



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO 91 OF 1996

PETER MUGAMBI MARETE.....PLAINTIFF

VERSUS

NGUTARI MIRITI.....DEFENDANT

JUDGMENT

LITIGATION HISTORY

The litigation history of this matter is extremely scanty. The original court file is missing or cannot be traced. The matter came up before me on 6.10.17 as a Certificate of Urgency for reconstruction of the court file. I gave the date of 11.10.17 with directions that the application be served.

On 11.10.17, I was expecting to handle the application dated 7.7.17 to have the court file H.C.C. No. 91 of 1996 reconstructed and to adopt a consent order dated 22.5.2013 as an order of the court.

I did not just deal with the application, but I ended up hearing the entire suit writing the judgement and delivering it on the spot under very unusual circumstances.

When the matter was called out at 9.00 a.m. on 11.10.17, the plaintiff / applicant, an old man was present. Then when I called out defendants name, a lady by the name Regina Kuri, alerted the court that the defendant was her father and he was lying somewhere outside the court room as he was very sick. The court directed that he be brought into the court room. This was done.

The litigant (defendant) was carried into the court room by several people. He is very old, and he looked very frail. Obviously he could not walk or see. He was coughing uncontrollably, his eyes were withdrawn and a make shift bed had to be hastily made (where some garments were simply put on a bench for defendant to lie on). The sight was heart wrenching.

Seeing that none of the parties were represented, and after confirming from defendant that indeed the 1996 case had existed, the court proceeded to give the following directions: -

- 1. The application of 7.7.17 was allowed in terms of prayer 2 for reconstruction of the court file.**
- 2. I disallowed the prayer to have a consent of 22.5.13 adopted as an order of the court.**
- 3. The court moved itself *suo moto* to take the evidence of the plaintiff and the defendant *de bene esse*.**

Order 18 r 9 is the basis upon which evidence is taken *de bene esse*. The proviso states that such evidence is taken upon the application of any party or witness. In the instance case however, there was no room and time for formalities. Under Article 159 2(b) of the constitution, “**Justice shall not be delayed**”, while under sub article 2(d) provides that “**justice shall be administered without undue regard to procedural technicalities**”. This court also has a mandate to uphold the national values and principles of governance as outlined under article 10 of the constitution. These National values and Principles of governance bind all state organs, state officers, public officers and all persons whenever any of them;

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include –

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

This was a case filed in 1996, the court file was lost (as per a Certificate filed by Joseph Muchemi in charge of the archives at Meru Law Courts). The parties are very old. Defendant is not just old, but he is evidently very sick and on the verge of passing on. Plaintiff also cannot see, he is 81 years old and paralysed.

Against this back ground, I found it necessary to expand the application of order 18 rule 9 to include instances where the court on its own motion finds it necessary to take evidence *de bene esse*. I therefore proceeded to hear the case but starting with defendant.

THE EVIDENCE

Defendant gave evidence and was cross-examined. Fortunately he was quite lucid when it came to the issue of land. Plaintiff also did testify but was not cross-examined as the case took a new turn where the parties settled the matter.

The evidence given herein is that the defendant owns a parcel of land No. NYAKI / THUURA / 1139 which is four acres. The defendant admitted initially that he sold only 1 acre to the defendant whereas the plaintiff stated he bought 3 acres in 1972.

Defendant admits that the plaintiff is in occupation of the 3 acres of land.

Plaintiff avers that at some point another agreement was made where plaintiff was to refund 1 acre of land to defendant so that he (plaintiff) could remain with 2 acres.

Somehow the transfer was never effected. Plaintiff hence filed the suit H.C.C.NO. 91 OF 1996 in Meru. The suit was never heard and the court file eventually got lost.

Just before plaintiff could be cross-examined by defendant the court adjourned briefly to enable defendant to relax and to explore settlement.

Thereafter, the parties had a consent whereby defendant agreed to let the plaintiff have 2 acres of the land as long as he was given some trees. Plaintiff was agreeable to this proposal.

In the circumstances, I proceed to give orders as follows: -

1. Plaintiff is hereby entitled to 2 acres of land from Parcel No. NYAKI / THUURA / 1139.

2. The two acres of plaintiff are to be hived off from the portion that plaintiff is already occupying.

3. All inhibitions and cautions lodged on the suit land are to be lifted forthwith to facilitate the subdivision.

4. Plaintiff is to give some trees to defendant.

5. Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT MERU THIS 11TH DAY OF OCTOBER, 2017 IN THE PRESENCE OF:-

C:A Janet

Peter Mugambi Marete – Plaintiff present

Ngutari Miriti – Defendant present

Hon. L. N. MBUGUA

ELC JUDGE