REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO 65 OF 2013

MUKUYU-INI FARMERS COMPANY LTD & 167 OTHERS.....PLAINTIFFS

VERSUS

SAMWEL MALAKWEN CHUMO & 56 OTHERS.....DEFENDANTS

JUDGMENT

Introduction

1. By a plaint dated **7th December, 2011** and filed on **8th December, 2011** the plaintiffs seek a permanent injunction to restrain the defendants by themselves, their agents or servants from occupying, tilling and/or interfering with their occupation and use of all those pieces of land formerly known as **Cismara/Ololunga 157** and **198** (hereinafter referred to as the suit properties).

2. The plaintiffs contend that at all times material to the suit herein, they have been and still are the registered owners of all those pieces of land known as **Cis Mara/Ololunga 12699-131169** (formerly known as **Cismara Ololunga 157** held by **Makuyu-ini** Farmers Company Ltd (the first plaintiff); that sometimes in 1999 or thereabout the defendants through **Enosogon Group Ranch** (now defunct) invaded and encroached on their parcels of land herein. The said invasion prompted numerous court cases for determination of boundaries of the properties herein; that despite various court orders requiring the defendants to vacate the suit properties the defendants have failed neglected and/or refused to leave the suit properties.

3. Further, that the defendants through their Group Ranch herein, instituted proceedings in the defunct Land Tribunals which they lost. Upon appeal to the Provincial Land Disputes Tribunal and later to the High Court, an order for site visit and filing of a report in respect of the suit properties was made.

4. The plaintiffs have also pleaded that apart from **Nakuru High Court Civil Appeal No.11 of 2001**, there is no other pending claim for eviction of the defendants from the suit properties.

5. In reply, the defendants filed the statement of defence and counter-claim on **9th November, 2012.** In the statement of defence, the defendants have disowned the Enosogon group ranch and denied the allegation that they invaded the plaintiffs' parcels of land mentioned herein above. The defendants have acknowledged that the parcel of land known as Cismara Ololunga 157 belongs to the plaintiffs. With regard to parcel number 198, the defendants contend that it was fraudulently curved out of their parcel, number 110. The parcel (198) is said to be overlapping with parcel number 110, which belongs to the defendants. The 100 or so parcels of land created from the said parcel are said to be fictitious and none-existent on the ground.

6. Concerning the various proceedings in respect of the suit properties, the defendants contend that they

never authorized any person to represent them in those proceedings. For that reason, it is the defendants' case that they were not parties to those proceedings. Besides, they argue that the group ranch mentioned herein above had no capacity to represent its individual members, as at the time the proceedings were initiated, it had been dissolved.

7. It is the defendants' case that the order sought against them cannot issue because they have gained proprietory rights over suit properties by operation of the law (they allege that they have been in occupation of the suit properties for over 30 years). Moreover, the defendants argue that they have titles to their respective parcels of land which titles the plaintiffs have not proved were either obtained fraudulently or through corrupt dealings and/or collusion.

8. Since the current suit was filed more than twelve years after they obtained titles to their respective parcels of land, it is the defendants' case that the plaintiffs' suit is time barred.

9. The defendants have acknowledged existence of Nakuru HCCA NO. 11 of 2001 which is pending before this court.

10. As for the counter-claim, the defendants contend that they have acquired proprietory rights over the parcels of land they occupy by way of adverse possession.

11. For the foregoing reasons, the defendants seek a declaration that they have established proprietory rights and interest over the parcels Cismara/Ololunga 157 & 198 vide the doctrine of adverse possession.

EVIDENCE

The plaintiff's case

12. **P.W.1, Isaac Ngenga Kamunge**, the Chairman of the first plaintiff herein, testified that the first plaintiff bought the suit properties (parcels No. 157 and 198) in 1979 from **Gema Holdings Limited.** The suit properties were subsequently divided into parcels Cismara/Ololunga 12699 to 13169. After purchasing the properties, which measure approximately 1100 acres, its members took possession of the suit properties.

13. However, following the 1992 clashes, their members left the suit properties. When leaving they appointed **Cassason Ltd** as caretaker of the property. The said caretaker is said to have allowed the defendants to enter into the suit properties. The defendants' encroachment into the suit property is said to have occurred in 1997 when the group ranch herein was sub-dividing its parcel of land to wit, parcel No. 110.

14. Following the alleged encroachment, the plaintiffs sought the assistance of members of the Provincial Administration who resolved that the defendants vacate the suit properties. Being dissatisfied with the decision of the Provincial Administration, three members of the group ranch herein, on behalf of the Group ranch, filed a case in the Narok Land Disputes Tribunal. The tribunal determined in favour of the plaintiffs. On appeal, the Provincial Appeals tribunal also determined the appeal in favour of the plaintiffs.

15. Attempts by the plaintiffs to enforce the decree obtained in respect of the proceedings at the Land disputes tribunal was, however, unsuccessful because individual members of the group ranch filed objection proceedings arguing that they were not party to the proceedings at the Tribunal.

16. P.W.1 acknowledged that about 50 families occupy parcels of land belonging to the plaintiffs but was unable to identify the defendants who have encroached on the plaintiffs land and/or the particular parcels of land onto which the defendants have encroached.

17. With regard to the defendants' claim that they are entitled to the suit property by way of adverse possession, he stated that the defendants are not entitled to such orders because their occupation has been

interrupted through the various court actions herein. The defendants are also said to have failed to prove ownership of the whole of the suit properties. In this regard, P.W.1 explained that the titles held by the plaintiffs are different from those held by the defendants.

18. Sub-division in respect of the suit properties, and in particular parcel number 157 began in 2008. Titles in respect of that parcel were issued in 2010. Parcel number 198 was not sub-divided.

19. Referring to a report dated **23rd January, 2004** made in respect of the suit properties, P.W.1 stated that the defendants appear to have encroached on parcel No.157. That notwithstanding P.W.1 maintained that there was no confusion as to acreage. In this regard he stated that the titles that the defendants held were not within No.157 but within No.110.

20. The visit by the court to the suit properties is said to have established that some defendants had settled on the plaintiffs land. The problem concerning the location of the suit properties is said to have occurred after sub-division of the suit properties.

21. **P.W.2, Antony David Mureithi,** the Land Adjudication officer, Narok County, informed the court that their office adjudicated over the suit properties. According to the records they held in respect of the suit properties, Cismara/Ololunga 157 was originally owned by **David Lomolo** Kapen. Cismara/Ololunga 198 was originally allocated to **George Mepukooli Partet**. Cismara/Ololunga 110, on the other hand, was originally allocated to **Enosokul Group Ranch.**

22. On or about **20th March, 1979** there was change of ownership in respect of Cismara/Ololunga 157. 200 acres were excised from 157 and Cismara/Ololunga 198 was created. The new title, Cismara/Ololunga/198 was then registered in favour of **George Mepukori Partet**. Subsequently, both Cismara/Ololunga 157 measuring about 365 hectares and Cismara/Ololunga 198 measuring 82 hectares were transferred to **Gema Holdings Limited** on **17th April, 1979** and **12th September, 1980** respectively.

23. **P.W.2** further testified that after an area is identified for adjudication, the land owners are expected to point out boundaries usually based on permanent physical features.

24. **P.W.2** had not heard of any boundary dispute in respect of the suit properties. He only visited the suit properties during the court visit. The court heard that after registration is effected, the land adjudication department ceases being part to the proceedings. He produced records in respect of the suit properties and his expert witness report as **Pexbt 1.**

25. Concerning the surveyors report dated **23rd February 2004**, paragraph 3 and 4 thereof, he stated that the contents therein are correct.

26. With respect to his report marked A, he made reference to entry 14 therein and maintained that parcels 157 and 198 were later recombined.

27. **P.W.3, Audrey Githingi Kibebe**, a land surveyor at Narok County, recalled that on **7th February, 2014** they visited the suit properties. He testified that in adjudication, matters the survey department comes in when the adjudication department is combining maps and when doing the adjudication boundaries of the entire area. The court heard that the RIM is developed from field sheets from the adjudication and survey departments. At that juncture the boundaries are already determined.

28. Concerning the site visit, P.W.3 stated that on that date, they were unable to determine the boundaries. Consequently, they agreed to use the Global Positioning System (GPS) to track the streams and transfer the same to the RIM/Photo-graphical maps. Thereafter, they picked the GPS co-ordinates and checked them against the maps. They also agreed to pick the existing primary school to help them determine whether it was located in parcel No.157 or 110.

29. **P.W.3** produced his report dated **23rd October, 2014** and the tracing map annexed thereto as **Pexbt**

30. **P.W.3** informed the court that there are grid maps corresponding with the GPS markings. In this regard, he stated that he succeeded in obtaining a copy of the original adjudication maps before the properties were sub-divided.

31. After picking the location of the primary school, they marked the same as B. According to the map, the school is located in parcel number 157. He explained that Plot A in the map is a small stream marking the end of plot 110 on the southern side. According to the sub-division of 110, there was no overlap or any parcel over the other. According to the maps the sub-division of parcel 110 did not touch on 157 and 198. In this regard, he referred to his report and the map, which he produced as **Pexbt 3.**

32. The court heard that upon sub-division of parcel No.110 measuring about 155 hectares the officials of the group ranch and the surveyor were supposed to show the members of the group ranch their respective parcels of land. He acknowledged having noticed some development on the suit property which were over 10 years old. He also acknowledged having seen the mutations in respect of parcel No.110, signed by the Government surveyor. He stated that he was not aware of the surveyor/person who showed the defendants their respective parcels.

33. Concerning the maps he referred to, he stated that the maps are not authorities on boundary dispute. He explained that GPS was introduced in or about 2002. The court heard that sub-divisions in respect of plot No. 157 was done between 2007 and 2008.

34. He explained that GPS was introduced after parcel No.110 had been sub-divided. The system makes surveyors' work easier and is more accurate. GPS only helps surveyors navigate. It does not change boundaries. He stated that the only permanent structure he saw on the suit property is the primary school. He produced the sub-division maps in respect of the suit properties as **Pexbt 4 (a)** and **(b)** in respect of parcel No. 110 and **4(c)** in respect of parcel No. 157.

35. He maintained that determination of acreage in respect of the sub-divisions is done in Nairobi at the end of the process.

36. **P.W.4**, **Nixon Nzioki Mutiso**, the Land Registrar, Narok County's testimony was to the effect that parcel Nos. 110 and 157 have been sub-divided and some title deeds issued in respect of the sub-divisions. The court heard that the titles are first registration. Parcel number 110 which measured about 155 hectares was sub-divided into parcels Nos. 3138-3409.

37. According to P.W.4, from the RIM maps generated in respect of the sub-divisions, it is possible to identify the parcels on the ground.

38. Like **P.W.2**, he explained that parcel number 157 was originally owned by David Lomomo. It was later transferred to Gema Holdings Limited and subsequently to the 1st plaintiff. The parcel, which measured 365 hectares or thereabout was sub-divided into parcel numbers 12699 to 12751 and 12815 to 13198. Maintaining that it is possible to identify those parcels on the ground using RIMs, he produced green cards in respect of the properties as **Pexbt 5(a)** and **(b)**.

39. On cross-examination, **P.W.4** explained that sub-division in respect of parcel number 110 was done on **23rd March, 1996** and some titles issued in 1996.

40. With regard to parcel No.157 he explained that it was sub-divided on **11th March, 2009**. The 1st plaintiff acquired a title in respect of the property on **25th November, 1998** from Gema Holdings Limited.

<u>The Defence Case</u>

41. **D.W.1, Samwel Malakwen Chumo**, explained that the Group Ranch herein was allocated parcel No.

110 in 1973. The parcel was given its number in 1974. As at that time they had no neighbours. The parcel was sub-divided in 1991 and titles in respect thereof issued in 1996. Upon sub-division, D.W.1 was allocated parcel number 3363 measuring 35.5 hectares.

42. D.W.1 faulted the map produced by the Government Surveyors herein saying that his shamba is located in a different place from where he lives. He, however, conceded that the Government surveyors were the custodian of survey records and the experts. That notwithstanding, he vowed that he would not agree to move if shown a different location. That was so despite the survey maps having established that his land was in 157, which admittedly belongs to the plaintiffs.

43. He explained that the original members of the group ranch were 171, their local primary school included.

44. He stated that his was not aware of the original of parcels numbers 157 and 198 and claimed that he got to know about the 1st plaintiff when the company claimed the parcels of land in the year 2000. He admitted that the group ranch filed a case at the defunct land Dispute Tribunals and that the dispute was determined in favour of the plaintiffs. He also admitted that there are no permanent structures on the suit property.

45. He further admitted that the original size of the parcel of land owned by the group ranch was 155 hectares and that during sub-division they shared more than they were entitled. They did so on the basis that nobody else was near.

46. D.W.1 also admitted that they have had cases with the 1st plaintiff from the year 2000 (barely 4 years from the time their titles were issued).

47. He contends that during sub-division of the suit properties they were not shown the river which marked their boundary.

48. **D.W.2**, **Stanley Kiprono Langat**, informed the court that he was not a member of the group ranch herein. He bought his 7 acre parcel of land (parcel number 3364) from D.W.1 in 1989 (this was way before the property was sub-divided). At the time parcel number 110 was sub-divided and titles issued he was in occupation of his parcel of land.

49. Like D.W.1, he stated that he did not recognize the map relied on by the Government surveyors herein. Wondering how his parcel of land was far away from that of D.W.1 yet they were neighbours, he vowed not to move away from the parcel of land he occupies irrespective of the decision this court will arrive at. Besides, he contended that from the time they were issued with titles in respect of their respective parcels of land the Land Registrar had never informed them that the property they are occupying was not theirs.

50. On his part, **D.W.3, Benson Kibet Rotich**, contended that defendants number 54, 55, 56 and himself are improperly sued as they were members of another group ranch, Enkishomi Group Ranch, which owned parcel number **Cismara/Ololunga 115**.

Submissions:-

51. Following an order for filing and exchange of submissions, counsel for the plaintiffs filed submissions on behalf of the plaintiffs. At the time of writing this judgment no submissions had been filed on behalf of the defendants.

52. In the submissions filed on behalf of the plaintiffs, it is submitted that the current suit is a consolidation of all matters raised in Nakuru HCCC NO. 357 of 2011 (later renamed Nakuru ELC No. 65 of 2013); Nakuru HCCA No.11 of 2001 and Petition No.18 of 2011; that all the witness experts who testified in this suit, acknowledged the existence of the plaintiffs' land and the determination of boundaries in respect thereof way back in 1975; that the district surveyor produced area maps which

indicate where the defendants parcels are; that although D.W.1 denied existence of the plaintiffs and/or their predecessors in title, he admitted existence of the Group Ranch herein and the fact that the Group Ranch was entitled to parcel number 110 with distinct acreage, 155 hectares.

53. Since the parcel of land owned by the Group Ranch to wit, parcel number 110 had a distinct acreage it is submitted that its members could not have shared more land than their group ranch had. This notwithstanding, D.W.1 admitted that the group members shared more land than they had on the pretext that the land next to what the group ranch owned had no known owner. The said admission by the D.W.1 is said to be proof that the defendants have trespassed into the plaintiffs' land.

54. On whether the defendants have acquired proprietory rights in respect of parcels number 157 and 198, it is submitted that since defendants occupy just small portions of parcels number 157 and 198 they cannot be heard to claim entitlement the parcels in their entirety.

55. Arguing that there is no way the plaintiffs parcels would be sub-divided while the defendants were in occupation and given the fact that the plaintiffs' individual titles were issued in 2011, it is submitted that if the defendants are in adverse possession to any of the plaintiffs' individual titles, then that fact cannot have been in existence for more than two years since the claim for adverse possession was only raised when the current suit was filed in 2011. In view of the foregoing it is submitted that the defendants have not satisfied the conditions for obtaining land by adverse possession as enunciated in the case of **Njuguna Ndatho** v. **Masai Itumo & 2 others** Civil Appeal 231 of 1999.

56. On whether granting the orders sought would be prejudicial to the defendants, it is submitted that granting the orders sought would not prejudice the defendants as they had their respective parcels of land. For that reason this court is urged to direct the surveyors to show the defendants their individual parcels of land.

Issues for determination

57. From the pleadings herein, the evidence and submissions, the issues for determination are:-

1. Whether the suit herein is time barred? If not,
2. Whether the suit is *res judicata* and/or *sub judice* any of the other suit(s) pending before this court?
3. Whether there are fictitious titles in respect of parcel number 198?
4. Whether there is a problem with the titles issued to the parties herein and in particular, the titles issued to the defendants?
5. Whether any of the parties to this suit has made a case for issuance of the orders sought? If none,
6. What orders should the court make?

Analysis and determination of the issues

Whether the suit herein is time barred?

58. On this issue, it is contended that the plaintiffs' case having been brought more than 12 years from the time the defendants obtained titles to the suit property, the claim is time barred. Although the defendants have not specified the provision of the law on which their contention is based, the same must be premised on **Section 7** of the Limitation of Action Act, Cap 22 Laws of Kenya. The Section provides as follows:-

"7. An action may not be brought by brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

59. In applying this section of the law, I note that the plaintiffs' right of action against the defendants accrued from the time the defendants encroached on their title in respect of the parcels of land to wit, parcel number 157 and 198. From the testimony of P.W.4 the plaintiffs, in particular the 1st plaintiff

obtained title document to the two parcels in 1998. In my view, the defendants' adverse claim to the title held by the plaintiffs' cannot have began before that time as such title in favour of the plaintiffs was none existent. This notwithstanding, by the time the current suit was filed (2011) the time contemplated in **Section 7** of the Limitation of Actions Act had lapsed.

60. Although before the plaintiffs' brought the current suit they had previously, and in particular in 2004, sought to recover the parcels of land wrongfully held by the defendants, a reading of **Section 7** with **Section 15** reveals that filing of the earlier suit(s) for recovery of the parcels did not preserve and/or renew the plaintiffs right of action against the defendants. See **Section 15** of the Limitation of Actions Act aforementioned which provides:-

"For the purpose of this Act, no person is taken to have been in possession of any land by reason only of his having made a formal entry thereon, and no continual or other claim upon or near any land preserves right of action to recover the land."

61. It appears that from the foregoing provisions of the law, neither the claim filed by the plaintiffs to recover the portions of the suit properties wrongfully occupied by the defendants nor the plaintiffs' allegedly subsequent entry into the suit property preserved the plaintiffs' right of action against the defendants after the lapse of the twelve years.

62. The period of twelve years within which the plaintiffs could seek to recover the land wrongfully occupied by the defendants lapsed on 25th November, 2010.

63. The upshot of the foregoing is that the plaintiffs suit is time barred.

Whether the suit is* res judicata *and/or* sub judice *any of the other suit(s) pending before this court?

64. Although there are several suits file in respect of the subject matter herein to wit Cis/Mara/Ololunga 110, 157, 198 and involving the parties herein and/or their representatives there is no evidence that any of the suit has been heard and determined on its merits to warrant the invocation of the doctrine of *res judicata*, under **Section 7** of the Civil Procedure Act. However, a note that there exits suits filed before this suit in which the same and/or similar orders to the one sought in this suit are sought. Those suits include Nairobi High Court Civil Case No. 1352 of 2004; Nakuru High Court Civil Case No.123 of 2009 and Nairobi High Court Petition No. 18 of 2011. Curiously, the parties deliberately chose to keep the court in the darkness concerning the status of those suits.

65. **Section 6** of the Civil Procedure Act, Cap 21 Laws of Kenya prohibits a court from proceedings with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

66. Nairobi HCCC NO. 1352 of 2004 and Nakuru HCCC No. 123 of 2009 were clearly filed before the current suit. The parties and the issues raised therein are substantially similar to the issue raised in this suit being the right to occupy the parcels of land known as Cis/Mara/Ololunga 110, 157 and 198 and/or the parcels of land created from those parcels of land. The parties are basically the same being the former members of Enosoogon Group Ranch and Mukuyuini Farmers Company Ltd and/or its members.

67. Instead of fast tracking the aforementioned cases, it appears the parties have decided to engage in filing of a multiplicity of suits. It is noteworthy that on the date the current suit was filed the defendants also filed Petition number 18 of 2011. In that petition the 1st plaintiff in this suit is impleaded as an interested party.

68. The aforementioned conduct of the parties herein and/or their advocates is clearly an abuse of the process of the court.

69. Being of the view that the current suit ought not to have proceeded to its logical conclusion unless it was consolidated with the suit filed before it and the status of those suits being uncertain it is not necessary to consider issues number 3, 4 and 5.

70. With regard to the last issue, having considered the totality of the evidence adduced in this suit and the entire court record, I find that various findings and/or courts orders have been issued concerning the issues raised in this suit and the issues raised in the pending suits which if implemented have the potential of solving the problem between the parties herein once and for all. Those findings include the verdict of the **Rift Valley Lands Disputes Appeal Tribunal** dated **21st November, 2000**; the decree issued in in respect of **Narok PMC's Land Case No.12 of 2009** issued on **21st July, 2011** and the order of **Ouko J.** vide the ruling delivered on **31st January, 2011** in respect of **Nakuru HCCA No. 11 of 2001**.

71. In my view it is only through the parties ensuring compliance with those orders and findings, that the dispute herein will be solved once and for all. The visit by the court and the report filed by the expert witnesses in respect of the location of the boundaries to the parent titles (Cis/Mara/Ololunga 110, 157 and 198) clearly establishes that some of the defendants have encroached on parcels of land belonging to members of the 1st plaintiff and/or belonging to the 1st plaintiff.

72. Without identity of the defendants who have encroached and the particular parcels of land on which they have encroached the orders sought cannot issue against the defendants.

73. There being evidence that parties in this suit began litigating barely four years after the defendants obtained title to the suit property and in view of my finding, time for purposes of adverse possession began to run in favour of the defendant (in as far as the 1st plaintiff's title is concerned) in 1998. I find that the defendants have not established a case for being declared owners of the suit property by adverse possession.

74. The upshot of the foregoing is that the plaint and the counter-claim raised in respect thereof have no merit and are dismissed with no orders as to cost.

75. Parties and their advocates are advised to fast track the implementation of the various orders herein and in particular the order of **Ouko J.**, cited herein above. In any event, parties to this dispute are directed to file a report in court concerning implementation of the said order in court within 45 days from the date of this judgment.

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

L.N. WAITHAKA

JUDGE

In the presence of:

Ms Wanjiru for the Defendants and Mr. Chege for the plaintiff

Court Clerk – Emmanuel Maello