the Court of Appeal and HCCC No 4699 of 1992 (OS) brought by the 1st defendant against the plaintiffs which is still pending.

The chamber summons also asked for costs.

Briefly put the judgment in this suit was delivered on 13.5.92. The suit which the plaintiffs had brought against the first defendant, an individual, and the Settlement Fund Trustee was dismissed with costs.

Apparently the plaintiffs were not satisfied with that judgment and it has been shown to the Court that a notice of appeal was filed. No appeal followed because, as Mr Gaturu submitted, the proceedings in the case have not been supplied to date.

The 1st defendant swore and filed a long affidavit dated 14.12.93. The Hon the Attorney General who appeared all along for the Settlement Fund Trustees filed grounds of objection to the plaintiffs' chamber summons. It came for hearing on 4.3.94.

Referring to the application itself as well as the affidavit in support Mr Gaturu wished to add to and pray for relief under o 41 r 4 for a stay of execution in case of appeal. He told the Court that by his letter of 16.11.93 the Land Registrar I/C of Nyahururu and Samburu had written a letter to his clients inviting them to be present on 2.12.93, apparently on the disputed land, so that he could:

“... implement the High Court of Kenya Nairobi order in respect of the ... case HCCC No 2766 of 1976.”

To Mr Gaturu’s clients that may have meant that their land “going” – by whatever activity the Land Registrar wished to implement their court’s orders in this case. Now pausing for a moment and assuming that the “order” to be implemented related to the judgment of 13.5.92 what could that amount to? Actually nothing. Nothing because the judgment dismissed the suit of the plaintiffs against the 2 defendants. And except for the order of costs, which a land registrar has nothing to do with, there was no other orders to be implemented.

Be that as it may, Mr Gaturu argued that any subdividing, surveying, demarcating etc could interfere with the suit premises and he gave 10 titles to them including plot No 656. Again the Court pauses here to observe that the only plot in dispute is No 656. It is not clear as to why the other 9 plots, not a subject of this suit came in. Are the defendants also interfering and/or claiming these ones? Anyway the submission on behalf of the plaintiffs concluded that in case an injunction was not issued against the 2 defendants and also a stay of execution put in place, the plaintiffs could be greatly prejudiced in case they won their appeal while the suit premises had been surveyed, subdivided and demarcated. No amount of money would compensate them.

Miss Kimani for the 2nd defendant clarified that on receipt of a copy of the Land Registrar’s letter (*supra*) regarding implementing this court’s order, they had informed him that all he could consider to do was to resurvey the plot in dispute so that its original size and shape was once again known. Earlier in 1979 the 1st defendant had offered a strip of about 50 m against plot No 656 to the plaintiffs to use for the transit of their stock to a water point. Apparently the plaintiffs refused this and wanted the whole plot No 656 for themselves. In short the survey by the 2nd defendant could enable both the 1st defendant and the plaintiffs to know the exact boundaries of the land they are litigating about whether it is in this Court or the Court of Appeal. Miss Kimani submitted further that injunctions do not issue against the Government under s 16 of the Government Proceedings Act (cap 40). This application was therefore bad in law. It should be dismissed.

The 1st defendant also desired this Court to dismiss the application on the ground that it was without merit. The Court had dismissed the plaintiffs’ claim over the suit premises. They had not filed an appeal for over 20 months since judgment was entered. The plaintiffs were thus using a delaying tactic so that they continue to occupy and use his land.

He told the Court that he did not wish to dispose of plot No 656. Like the submission on behalf of the 2nd defendant, a resurvey is what was intended to be undertaken by the local Land Registrar. Both sides should at least know the exact parcel of land in issue. This can only be done by a resurvey in the light of the 50m strip he granted the plaintiffs in 1979 and they declined to use.

As a result of the judgment herein dismissing the suit against him the 1st defendant had filed HCCC No 4699/92 (OS) in which he, *inter alia*, sought to evict the plaintiffs as well as recover damages for the trespass over and use of his land since 1976. The 1st defendant had not proceeded with this case because the resurvey was necessary. By this he could know who should move from what point, remove what fences and cease to till where.

After all the submissions this Court was of the view that this chamber summons should be dismissed with costs.

Beginning with the 2nd prayer for stay, there was nobody of the parties in dispute who had a judgment to execute. It was dismissed and the defendants were awarded costs. It was an erroneous impression for the plaintiffs to believe that a judgment was about to be executed against them. There is no judgment against them over plot No 656 yet – probably if the 1st defendant’s originating summons in HCCC 4699/92 succeeds. But that is another matter. We are not yet there. As said about the Land – Registrar’s letter to the plaintiffs this Court is satisfied that the impression seems to have been corrected by correspondence. The Land Registrar had no orders to implement arising from the judgment of 13.5.92. In the circumstances there can be no order to stay execution because there was no judgment in favour of

anybody which was due for execution at all. That being the case the aspects (under o 41 r 4) of substantial loss, delay and security to be posted, were not gone into.

What about the injunction in prayer 1? While Miss Kimani submitted that the 2nd defendant is a Government department and so no injunction can issue against it under the Government Proceedings Act, Mr Gaturu told the Court that the 2nd defendant was no such a department and it should be enjoined so that even if it is only a survey, the same is not carried out at all. Fair enough. No exhaustive arguments were put forth on this aspect. But it is not in this court's mind, doubted that the 2nd defendant is not a Government department charged with land settlement matters. Besides, why was an objection not raised right from the beginning when the Attorney General appeared on the Settlement Fund Trustees' behalf?

The Attorney General appears for the Government and its departments – that is the general view and practice. In brief an injunction should not issue against the 2nd defendant in the light of the contents of s 16 (i) (ii) of the Government Proceedings Act. Accordingly none will issue here.

As against the 1st defendant it was not shown here that he was doing anything to prejudice the interests of the plaintiffs.

The general impression left with the Court is that a resurvey of the suit premises by the 2nd defendant is what is desirable and intended. Indeed it is convincing to agree that by such an exercise the original size and shape of the dispute plot No 656 should be ascertained with beacons and points. This is necessary whether the appeal is in progress, if it will be, or HCCC 4699/92 is being prosecuted.

Having said so the Court was left a little puzzled that the defendant in HCCC 4699/92 were the ones praying for an injunction until that suit is determined. A little curious is it not?

In conclusion this chamber summons is dismissed with costs.

Dated and Delivered at Nairobi this 18th day of March 1994.

J.W.MWERA

JUDGE