REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CIVIL APPEAL NO. 81 OF 2014

REV. CHARLES MWAI NJUKI ….....…. 1ST APPELLANT

THE FULL GOSPEL CHURCHES OF KENYA.....2ND APPELLANT

-VERSUS-

BOG-KIARUHIU SECONDARY SCHOOL …….....…..……1ST RESPONDENT

GEOFFREY MIANO KARIMI ….....…. 2ND RESPONDENT

ENG. WAMBUGU KARIUKI ….....…..... 3RD RESPONDENT

REV. JULIUS NGOTHO……...….....…. 4TH RESPONDENT

THE PCEA CHURCH (*Through its Registered Trustees*)……. 5TH RESPONDENT

DAVID MUCHIRI MUKUNGA ….....…... 6TH RESPONDENT

(An appeal from the ruling and order of Honourable L. Mbugua, Principal Magistrate, dated 1st December, 2010 in

Karatina SRMCC No. 76 of 2006)

JUDGMENT

Introduction

1. Principal Magistrate delivered on 1st December, 2010 in Karatina SRMCC No.76 of 2006. Vide that ruling, the trial magistrate (hereinafter referred to as TM) dismissed an application by the appellants dated 5th November, 2010 and filed in court on the same day. In that application, the appellants had asked the TM to review, set aside and/or vacate the order or decree she issued on 21st April, 2010 and 29th September, 2010 and any subsequent order(s) issued pursuant to those orders/decree. The appellants also sought to stay the execution of those orders pending the hearing and determination of the application.

2. In dismissing the application, the TM observed:-

"I have weighed all the issues raised herein. I findthat the primary ground upon which

applicants seek review orders is that they allege that they also own the suit land…The document upon which the applicants rely to claim ownership of the suit land are minutes of County Council of Nyeri marked "CMN 3." I find that these minutes only state that:

"Recommended for half an acre at Kiaruhiu village."

That document has no reference to the suit land IRAINI/CHEHE/1392. Order 44 is clear that there must be a discovery of new and important matter in order for a court to allow a review. In the instant matter, the applicants have not shown that they have a claim to that land referred to as IRIANI/CHEHE/1392. It is the Nyeri County Council which apparently allocated to the applicants the alleged ½ acre of land and so the applicants ought to seek redress from this body so that they are shown their portion of the land.

On this basis I find that the orders for review shouldn't be granted. However, it is pertinent to note that no decree has been extracted. Order 20 rule 6(1) provided for existence of a decree. That order ought to be complied with hence a decree shall be extracted and execution to proceed. Such partieswho are on the suit land are to be evicted.

The application is dismissed with costs to the Respondent."

3. Aggrieved by the decision of the TM, the appellants filed this appeal challenging the decision on twenty (20) grounds which can be summarised as follows:-

That the learned TM:-

1. Fettered her discretion;

2. Failed to consider the fundamental issues raised in the application;

3. Failed to find that the execution proceedings against the appellants were illegal;

4. Failed to find that the appellants had not authorized the defendant to defend them (suit was not a representative action);

5. Failed to find that there was an error on the face of the record;

6. Failed to find that the appellants were not served with summons to enter appearance;

7. Failed to find that the suit was not heard on merit;

8. Failed to find that there was no order or prayer for eviction in the suit;

9. Failed to find that orders issued in the suit could not bind the appellants who were not parties to the suit;

10. Failed to find that the court had no jurisdiction to entertain the claim because it was based on trespass;

11. Failed to find that the respondents had no legal title to the suit property;

12. Failed to find that no final consent between the parties to the suit, hence the suit should have gone for full hearing;

13. Ruling was against the weight of evidence;

14. That the ruling did not meet the legal standards of writing a ruling, provided for under **Order**

21 of the Civil Procedure Rules;

15. That the TM considered issues not addressed by the respondents; and

16. That the TM issued orders not sought by the respondents.

4. For the foregoing reasons, the appellants seek the following orders against the respondents:-

1. An order setting aside the ruling and order dated 1st December, 2010 and in its place an order allowing the appellants application dated 5th November, 2010 bemade;

2. An order varying the decree issued in Karatina SRMCC No. 76 of 2006 and in its place an order dismissing the plaintiffs case with costs be made;

3. That the costs of the appeal and the suit in the lower court be awarded to the appellants.

5. This being a first appeal, this court is under an obligation to evaluate afresh the evidence adduced before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither saw nor heard the witnesses testify. See **Selle & Another** vs. **Associated Motor Co. Ltd & Others** (1968) E.A. 123.

6. The case presented before the TM and which led to the impugned decision was that the Kiaruhiu Secondary School (represented in this appeal by the 1st respondent) is the lawful registered owner of the parcel of land known as No. Iriani/Chehe/1392. The respondents contended that the defendant, David Muchiri Mukunga, had led a group referring itself as Kiaruhiu Communal Villagers (comprising more than 100 members) to the suit property wherein they sub-divided it among themselves and began developing it (tilling and planting crops thereon).

7. Based on the alleged unlawful activities of the defendant and the members of the Kiaruhiu Communal Villagers, the respondents sought a permanent injunction against the defendant and the members of Kiaruhiu Communal Villagers, the defendant's assignees and anyone else claiming under the defendant from occupying, wasting, alienating, cultivating, tilling, planting crops upon, putting up any structures or in any other manner tampering with the suit property.

8. It was contended that demand had been issued to the defendant and all members of Kiaruhiu Communal Villagers requiring them to vacate the suit property but they had refused to heed it rendering filing of the suit necessary.

9. In his statement of defence, the defendant denied organising the group to trespass into the suit property and carry out the impugned activities thereon. Instead he explained that some members of the village and himself occupy the parcel of land known as L.R No., Iraini/Chehe/890 which he contended is different from the suit property. The defendant further contended that he had no capacity to be sued on behalf of all the members of Kiaruhiu Communal Villagers.

10. On 25th January, 2008 advocates for the parties in the dispute preferred to the lower court, agreed to have the dispute determined without calling witnesses. Instead, they agreed to involve the County Council of Nyeri to clarify the issues raised in the suit.

11. On 18th July, 2008 in accordance with the agreement entered into between the advocates for the parties, anorder was issued directing the Clerk to the County Council of Nyeri to file a report concerning the two parcels of land in dispute.

12. On 8th April, 2009 the advocates for the parties recorded a consent in the following terms:-

"By consent the boundary of Iriaini/Chehe/1392 be identified to the parties by the Draftman

Nyeri County Council with assistance of District Surveyor after which case can be mentioned to confirm settlement on 3rd June, 2009."

13. On 4th November, 2009, both the Surveyor and the Draftsman, attended court and confirmed that the boundaries between the two parcels of land had been put in place and beacons pointed out. The report in that regard is contained in the surveyor's letter to the court dated 1st September, 2009. The report is as follows:-

"RE: IRIAINI/CHEHE/1392-BOUNDARY

RE-ESTABLISHMENT CIVIL SUIT NO.76 OF 2006

Your orders given on 8th April, 2009 to establish the boundaries of the above mentioned parcels of land refer.

I visited the suit land on 26th August, 2009 accompanied by the County Council of Nyeri, the area Chief.

The boundaries of the above parcel of land, Iriaini/Chehe/1392 were re-established and the beacons pointed out to the concerned parties in the presence of the area Chief."

Ann W. Mwangi District Surveyor-Nyeri."

14. Based on the consent referred to herein above and the report filed by the District Surveyor, on 21st April, 2010; the TM entered judgment in favour of the plaintiff as prayed for in the plaint dated 16th August, 2006.

15. Following entry of judgment in its favour, the plaintiff filed an application dated 14th May, 2010 seeking eviction orders against the defendant and some other 10 persons listed in the affidavit sworn in support of that application.

16. The application for eviction was heard and determined *ex parte* and an order of eviction issued against the persons named in the application on 29th September, 2010.

17. It is that order for eviction which prompted the application that is the subject matter of this appeal, the notice of motion dated 5th November, 2010. Vide that application, the appellants sought to review the orders issued on 21st April, 2010 (entering judgment in favour of the respondents and against the defendant in that suit and the members of Kiaruhiu Communal Villagers) and on 29th September, 2010 (allowing the respondents' application for eviction against the defendant and the members of Kiaruhiu Communal Villagers named in the application). The appellants also wanted to stay execution of those orders pending the hearing and determination of the application.

18. The application was premised on, among other grounds, that the defendant could not be sued on behalf of the appellants; the appellants were condemned unheard and that judgment was in *persona* and not in *rem.*

19. Upon hearing the application, the TM dismissed it on the grounds disclosed at the beginning of this judgment.

20. The foregoing were the circumstances that led to filing of the instant appeal.

21. The appeal was disposed of by way of written submissions.

Submissions by the appellants

22. In the submissions filed on behalf of appellants, it is submitted that the TM failed to find that there was sufficient cause to issue the orders sought; that the TM endorsed execution of non-existent orders without being prompted to do so by the respondents, ambushed the appellants with eviction orders, failed to find that the appellants had not authorised the defendant to defend them and that they were not served with summons to enter appearance.

23. It is further submitted that the TM failed to find that the suit was not a representative one hence condemning the appellants unheard. The TM is also faulted for having failed to find that the decree sought to be executed did not flow or agree with the judgment and that only the Land Disputes Tribunals established under the Land Disputes Tribunal Act, No. 18 of 1990 (repealed) could entertain a claim for trespass to land.

24. It is also contended that the TM did not address the matters raised in the pleadings and evidence as required by **Order 21** of the Civil Procedure Rules; that the TM decided on issues not raised by the respondents and granted orders not sought by the respondents.

25. For the foregoing reasons, it is submitted that the TM ought to have found that there was sufficient cause for reviewing the impugned orders.

26. Besides the foregoing submissions, it is contended that the respondents counsel had no capacity to represent them for the reason that he had not taken out a practicing certificate for the period 2009 to 2014.

Submissions by the Respondents

27. On behalf of the respondents, it is submitted that the issue of capacity of the respondents' advocate to represent the 1st to 5th respondents is no longer tenable because he has been replaced by the new firm of advocates, S.K Njuguna & Company Advocates.

28. On whether the learned TM fettered her discretion, it is submitted that the fact that the learned magistrate did not grant the orders sought by the appellants does not amount to fettering her discretion.

29. On the contention that the learned TM issued eviction orders when there was no such prayer in the plaint, it is pointed out that following the issuance of judgment in their favour, the respondents brought a separate application for eviction, and submitted that in exercise of the powers vested in the Court under **Section 3A** of the Civil Procedure Act and the overriding objective under **Section 1A** of the Civil Procedure Act, to avoid multiplicity of suits, the TM was justified in issuing the impugned eviction orders.

30. With regard to the contention that the suit in the lower court was not heard on merits, reference is made to the consent executed between the advocates for the parties and submitted that the parties agreed to dispose of the suit without hearing.

31. As for the appellants' application for review, it is pointed out that their main ground for review was the allegation that they were entitled to a portion of the suit property which claim they were unable to prove.

32. Explaining that all the other parties affected by the impugned judgment and the eviction orders vacated the suit property and that only the appellants refused to vacate, and further that the appellants were aware of the suit, it is submitted that the appellants cannot be heard to say that they were condemned unheard.

33. On whether the trial court had jurisdiction to entertain a claim based on trespass to land, it is submitted that the issue is being raised for the first time in the appeal, hence unmeritorious. Besides, it is submitted that the Land Disputes Tribunals did not has power to issue injunctive reliefs. For that reason, it is submitted that it was proper for the respondents who sought injunctive relief to move the court as

opposed to the repealed land disputes tribunal.

34. As to whether the respondents proved their entitlement to the suit property, it is submitted that the evidence on record and in particular the minutes of the County Council to wit, (Min No.187 of 14/4/1986) shows that the suit property was allocated to the institution represented by the respondents. For that reason, the respondents had a duty to safeguard and defend the suit property from those threatening it with illegal occupation.

35. On whether the judgment of the court met the requirements set under **Order 21** of the Civil Procedure Rules for writing a judgment/ruling, it is submitted in the circumstances of this case, the impugned judgment covered all what was important to cover.

36. With regard to the contention by the 6th respondent that the Surveyor and the Draftman were strangers to the case, it pointed out that the 6th respondent, who did not appeal against the judgment and eviction orders, was represented by an advocate when the consent orders pursuant to which report of the surveyor was filed and submitted that the 6th respondent should not benefit from an appeal he did not file.

Analysis and determination

37. From the memorandum of appeal herein and the submissions by the respective parties, I find the issues for determination to be :-

1) Whether the appellants have made up a case for setting aside the orders issued on 21st April, 2010 and on 29th September, 2010?

2) If the answer to (1) above is in the affirmative, what orders should the court make?

38. In determining the 1st issue, I begin by pointing out that whereas the respondents contended that the defendant had been sued on his own behalf and on behalf of all members of Kiaruhiu Communal Villagers, the defendant had by his statement of defence, dated 7th September, 2006 denied having any capacity to be sued on behalf all members of Kiaruhiu Communal Villagers. In addition to that denial, the defendant had averred that some villagers and himself were in occupation and utilising L.R No. Iriaini/Chehe/890 which is different from the suit property.

39. The foregoing defence by the defendant, who allegedly represented all the members of the group sought to be restrained from carrying out the activities listed in the plaint, brings into question the issue of the defendants capacity to represent all the members of Kiaruhiu Communal Villagers and whether the appellant was one of the members of Kiaruhiu Communal Villagers whom the plaintiff sought to restrain by doing the activities listed in the plaint.

40. Under **Section 107** of the Evidence Act, the plaintiff had a duty to prove by way of evidence the existence of an organized group by the name of Kiaruhiu Communal villagers, its membership and more importantly, that the defendant had capacity to be sued on behalf of the members of that group.

41. In the circumstances of this case, I note that despite the defendant having categorically averred that he had no capacity to be sued on behalf of all the members of the group, that issue got subsumed in the consent entered into between the parties to that dispute. In my view, in the absence of any evidence capable of proving that the defendant had capacity to be sued on behalf of all the parties to the suit, the orders issued in that suit could only issue against the defendant and those members of the group claiming under the defendant and not any other person claiming an interest to the suit property individually.

42. Although the appellants were unable to prove that the parcel they claim to have been allocated by the Council of Nyeri is the same or forms part of the parcel issued to the plaintiff by the same Council, owing to the fact that they were in occupation of the suit property, I find and hold that the TM in

considering the application for review ought to have considered that fact. In my view, if the trial magistrate had considered that fact alongside the fact of the capacity of the defendant to represent all the persons alleged to have been occupying the suit property illegally, she would have limited execution of the order issued in the impugned proceedings to the defendants and those proved to have being in occupation of the suit property under him.

43. I say this because under **Order 1 Rule 8**, one person may sue or defend on behalf of all in the same interest. The only rider to a suit being instituted or defended by one person on behalf of other persons having interest in the suit is that, the parties are obligated to give notice of the suit to all such persons as the court may direct.

44. In the circumstances of this case, there is no evidence that the notice contemplated by **Order 1 Rule 8(2)** was issued to all the persons allegedly represented by the defendant.

45. In view of the foregoing, I find and hold that, in the circumstances of this case, there was a sufficient cause for reviewing the orders issued on 21st April, 2010 and on 29th September, 2010 not to the extent sought by the appellants but to the extent that they would only apply to the defendant and those members of the Communal Village claiming under him.

Dated, signed and delivered at Nyeri this 22nd day of March, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mrs Ngugi h/b for Mr. Macharia for plaintiff

Ms Mwangi h/b for Mr. Njuguna for 2nd respondent

Court assistant - Lydia