



Changwony (Suing on behalf of Kaprotei Sub-Clan) v Kayoi Clan Committee & another (Environment & Land Case 12 of 2020) [2023] KEELC 20491 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20491 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 12 OF 2020
L WAITHAKA, J
SEPTEMBER 27, 2023**

BETWEEN

ERNEST CHANGWONY (SUING ON BEHALF OF KAPROTEI SUB-CLAN) PLAINTIFF

AND

THE KAYOI CLAN COMMITTEE 1ST DEFENDANT

THE CHAIRMAN, KAYOI CLAN COMMITTEE 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 5th August, 2020 the plaintiff herein instituted this suit seeking judgment against the defendants for orders that :-
 - a. He (the plaintiff) and his sub-clan are the genuine owners of all that parcel of land known as the Kayoi Community Land;
 - b. The defendants have jointly and severally unlawfully, illegally and without any colour or right and justification trespassed upon and illegally and/or unlawfully interfered with the plaintiff's land;
 - c. An order of permanent injunction to restrain the defendants, jointly and severally, whether acting by themselves, their servants, contractors or agents from constructing, pulling down the fence, taking possession or in any other way interfering with the plaintiff's parcel of land known as the Kayoi Clan Community land;
 - d. The defendants be compelled to implement the traditional boundaries
 - e. That any person who has encroached into another's parcel be evicted from the suit parcel.



- f. Exemplary damages and such further and/or orders that the honourable court may deem fit to grant
 - g. Costs of the suit and interest.
2. The plaintiff's suit is premised on the grounds that at all time material to the suit, the Kaprotei sub-clan who are part of the larger Kayoi clan of which he is a member, is the genuine legal owner of a portion of the traditional land known as Kayoi Clan Community Land; that the members of Kaprotei sub-clan have lived in their portion of the suit land together with their families for a long period of time.
 3. The plaintiff acknowledges that there were boundary disputes among the different sub-clans of Kayoi clan but contends that the disputes were resolved through a resolution of elders to the effect that the traditional boundaries be maintained.
 4. The plaintiff accuses the defendants of negating the resolution and proceeding to divide and demarcate the clan land into six equal portions thereby rendering them liable to be forcefully evicted and displaced from their homelands.
 5. Explaining that they complained to the defendants and lamenting that their complaints were ignored, the plaintiff terms the actions of the defendants complained of trespass to land.
 6. When the case came up for hearing the plaintiff availed a total of seven (7) witnesses himself included. The defendants availed two (2) witnesses.
 7. At close of hearing, parties to the suit filed submissions, which I have read and considered.
 8. From the pleadings, evidence and the submissions filed by the respective parties, I find the issues for the court's determination to be:-
 - i. Whether this court is the right forum to hear and determine the dispute brought to it as a court of first instance; and
 - ii. Whether the plaintiff has locus standi to sue on behalf of his clan or sub-clan.
 9. With regard to the first issue, Michael C. Kwambai one of the witnesses availed by the plaintiff and who testified as P.W.7 informed the court that the clan's constitution has a dispute resolution mechanism.
 10. Concerning the clan's disputes resolution procedure/mechanism, P.W.7 stated:-

“If any dispute arises, it is referred to the elders of that clan. If the elders of that clan are unable to resolve the issue it is brought to the Management Committee of the Cheboror/Irong Committee comprising of two members of each clan.”
 11. From the testimony of P.W.7, it is clear that the plaintiff had an internal dispute mechanism which he ought to have pursued before coming to court.
 12. PW 7 confirmed that the dispute before the court was not presented to the clan's Management Committee for arbitration.
 13. Section 39(2) of the [Community Land Act](#), No.27 of 2016, provides that any dispute arising between members of a registered community, a registered community and another registered community shall, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.



14. Arising from the fact that the parties had an internal dispute mechanism which they ought to have pursued before coming to court and guided by the provision of Section 39(2) of the [Community Land Act](#), cited herein above, I find and hold that this court is not the right forum to resolve the dispute preferred to it by the plaintiff as a court of first instance.
15. As to whether the plaintiff had capacity to sue on behalf of his sub-clan, it is the considered view of this court is that it is only the officials of a clan who can sue and be sued on behalf of the members and not the members of the clan on their individual capacity.
16. To institute and maintain a suit as an member of his clan, the plaintiff needed to bring a representative suit and meet all the legal requirements for a representative suit; like issuance of a notice to all the persons to be affected by the case and filing authority of the persons he represents, which he did not do rendering his suit bad in law. In that regard, see the case of Phares Omondi Okech & 3 others (Suing for and on behalf of Kasgam Community – Wadhari Clan) v Victory Construction Co. Ltd & Kisumu Water & another [2015] eKLR where it was held:-
 - “ ...
 - (a) That an incorporated society cannot sue or be sued in its name, but that its officials or trustees can institute a suit or defend a suit on behalf of the society in accordance with their constitution {see African Orthodox Church of Kenya – V- Rev Charles Omuroka & Lagos Ministry for Orthodox Renewal {2014} eKLR, Mitinyani Women Development Group – V – Group Four security Limited {2005} eKLR, Simu Vendors Association – V – The Town Clerk, City Council of Nairobi & Another {2005} eKLR, Ertrea Orthodox church – V s Wawiwax Generation Limited {2007} eKLR, Living water Church International – V – City Council of Nairobi {2008} eKLR which are cited in Football Kenya Federation – V – Kenya Primer League Limited & 4 others {2015}) eKLR.....
 - (b) That the issue of capacity to sue cannot be a matter of procedure as counsel for the plaintiffs submitted to be cured through Article 159 of [the constitution](#) by the consideration of substantive justice. The lack of capacity cannot be cured by Article 159 of [the constitution](#) that emphasizes on substantive justice or by applying the oxygen principle under Section 1A, 1B and 3A of the [Civil Procedure Act](#) (see Amina Hassan & 372 others. (suing as Lekiji Community) – V – Nigel Weibay Trent & another (2011) eKLR and Football Kenya Federation – V – Kenya Premier League & 4 others (2015) eKLR....
17. Also see the cases cited by the 1st defendant in support of his contention that the plaintiff lacks capacity to institute the instant suit namely Kahindi Katana Mwangi & Another vs. Cannon Assurance (K) Ltd (2013)e KLR; Yias Ole Seese & 4 others vs. Sakita Ole Narok & 2 Others (2008)e KLR Ahmed Dolai & Others (Suing on their behalf and on behalf of 27 members of Likoley Farmers) vs. Kengen & another (2018)e KLR.
18. There being no evidence that the plaintiff met the requirements for filing a representative suit while filing the instant suit, I find the suit to be bad in law for none compliance with the mandatory legal requirements for filing such as suit.
19. Turning to the merits of the case, from the testimony of the plaintiff and his witnesses, it is clear that the subject matter of the suit is sharing of community land between the different families/ sub-clans of the Kayoi clan.



20. The plaintiff wanted the land to be shared as per traditional boundaries as resolved and/or recommended by elders in meetings that had been called to settle the dispute. Owing to subsequent discussions and deliberations, the recommendation was changed and a new resolution/recommendation to the effect that the suit land be shared equally among the six families/sub-clans of Kayoi was made and implemented using private surveyors.
21. The evidence adduced in this case shows that all the six (6) families were represented by their leaders in the impugned decision/resolution. There is evidence that the resolution and/or recommendation was implemented and that all the sub-clans of Kayoi except that of the plaintiff support the decision.
22. Whilst the plaintiff and his witnesses claim that they were not consulted when the decision to subdivide the land equally among the six sub-clans was made, the evidence on record shows that the plaintiff's family was represented in the meeting where the impugned decision was made. Granted that the decision made would definitely affect the parcels of land occupied by the various clans, the court is not satisfied that the defendants did anything outside their mandate as clan leaders to warrant interference with their decision.
23. The mere fact that there was no mutual agreement on the impugned decision, which decision appears to be supported by most of the members of the sub-clans affected, is not a good reason for upsetting the impugned decision.
24. For the foregoing reasons, I find the plaintiff's suit to be not only lacking in merit but also fatally defective and I proceed to dismiss it with costs to the defendants.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 27TH DAY OF SEPTEMBER, 2023

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Kibet for the plaintiff

Mr. Cheptarus for the 1st defendant

Mr. Barmao for the 2nd defendant

