



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1317 OF 2006

MWIHIKE FARMERS CO. LTD..... PLAINTIFF

VERSUS

JOHN NJOROGE CHEGE.....1ST DEFENDANT

JACKSON WAINAINA NGUNYI 2ND DEFENDANT

JUDGMENT

The Plaintiff by a plaint dated 8th December 2006 and filed in court on 14th December 2006 prays for judgment to be entered against the Defendant for:-

1. The Defendants by themselves their servants, employees agents or anybody else claiming through the Defendant or howsoever be restrained by a permanent injunction from illegally trespassing, occupying or in anyway interfering with the plaintiffs parcels of land known as Land Referece NO. 8469/10 and Land Reference NO. 8469/11.
2. That the Defendants by themselves their agents, employees or anybody claiming through them be ordered to vacate forthwith LR.NO.8469/10 and L.R. NO.8469/11 forthwith and in default an order of eviction evicting the Defendants be issued.
3. Damages for trespass.
4. Exemplary damages for trespass and illegal occupation of the plaintiff aforesaid lands.
5. Costs of the suit with interest on (3) and (4) above.
6. Any other or further relief as this Honourable court may deem fit to grant to the Plaintiff.

The Plaintiff in the plaint contends that at all material times they were the owners of **L.R. NOS.8469/10 and 8469/11** (hereinafter referred to as the suit properties) having purchased the same from **M/S Mukinye Enterprises Ltd** sometime in 1996. The Plaintiff aver that they subdivided the suit properties and allocated the resultant subplots to their members. The plaintiffs further claim that the Defendants from January 2006 or thereabouts without the consent or authority of the plaintiff entered the suit properties and purported to subdivide the land into subplots which they purported to sell to unsuspecting members of the public who have entered the said plaintiff's land and have erected buildings thereon. The plaintiff's claim the Defendants were both the area councilor and Chief respectively who instead of using their positions to have the illegal entrants onto the plaintiff's land evicted used their said positions to facilitate the illegal trespass and were largely responsible for the illegal occupation of the plaintiffs said parcels of land. The Plaintiff thus have brought the instant suit to obtain an order of injunction and

eviction of the Defendants from the suit premises and damages for trespass.

The 1st Defendant in his filed defence denies any knowledge of the facts pleaded in the plaintiff's plaint and specifically denies ever having trespassed onto the plaintiff's alleged suit premises and/or subdividing the same and/or selling any subplots as alleged by the plaintiff to anybody. The 1st Defendant denied having had anything to do with any persons occupying the suit premises and states he had no control and/or had anything to do with the persons who occupied the suit land. The 1st Defendant contends the plaintiff's suit does not disclose a reasonable cause of action against him and seeks its dismissal against him.

The 2nd Defendant denies the contents of the plaintiff's plaint and specifically denies ever trespassing and/or occupying the suit premises. The 2nd Defendant states that if any persons are in occupation of the plaintiff's land as alleged they are in occupation in their individual capacities and are not there as agents and/or servants of the 2nd Defendant and thus the plaintiff ought to pursue them directly. The 2nd Defendant contends the suit does not disclose a reasonable cause of action against him and the same should thus be dismissed.

The plaintiff and the 1st Defendant on 9th September 2009 filed a statement of agreed issues before the 2nd Defendant filed his statement of defence. Arising from the pleadings the following issues arise for determination.

1. **Whether the plaintiff are the legal and/or beneficial owners of L.R. NOS.8469/10 and L.R. NO.8469/11?**
2. **Whether the plaintiff took possession of the said parcels of land and if so whether the plaintiff caused the said parcels of land to be subdivided and allocated to its members?**
3. **Whether the Defendants unlawfully entered into any parcels of land belonging to the plaintiff and caused the same to be subdivided and sold to non members of the plaintiff?**
4. **Whether the Defendants either by themselves and/or through their agents or servants occupied any of the plaintiff's lands and if so whether they are trespassers?**
5. **Whether the plaintiff's suit raises a reasonable cause of action against the Defendants?**
6. **What orders should the court make and by whom are the costs of the suit payable.**

The plaintiff called 3 witnesses in support of its case. **Pw1 Njogu Njoro** testified that he was the Chairman of the plaintiff company and relied on the witness statement he made dated 17/5/2011 and filed in court. The witness testified that the plaintiff purchased the suit properties from **Mukinya Enterprises Ltd** in 1982 as per the agreement for sale exhibited and included in the plaintiff's bundle of documents and marked as PEX1. **Pw1** testified that the suit properties were subdivided into 220 plots of 50ft by 50ft and allocated to the members of the plaintiff company. He stated that most of the members allocated the plots developed their plots but he stated that he could not tell how many of the members took possession and developed their plots but said that at least 29 members claimed their plots had been invaded and that the matter had been reported to the police and later the District Commissioner.

The witness testified that sometime in 2006 it became apparent that the 1st and 2nd Defendant were involved in the illegal allocations as he claimed that sometime during the month of July 2006 he met the Defendants together with a group of people to whom they were allocating plots in the said plaintiff's parcels of land. In cross-examination the witness stated that though they purchased the land in 1982 the consent of the Land Board was not obtained until 2001. The witness explained under cross examination that there were more than 500 subplots carved out of L.R. NOS.8469/10 and 11 and that they had sold all the plots. The witness stated that they have sued the councilor and the Chief (**1st and 2nd Defendants respectively**) because they are the ones who brought the new occupants onto the land and further stated they did not bring the suit against the new occupants because it is the Defendants who brought them to the plots and further because they did not know them.

Pw2 Stephen Kuria Njenga testified that he is a resident of Mau Narok and that he in 2002 bought a plot NO. 131 from the plaintiff company and was shown his plot on the ground but he never fenced and/or

built on the plot. The witness states that when he later visited the site he found a house had been constructed and another being constructed on the plot where upon he reported to Kasarani Police Station who referred him to the area chief the 2nd Defendant herein. The witness stated that after he showed the chief his documents of ownership of the plot, the chief gave him a letter to take to the intruder but the intruder refused to accept the letter from the Chief. After the refusal by the invaders to vacate the witness reported the matter to the D.O who summoned all the parties to appear before him and the witness stated that the persons who were constructing on his plot did not produce any ownership documents and neither did they vacate.

Pw3 Kihara Kamau testified that he had been a resident of Kasarani for over 50 years and he knew the plaintiff company purchased the suit properties in 1982. He stated that the 2nd Defendant asked him about some empty plots within the premises which he informed him were owned by people and were not available for allocation. The witness states that he later saw people marking the plots and he informed **pw1** as the chairman of the plaintiff company so that he could find out who was marking out the plots. The witness states he later found out the chief was involved in the marking out of the plots. He stated that the persons who bought the plots from Mwhike Farmers started settling on the plots in 1983.

The 1st Defendant **John Njoroge Chege**, is the current member of parliament for Kasarani constituency and before being elected as MP he was an elected councilor for Kasarani. He testified that he did not know the directors of the plaintiff but knew where the suit land is located. He denied subdividing and selling the plaintiff's land as alleged in the plaint. He stated that when he was elected as councilor in 2003 he was aware there were squatters and there were land disputes within the area. He testified that the squatters have been on the land for over 10 years and that there are various companies who claim land within the area.

The 2nd Defendant who presently is the senior Chief Ruai Location testified that from 2003-2005 he was Assistant Chief Kasarani Location before being promoted to become the chief. He stated that in 2003 there were Ruaraka squatters and Kasarani squatters who used to be workers for the Kenyatta Family who sold the land to the plaintiff and several other companies. The witness states that even before he became Assistant Chief the squatters were there and he left them there. He testified that there were land disputes involving the various companies that purchased land within the area even before he was employed as an Assistant Chief.

The witness denied that he subdivided or sold any land belonging to the plaintiff or that he declined to assist the plaintiff to get people out of the land. The witness explained that he had no powers to evict the squatters from the land forcefully. The witness denied that he acted in concert or in collusion with the 1st Defendant and maintained that he had nothing to do with the plaintiff's land. The witness denied that he was instructed by his superiors to evict anybody from the suit land. The witness admitted that as the Chief members of **Mwhike Farmers** used to complain to him but there was nothing he could do and that he used to refer them to the directors of the company.

The evidence adduced by the plaintiff indeed establishes that the plaintiff in or about 1982 purchased some land as evidenced by the copy of agreement for sale dated 11th January 1982 produced as PEX1 in evidence and as further evidenced by the letter of consent from the Land Control Board dated 21st November 2001 whereby consent for transfer of **L.R. NO.8469/11** measuring 22.7 acres to **Mwhike Farmers Co. Ltd** was given. Further by a letter of 11th August 2003 the Commissioner of lands approved a subdivision scheme for **L.R.NOS.8469/10 and 11**. This letter was addressed to **Mwhike Farmers Co. Ltd**. Thus the court is satisfied that even though no formal documents of ownership for **L.R NOS.8469/10 and 11** have been exhibited by the plaintiff it is established that the plaintiff is the legal and/or beneficial owner of the suit properties.

As regards issue number 2 the court is satisfied that on the evidence the subject parcels of land were subdivided and the approval of the subdivision scheme as per the commissioner of lands letter dated 11th August 2003 attests to this fact and thus it is probable and acceptable that the plaintiff allocated the subplots to its members.

The plaintiff however has not exhibited any list of allottees of the subplots to illustrate who was allocated what subplot. The plaintiff has given varying evidence of the number of plots that were subdivided. In examination in Chief **pw1** stated the subplots were 220 yet under cross examination he stated there were over 500 subplots. **Which is the correct figure?** The plaintiff's further evidence was that 29 of their members complained that their plots had been invaded by outsiders. Who were **these members and which were the specific plots that had been occupied by outsiders?** It is also unclear when the so called outsiders and/or invaders occupied these plots. The correspondence establishes that there was a history of squatters occupying plots that were not theirs. The evidence by the 1st and 2nd Defendants also points to there having been squatters from the time the land was purchased by the plaintiff. There is no evidence that as at the time of the purchase that the land was in vacant possession. It is unclear what the status of the land was between 1982 when the plaintiff purchased it and 2006 (24 years) when the issue of illegal occupation took centre stage leading to the filing of the present suit.

The plaintiff has also alleged that the Defendants acting jointly caused the land to be subdivided and sold to the outsiders. The court is not satisfied that there is any credible evidence to support this allegation. As observed the alleged 29 subplots of members that have been allegedly invaded have not been identified and neither is there any evidence of how and when the Defendants did the subdivision. Equally there is no evidence that any person was indeed sold any plot by the Defendants as alleged by the plaintiff. If such sales took place it should have been possible to obtain evidence from the persons who were sold the plots by the Defendants since at any rate such persons would have been issued with documents to evidence such sales. The court in the circumstances is not satisfied that the plaintiff has adduced any credible evidence to show or demonstrate that the Defendants unlawfully entered onto the suit properties, subdivided any parcels of land and/or sold any land to anybody. The court thus resolves issue number 3 and 4 in favour of the Defendants and holds and finds that the plaintiff has not proved any trespass on the part of the Defendants onto the plaintiff's parcels of land.

In regard to issue NO.6 it is quite apparent the plaintiff opted to take the easier option out. The plaintiff by targeting the Defendants as persons who were in authority and thus holding them to be responsible for the persons who may have illegally entered and occupied parcels of land within the plaintiff's suit properties hoped they could ride on them to secure the eviction of the squatters and/or intruders. The plots are occupied by specific persons who would stand to be affected by any orders of eviction and these persons ought to have been the proper Defendants so that they would have a chance to explain how they came to be in possession and occupation and to show cause if any, why they should not be evicted. It is stated that these persons have constructed houses on the plots and it is therefore them and not the defendants who are in possession. Why then not identify them and enjoin them in the suit as parties who are affected directly.

The plaintiff also claims to have allocated all the plots to its members and having done the allocation the issue does arise whether the allottee members of the company would not be the proper plaintiff in any claim attaching to the specific plot.

It may nonetheless be argued that since the plots had not been transferred out to the individual member allottees the company still remained a proper plaintiff. I make no specific finding on the point but having regard to what I have stated in regard to the answer to issue Nos. 3 and 4 above I have come to the conclusion that the plaintiff's suit herein does not raise a reasonable cause of action against the Defendants and is therefore unsustainable against them.

The upshot is that I find and hold that the plaintiff has failed to prove its case on a balance of probabilities against the Defendants and I order the plaintiff's suit dismissed with costs to the Defendants.

Judgment dated, signed and delivered at Nairobi this ...**30TH**day of.....**MAY**.....
2014.

J. M. MUTUNGI

JUDGE

In presence of:

.....for the Plaintiff

.....for the Defendants