



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

ELC CIVIL SUIT NO.335 OF 2012

LOICE CHEMUTAI NGURULE.....1ST PLAINTIFF

JACOB AGUYA NGURULE.....2ND PLAINTIFF

VERSUS

WILFRED LESHWARI KIMUNG'EN.....1ST DEFENDANT

WILFRED ABUYE KIMUNG'EN.....2ND DEFENDANT

KENNETH ROTICH.....3RD DEFENDANT

JUDGMENT

The facts of this case can be summarized as follows:-

1. The suit herein relates to ownership and use of a parcel of land described as parcel No.**Nakuru Mariashoni/980**. The said parcel of land (hereinafter referred to as “the suit property”) measures approximately 5 acres. The contending parties claim to have taken possession of the suit property between 1993 and 1997 when the Government of Kenya hatched a scheme to resettle members of the Ogiek Community to which the contending parties belong.
2. The court heard that following the said plan of the Government of Kenya and which was later on shelved, each of the mature members of the Ogiek Community was allocated 5 acres of land carved out of the Mau complex.
3. Although no titles were issued to members of the Ogiek Community who were being resettled, a Government surveyor conducted survey in respect of the settlement scheme and showed the members of the said community their respective parcels of land in the areas they had settled.
4. The plaintiffs herein, just like the other members of the community were allocated 5 acres each.
5. The court heard that as early as the year 2010, there was a dispute between the plaintiffs and the 1st defendant over the ownership of the suit property herein. That dispute was arbitrated by the area chief, **Samson Kibilo Ole Salim, (P.W.2)**, together with some village elders who found in favour of the plaintiff and ordered that the 1st defendant should never enter or carry out any activities on the suit property. See the chief's letter dated **8th April, 2010**.

6. Despite the said letter of the chief, the dispute between the parties herein concerning use of the forest resources on the suit property ensued. Consequently, the District Commissioner (D.C), Molo District on **31st July, 2012** convened a meeting of the area administration officers of the area (D.OS and chiefs) together with the parties herein in a bid to settle the dispute over ownership of the suit property and the forest resources therein.

7. In that meeting, it was resolved that the parties to the dispute under consideration (1st defendant herein and the 1st plaintiff) share the trees thereon equally. See the minutes of the meeting convened by the D.C and the letter from the District Officer Elburgon Division, dated **3rd August, 2012**.

8. Although in the meeting convened by the D.C, the parties herein agreed to share the forest resources on the suit property, the contending parties have both disowned that agreement. In that regard **P.W.1, Jacob Aguya Ngurule**, who is the 2nd plaintiff, acknowledged that the members of the provincial administration attempted to amicably resolve the dispute between them. He however, testified that they refused the recommendation of sharing of the trees on the suit property because the defendants had their own land yet they wanted to share what belonged to the plaintiffs. He stated that the D.O's letter dated **3rd August, 2012** which alleges that the dispute between them was resolved amicably and that the parties agreed to share the trees equally did not reflect the true position.

9. Concerning their claim to the suit property, even though they have no title documents, he explained that they took possession of the suit property sometime in 1997 or thereabout when the Government issued a directive that members of the Ogiek Community be resettled. Following that directive, a Government Surveyor came and demarcated the land. For purposes of identification of the parcels given to the occupants of the land, the Surveyor gave them numbers.

10. It was his case that in the area allocated to them, (the suit property) there were about 4000 remnants, of the trees that had been harvested by Timsales from the forest. In addition to those remnants, the plaintiffs planted 1000 more trees which, together with the remnants, are the subject matter of the suit herein.

11. On his part, D.W.1, stated that the suit property was allocated to him. (It is noteworthy that D.W.1 contradicted himself on the alleged allotment by stating that he was given the suit property by his brother, Wilfred Abuya Kimung'en). He also contended that in the meeting held on **31st July, 2012** it was resolved that the land belonged to him. He admitted that it was suggested that they share the trees but he refused the suggestion because the plaintiff had their own parcels of land. He admitted that the plaintiffs were allocated land but contended that it was not the suit property.

12. Concerning the photographs and the report of the court bailiff which suggest that the suit property and the developments effected thereon (houses constructed thereon) belong to the plaintiffs, he claimed that the houses are in a different parcel and not the suit property. He, however, admitted that neither himself nor the 2nd defendant live near the suit property.

13. According to the testimony of D.W.2, **Kenneth Chepchirchir Rotich**, who is the area sub-chief, the 1st and 2nd defendant live six to seven kilometres away from the suit property. That notwithstanding, D.W.2, informed the court that it is the sons of the defendants who live nearer to the suit property.

14. Concerning the dispute that was allegedly arbitrated on by the members of provincial administration on **31st July, 2012**, D.W.2 informed the court that the dispute was not about ownership of the suit property but the right to access the trees thereon.

15. Concerning ownership of the suit property, given the fact that none of the contending parties has title to the suit property, D.W.2 stated that the party or parties in occupation should be deemed as the owner of the property. He (D.W.2) admitted that the plaintiffs have put up structures on their respective properties but contended that there are no such structures on the suit property. He denied having been an agent of the defendants and urged the court to dismiss the case against him with costs.

16. With regard to the impugned permit to harvest the trees, D.W.2 maintained that the 1st plaintiff signed the form and agreed to share the trees with the 1st defendant. With regard to the question of ownership of the suit property, the court heard that since the members were not sure who was entitled to the suit property, they left that determination to be made by the elders who informed them the land had been allocated to the 1st defendant, Leshwari).

17. As D.W.2 had led testimony to the effect that there was a road dividing the suit property and the property occupied by the plaintiffs, pursuant to an application by counsel for the plaintiff for the area to be visited to establish that fact, the court directed that a court bailiff in the company of the parties and their advocates do visit the suit property and file a report concerning those issues.

18. Consequently, the court bailiff, **Martha Wangare Wanjiru**, visited the suit property and filed her report dated **30th October, 2014**. The report, even though contested by counsel for the defendants, was to the effect that there was no baseline/road within the plaintiffs' parcel or adjacent to the plaintiffs' parcel. In her opinion, what the defendants were claiming to be a baseline is the grazing ground for the plaintiffs' sheep and the same is demarcated since it has grass all around. She further stated that the plaintiffs and their family members are the ones who have been in full occupation of the suit property and that the area where the trees were felled and the portion where the plaintiffs have built their houses is part of the same parcel of land.

19. At the close of the case, advocates for the respective parties filed submissions, which I have read and considered. From the pleadings and the submissions in respect thereof, the issues that have emerged for the courts determination are:-

(a) Whether the plaintiffs have made up a case against the defendants? If yes

(b) What orders the court should make.

20. Before I determine the above questions, I begin by pointing out that, it is acknowledged by both parties to the dispute that none of them has title documents to the suit property. That notwithstanding, the evidence on record reveals that members of the Ogiek Community, to which the contending parties belong, were allocated parcels of land by the Government in what the plaintiff describes as “Mariashoni Settlement Scheme.” According to the testimony of the the area sub-chief, D.W 2, in the absence of any title documents the person in occupation is deemed to be the person entitled to the suit property.

21. In the instant case, the plaintiffs claim to be entitled to the suit property by virtue of having settled thereon and carried out what they call substantial development on the area they occupied, to wit building houses, growing and tendering the trees and grazing their livestock.

22. The plaintiffs accuse the defendants, who are their relatives, of having unlawfully trespassed onto the suit property and felling down some of the trees thereon. Despite having expressed their displeasure with the defendants alleged unlawful activities, the defendants have refused to stop their unwanted interference with the suit property.

23. For those reasons, they filed this suit in order to permanently restrain the defendants from carrying on the various acts sought to be restrained in the plaint herein and seeking to be declared the exclusive and unimpeded owners (read occupiers) of the suit property. In addition to the foregoing prayers, the plaintiffs also seek damages for trespass to land, costs of the suit and interest.

24. It is not in dispute that the parties to this suit were allocated the parcels of land on which they live by the Government of Kenya sometime in 1997. Even though they do not possess title deeds to those parcels of land, by dint of the provisions of **Section 2** of the Land Act, 2012 the parties have sufficient interest over their respective parcels. In this regard see **Section 2** of the Land Act which defines “**allocation of land**” as the legal process of granting rights to land and an “**interest**” as, “**a right in or over a land**”. The section also defines “**partition**” as, “**the separation by a formal legal instrument of the shares in land or lease held by owners in common so that each such owner takes shares free of the rights of**

the others”.

25. Even though the land from which the parcels allocated to the parties initially belonged to the Government, there is evidence that the land was partitioned and each of the mature members of the Ogiek community allocated 5 acres of land. A Government surveyor came and demarcated the parcels held by the members by putting beacons.

26. It is clear from the evidence on record, that the suit property is and has been occupied by the plaintiffs. See the letter from the chief dated **8th April, 2010** wherein it was confirmed by the chief and village elders that it is the plaintiff and her children who were living in the suit property. The court bailiff, who visited the suit property on three occasions, filed reports which confirm that the suit property is occupied by the plaintiff and her children.

27. As pointed out hereinabove, concerning how the 1st defendant gained interest in the suit property, the 1st defendant contradicted himself by stating that the suit property was allocated to him and at the same time alleged that it was given to him by his brother, the second defendant. In my view, if that was the case, the second defendant would have come to court and given evidence to support his case.

28. It is also noteworthy that, unlike the plaintiffs who claim to have taken care of the trees in dispute, the defendant maintained that the trees grew on their own.

29. Having read and considered the provisions of **Section 2** of the Land Act, which defines **“unexhausted improvement”** as **“anything or any quality permanently attached to the land directly resulting from the expenditure of capital or labour by an owner or any person acting on the owner's behalf and increasing the productive capacity, the utility, the sustainability of its environmental quality and includes trees, standing crops and growing produce whether of agricultural or horticultural nature,”** and upon considering the testimonies of the contending parties, I am persuaded that the plaintiffs effected an exhausted improvement to the suit property.

30. In making the foregoing determination, I took judicial notice of the fact that for the trees on the suit property to have grown to the current enviable status, the plaintiffs must have contributed by taking care of them and/or preventing their wanton destruction. The attempts by the plaintiffs to protect the suit property and the resources thereon are clearly demonstrated by the many claims lodged against the defendants herein, both before the members of the provincial administration and now before this court.

31. Having found that the 1st and 2nd defendants have not demonstrated sufficient interest in the suit property and given that the report of the court bailiff confirms that fact, I find and hold that the plaintiffs have proved their case against the 1st and 2nd defendant's on a balance of probabilities. Consequently, I allow their case in terms of prayer (a) and (b) of the plaint.

32. With regard to the case against the 3rd defendant, I find no evidence capable of making him an agent of the defendant's as claimed. I therefore dismiss the case against him with no orders as to cost.

33. With regard to prayer (c) and (d) in the plaint, I am satisfied that the plaintiffs suffered loss and prejudice owing to the unlawful dealings of the 1st and the 2nd defendant. Consequently, I award them Kshs. 100,000/= being general damages for trespass to land and Kshs.70,000 being money paid to the 1st and 2nd defendants for the 254 cyprus logs felled and sold by the defendants. They shall also have the costs of the suit. Orders accordingly.

Dated, signed and delivered at Nakuru this 30th day of January, 2015.

L.N. WAITHAKA

JUDGE

In the presence of:

Mr. Ogeto for the defendant and Ms Kibiru holding brief for Mr. Kanyi Ngunjiri for the plaintiff.

Court Clerk – Emmanuel Maello