



## REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 362 OF 2017

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

VS

ANGLICAN CHURCH OF KENYA

(DIOCESE OF MOUNT KENYA CENTRAL.....1<sup>ST</sup> DEFENDANT  
THE COUNTY GOVERNMENT OF MURANGA...2<sup>ND</sup> DEFENDANT  
NATIONAL LAND COMMISSION.....3<sup>RD</sup> DEFENDANT  
THE HON ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT  
BISHOP MAHIA-INI ACADEMY &  
BISHOP MAHIA-INI MIXED  
SECONDARY SCHOOL.....5<sup>TH</sup> DEFENDANT

### RULING

1. This Ruling refers to the Notice of Motion dated 21.9.2017 filed by the Plaintiffs/Applicants under Order 2 rule 15, Order 15 rule 1 and Order 51 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders:-

a. That the 3<sup>rd</sup> Defendant's determination delivered on 27<sup>th</sup> January, 2017 pursuant to public hearings concerning land known as Title No. Loc. 11/Gaitega/345 be adopted as the judgment of this Honourable Court and a final determination of the main case herein.

b. That the 2<sup>nd</sup> Defendant/Respondent be ordered to comply with the determination of the 3<sup>rd</sup> Defendant/Respondent delivered on 27<sup>th</sup> January, 2017 by causing and effect demarcation of the land Title No. Loc. 11/Gaitega/345 within fourteen (14) days.

c. That if the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants are not willing to comply with the 3<sup>rd</sup> Defendants/Respondents determination delivered on 27<sup>th</sup> January 2017, this Honourable Court be pleased to issue and order directing 1<sup>st</sup> and 5<sup>th</sup> Defendants/Respondents statement of Defence to vacate the entire parcel of land and to revert the same to the community of Gituri & Gaitega villages who are represented

by the Plaintiffs/Applicants herein.

d. d 5<sup>th</sup> Defendants/Respondents statements of Defence and Counter claim filed herein be struck out for failure to disclose any triable issues and that summary judgement be entered against the Defendants/Respondents in favour of the Plaintiff/Applicants as prayed in the plaint.

e. That in the alternative, judgement on admission be entered against the Defendants/Respondents in favour of the Plaintiff/Applicants as prayed in the plaint.

f. That costs of this application be awarded to the Plaintiff/Applicants.

2. The application is premised on several grounds and the affidavit of Benson Kamau Macharia deponed on even date. In brief the Plaintiffs aver that the suit land measuring 25 acres registered in the name of the defunct County Council of Muranga (now County Government of Muranga) – reserved for Gituri Secondary School in 1965 is public land. That in the 1980s the 1<sup>st</sup> Defendant appropriated the land from the community and developed private schools in the name of Bishop Mahia-ini Academy and a mixed secondary school. That after the Plaintiffs filed this suit, the National Land Commission pursuant to its statutory and constitutional mandate initiated public hearings and investigations and made its final determination on 27.1.2017 *inter alia* splitting the suit land into two; 1/3 comprising of the primary school section of the land to the 1<sup>st</sup> Defendant and 2/3 of the land comprising the secondary school section to go the community. It is this determination among other prayers aforesaid that underpin this application. The Plaintiffs have urged this Court to adopt the determination as a judgment of the Court.

3. The application is opposed by the 1<sup>st</sup> and 5<sup>th</sup> Defendants vide their grounds of opposition dated the 23.10.2017 and the response to the replying affidavit dated the 24.11.2017 deponed by one Samuel Kuria. In short, they contend *inter alia* that the prayer for striking out their defense is without merit and is ill founded; This Court has supervisory jurisdiction over the National Commission under Art 165(1)(d) of the Constitution. It cannot adopt the recommendations of the 3<sup>rd</sup> Defendant summarily; they crave the exercise of their constitutional right to full trial in Court be upheld; the 3<sup>rd</sup> Defendant is a party to the case and as such its recommendations are not impartial.

4. The 2<sup>nd</sup> Defendant filed grounds of opposition on 27.11.2017 in which it contended that the application is *inter alia* an abuse of the process of the Court; render this Court functus official; reduce the function of this Court and its proceedings to an execution of a party's proceedings; orders sought cannot be sustained against the 2<sup>nd</sup> Defendant as they are only executable by the Central Government.

5. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not oppose the application.

6. Parties elected to file written submissions and chose to highlight before the Court.

7. I have considered the written submissions, the applicable law, the legal authorities, oral submissions as ably highlighted by the learned counsels for the Plaintiff and the 1<sup>st</sup> and 5<sup>th</sup> Defendants and proceed to determine the matters in issue.

8. As regards the prayer for interlocutory injunction, this prayer in my considered view is spent. It was allowed by consent by the parties on the 27.11.2017. It is still in force. No evidence was adduced in Court to the contrary. It will be superfluous and an abuse of the process of the Court to so determine.

9. Prayers 3, 4 & 5 concern the adoption of the 3<sup>rd</sup> Defendants recommendations as the judgment of the Court. I have examined the same and it would appear that the determination was not arrived at based on consensus of the parties. Under paragraph 26 of the said determination, the totality of the recommendations as prepared by the Advocates of the parties was, *inter-alia*, that the suit land be split into two equal parts between the community represented by the Plaintiffs and the 1<sup>st</sup> Defendant. However, the 1<sup>st</sup> Defendant did not give its ratification and instead moved the Court under judicial review to stop the process. The 1<sup>st</sup> Defendant later abandoned the Judicial Review. The 3<sup>rd</sup> Defendant under paragraph 28 of the aforesaid determination, abandoned the settlement and made a decision, which in its opinion took into account the interests of both parties. It would appear that the 1<sup>st</sup> and 5<sup>th</sup> Defendants were unhappy with it hence the objection to the same.

10. The adoption of the said recommendations would amount to granting mandatory injunctions/summary disposal of the case. No compelling or special circumstances have been laid before the Court to warrant consideration of such a relief. **See Nation Media Group & 2 others Vs John Harun Mwau (2014) EKLR.** There are contentious issues best reserved for the trial Court.

11. It must be noted that the 3<sup>rd</sup> Defendant is a party to the proceedings and given that there is no consensus on the recommendations, it would be improper to adopt the same as an order of this Court. The Court would have taken a different position had there been an unequivocal consent of the parties.

12. Should the 1<sup>st</sup> and 5<sup>th</sup> Defendants' defence and counterclaim be struck out for failure to disclose triable issues? The Court of appeal in the case of **D T Dobie & Company (Kenya) Limited Vs Joseph Mbaria Muchina & Another (1980) EKLR** Justice Madan stated as follows;

“as the power to strike out pleadings is exercised without the Court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with a real life by amendment, it ought to be allowed to go forward, for a Court of justice ought not to act in darkness without the full facts of the case before it“.

13. In the case at hand, the Plaintiff's claim is that it is entitled to the public land registered in the 2<sup>nd</sup> Defendant to hold in trust for the community. It is the 1<sup>st</sup> and 5<sup>th</sup> Defendants' case, *inter-alia*, that the land comprises a portion that it purchased/exchanged with a third party which portion was consolidated with the portion allocated to it in the 1960s. The 2<sup>nd</sup> Defendant has maintained that the orders being sought against it are such that they can only be implemented by the National Government and therefore it would be issued against it in vain. All these contentious issues in my view are issues for trial. The Court is not concerned at this point whether or not they will succeed only that they are triable issues for the trial Court.

14. Further parties are bound by their pleadings. The Plaintiffs have invited the Court to exercise its discretion under Order 2 rule 15 in its entirety to strike out the 1<sup>st</sup> and 5<sup>th</sup> Defendants pleadings. The Plaintiffs have not paid attention to order 2 rule 15(2) which dictate that no evidence shall be admissible on an application under sub rule 1 (a) but the application shall state concisely the grounds on which it is made. An affidavit deponed by Benson Kamau Macharia would make the application on that account fatal. This underpins the dicta that the power to strike out pleadings is one which should be exercised only in very clear and plain cases. **See Yaya Towers Limited Vs Trade Bank Limited (in liquidation) (2000) EKL.R.** In the case at hand it is not plain and clear. I decline to exercise my discretion in that regard.

15. As to whether there is an admission by the Defendants, the Court has carefully reviewed the pleadings and responses of the Defendants where applicable and there is no evidence of explicit admissions. Having said that it is clear from the evidence on record that the 2<sup>nd</sup> Defendant appears to have taken action towards the implementation of the 3<sup>rd</sup> Defendants recommendations vide their letters dated the 6.2.2017 and 22.8.2017 where it convened a meeting of stakeholders to disseminate the decision. It would appear that it became a cropper. For the reasons given, the prayer for summary judgement is not available.

16. Having said that the Court is mindful of the Provisions of the Constitution that allows parties to a dispute to employ alternative dispute Resolution and in that vein would encourage parties to pursue the same. Parties are also under liberty to list the matter for pretrial conference at the earliest.

17. The application succeeds in terms of prayer 2 only which is already granted.

18. The Costs shall be in the cause.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31<sup>ST</sup> DAY OF MAY 2018**

**J.G. KEMEI**

**JUDGE**