REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 44 OF 2010

GEDDY KARIUKI NDORIA.....PLAINTIFF

VERSUS

WIYUMIRIRE FARMERS COOPERATIVE SOCIETY.....DEFENDANT

JUDGMENT

The Plaintiff's case

The Plaintiff's case is that the Defendant, with whom he shares a boundary, has encroached on 7 acres of his property (L.R No.10445/5). The plaintiff describes himself as the registered proprietor of the aforementioned parcel, while the defendant is the registered proprietor of LR No.10445/4

During the hearing of the plaintiff's case, it emerged that the encroachment complained about occurred way before the Plaintiff bought a portion of the suit property, L.R No.10445, formerly owned by Kiringa Farm Directors, hereinafter called **"the Original Owner".** The Defendant had bought 900 acres of the suit property while the Plaintiff had bought 200 acres.

Apparently, when settling its members, the Defendant encroached on 35 acres of land belonging to the Original owner. (that fact is not in dispute). Owing to the alleged encroachment, a dispute arose between the Defendant and the Original Owner over the alleged encroachment.

Before the dispute could be resolved, the Original Owner sold 400 acres of what remained of the suit property to the Plaintiff and his Colleague, William Mimi Chir. Later on the plaintiff and his colleague divided the 400 acres between themselves, each taking 200 acres.

The Plaintiff contends that out of the 35 acres that the Defendant and/or its members had encroached on, 7 acres form part of the 200 acres he bought from the Original Owner.

It is the Plaintiff's case that the dispute between the Defendant and the Original owner was resolved through an agreement signed on 11th April, 2000 between the Defendant and the Original Owner. In that agreement, which the Plaintiff produced as PEX 1, the Defendant conceded that it had encroached on 35 acres of land belonging to the Original owner and agreed to negotiate, through private treaty, to purchase from the owners the 35 acres.

The plaintiff contends that the term "owners" as used in the agreement signed between the Defendant and the Original owner meant the persons to whom the Original owner had sold the suit property to.

It is the Plaintiff case that on the basis of the understanding that the term owner in the agreement signed between the defendant and the original owner meant the persons who had bought the encroached portions, the Plaintiff entered into a series of negotiations with the Defendant which culminated into signing of a Memorandum of Understanding (M.O.U); The plaintiff contends that the the M.O.U which was signed on 29.8.2003 between the plaintiff and the Defendant inter alia, recognized him as the owner of 7 acres out of the 35 acres the Defendant had encroached upon.

The plaintiff argues that through the M.O.U, the Defendant admitted full responsibility for the encroachment and undertook to indemnify him on its own behalf and on behalf of its members. Relying on the contents of the M.O.U, the plaintiff explained that the defendant agreed to purchase the land encroached on at the price of Kshs.910,000/= for the seven acres. Consequently, the Defendant paid 210,000/= as deposit and promised to pay the balance of the Purchase price on or before 29th December, 2003.

It is the the Plaintiff's case that the Defendant failed to honour its part of the bargain at the agreed time and at all. This prompted his advocate to write to the Defendant and to its encroaching members informing them that the agreement had been cancelled.

Following the cancellation of the M.O.U, the Plaintiff sought assistance from members of the Provincial Administration, in Particular, the D.C Nyandarua North District, who ordered for a survey to determine the boundaries to the suit property.

The plaintiff claims that the survey ordered by the D.C revealed that the Defendant, through its members, had indeed encroached onto his land. Consequently, the members of the Provincial Administrations ordered the Defendant and its members to vacate his land to no avail.

According to the Plaintiff, that state of affairs prompted him to instruct his Advocates to issue demand letters to the Defendant and its encroaching members. He produced the bundle of demand Letters as PEX 3.

The Plaintiff explained that the Defendant, through its members, has been cultivating the encroached 7 acres from 2003; and that by so doing he has been denied an opportunity to make use of that portion of his land.

The plaintiff therefore seeks restraining orders against the defendant by itself, its members and/or agents from interferring with his quiet possession and use of LR No.10445/5

The Plaintiff also seeks an order compelling the Defendant's members to vacate the encroached land and to pay him mesne profits at the rate of Kshs. 6000/=.

Defence case

The evidence of D.W.1, Elijah Mwangi Njoroge, and the submissions filed in respect thereof on 18th February, 2014, is to the effect that the plaintiff does not deserve the orders sought because:-

1. He failed to prove ownership of the seven acres;
2. There is no proof that the suit property was ever surveyed and sub-divided into L.R No.10445/4 and L.R No.10445/5 as alleged;

3. That the M.O.U on which the plaintiff's case is premised was executed by people who had no authority to act for the Defendant;

4. That the plaintiff's suit is time barred;

5. That the plaintiff can be adequately compensated by award of damages;

6. That the dispute herein was not referred to arbitration as provided under the M.O.U signed between the plaintiff and the defendant;

7. That the orders sought cannot be issued against the encroaching members of the Defendant because the Plaintiff did not enjoin them in the suit; and

8. That the plaintiff cannot be awarded mesne profits because he did not plead and specifically prove them, as by law required.

Testifying on behalf of the Defendant, D.W.1's, a member of the Defendant and its former Chairman led evidence to the effect that he could not tell whether or not the Plaintiff's claim is justified. He conceded that the M.O.U produced by the Plaintiff was signed by the Defendant's Chairman but stated that the other signatories of the M.O.U were not the Defendant's officials.

Contending that no survey was done to establish the alleged encroachment, he explained that should it be established that the Defendant has encroached on the Plaintiff's land, the Defendant would be willing to buy off the encroached portion rather than having its members vacated.

Issues for determination

From the pleadings and the submissions filed in this suit, the issues for determination are:-

1. Whether the Plaintiff's suit is time barred?
2. Whether the dispute hereto was referred to arbitration as provided for under the M.O.U?

3. Whether the Defendant and/or its members have encroached on 7 acres of land belonging to the plaintiff?

4. Whether the Plaintiff ought to have enjoined the individual members of the Defendant into this suit?

5. Whether the Plaintiff is entitled to mesne profits?

6. What orders should the court make?

Is the plaintiff's suit time barred?

In the submissions filed on behalf of the Defendant it is contended that the Plaintiff's suit is by virtue of Section 7 of The Limitations of Actions Act, Cap 22 Laws of Kenya, time barred. That section requires that an action for recovery of land be brought within twelve years from the date upon which the action accrued to the claimant or, if it first accrued to some other person through whom he claims, within twelve years from the date the right accrued to that other person.

In the instant suit, the alleged encroachment is said to have taken place more than 34 years ago.

In reply Counsel for the plaintiff submitted that most issues raised in the suit were not disputed in evidence. He termed any submissions to the contrary as diversionary.

From the pleadings and the proceedings in this suit I note as a fact that the Defendant neither raised the Defence of time bar in its statement of defence nor in its evidence.

Under **Order 2 rule 4(1)** of the **Civil Procedure Rules** time bar under any statute of Limitation is one of the matters that a defendant is specifically required to plead in his/its statement of Defence.

The Defendant's attempt to rely on the statute of Limitation when it did not specifically plead it, clearly offends the provisions on pleadings. Be that as it may, from the totality of the evidence adduced in this

case I gather that the Plaintiff's cause of action flows from the Defendant's admission that it had encroached on 7 acres of his land. Although the encroachment occurred Long time ago, there is evidence that there was a suit by the Original owner which led to admission that the Defendant had infact encroached on the suit land. It is on the basis of that admission and the subsequent M.O.U signed between the plaintiff and the defendant that the plaintiff's cause of action arose. The M.O.U was signed in 2003 and the instant suit filed in 2010, barely twelve years from the time the Defendant admitted that its members had encroached on the Original owners land. In view of the foregoing, I am unable to find that the suit herein is time barred.

Was the dispute herein referred to arbitration?

In its defence, the Defendant referred to a clause in the M.O.U signed between the plaintiff and the Defendant for the proposition that the suit herein was prematurely filed. That clause provides as follows:-

"Any dispute between the parties herein shall be referred to the advocate herein for arbitration and this is a condition precedent before any party can seek redress in any court of law or tribunal."

Whereas D.W.1 claims to be un-aware of any reference to arbitration, given the fact that the demand letters produced in support of the Plaintiff's case are from the advocate who was to carry out the arbitration, the only reasonable inference that can be drawn therefrom is that the Plaintiff referred the dispute to the advocate for settlement as required of him in the M.O.U. The plaintiff was not under any obligation to coerce the Defendant and/or any of its members to submit to arbitration. On that basis, I find and hold that the suit is properly before this court.

Has the plaintiff proved encroachment?

It is contended that the Plaintiff has not proved encroachment onto its property. Some of the reasons given for this contention is that no survey has been done to determine the boundaries to the parcels the parties own.

Upon reviewing the totality of the evidence adduced in this suit, and in particular, the agreement signed between the Defendant and the original owner of the suit properties, I find as a fact that the Defendant encroached on 35 acres of land belonging to the original owner of the suit property. (See PEX1). I also find as a fact that the parties in this dispute acknowledged existence of L.R No. 10445/4 and L.R No.10445/5 which are subdivisions of the original suit property, L.R NO.10445 (See PEX 2).

Through PEX 2, which D.W.1, admitted was signed by among others, the Defendant's Chairman, the Defendant admitted that while settling its members on its land, it encroached on seven acres or thereabout belonging to the Plaintiff. Consequently, it took full responsibility for its members encroachment on the 7 acres and undertook to indemnify the plaintiff, on behalf of its members, for the encroachment.

In addition to the above admission and commitments the Defendant agreed to buy the seven acres at Kshs. 130,000/= per acre. Upon execution of the agreement, it committed itself by paying Kshs. 210,000/=. It promised to pay the balance of 700,000/= on or before 29th December, 2003 (see PEX 2).

The terms of the agreement signed between the Plaintiff, and the defendant demonstrates that the parties had provided for what would happen in the event that the Defendant failed to honour its part of the bargain. One of the obligations that the Defendant placed on itself was to intimate in writing to the plaintiff of its inability to raise the entire balance of the Purchase price.

Upon the intimation referred to above, the parties would excise such portion of the encroached land as the Defendant would have paid for. Thereafter, the Plaintiff would be at liberty, without any recourse to the courts or tribunal, to retake possession of any portion that the Defendant would not have paid for.

Being satisfied that the M.O.U was for all intents and purposes a binding agreement between the plaintiff and the Defendant and taking note of the provisions of Section 23 of the Evidence Act which provides

that no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given, I find and hold that under the M.O.U hereto (PEX 2), no further evidence is required to prove the alleged encroachment.

In that M.O.U, the Defendant, without any reservation, admitted having encroached into the Plaintiff's land. It is noteworthy that D.W.1 did not deny having knowledge of the M.O.U signed between the Defendant and the Plaintiff. He only alleged, without proof, that some of its signatories were not officials of the Defendant. I also note that the Defendant's defence concerning that M.O.U was that of mere denial. It did not, for in stance, allege that the M.O.U was entered by persons who were not officials of the Defendant, only that some of the signatories were not officials.

In view of the foregoing reasons, I find the Plaintiff's claim that the Defendant and/or its members encroached on 7 acres of land belonging to him to have been admitted and/or sufficiently proved.

Should the Plaintiff have enjoined the encroaching members of the Defendant?

As pointed hereinabove, the plaintiff is faulted for having failed to enjoin the individual members of the Defendant in this suit. Given the fact that the orders sought will affect the encroaching members of the Defendant It is submitted that it would be unlawful and against the Rule of natural justice to issue any orders against them.

There is no doubt that the orders sought herein will affect the encroaching, members of the Defendant. However, given the special circumstances of this case, I find that the plaintiff was not under any obligation to enjoin the individual members of the Defendant to the suit. I say so because the individual members of the Defendant, even though mentioned in the suit, came into the suit properties not in their individual capacity but as members of the Defendant. Moreover, as noted above, the plaintiff's claim is premised on the M.O.U signed between the Defendant and the Plaintiff. In that M.O.U, the Defendant took liability for the unlawful actions of its members. In those circumstances, the Defendant, and not its individual members, was the right party to sue.

Is the plaintiff entilted to mesne profits?

The plaintiff claims mesne profits for deprivation of use of the seven acres from August 2003. Although he did not plead the rate at which he wanted the mesne profit to be calculated, during the hearing of his case, he stated that the land is let at Kshs. 6000/= per acre.

In its submissions the Defendant challenged the the plaintiff's claim for mesne profits on the ground that it was not specifically pleaded and proved as by law required. In this regard, reliance was made on, among other authorities, **Chepsang Kipruto** v. **Francis Munyambu Nakuru HCCC No. 221 of 2009 (2010) eKLR** where W. Ouko J. (as he then was) quoted with approval the decision of the Court of Appeal in **Peter Mwangi Mbuthia** v. **Samow Edin Osman & Naftali Ruth Kinyua Civil Application No. NAI No.38 of 2004**, thus:-

"As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profits and it appears to us *prima facie*, that there was no evidence to support the actual figure awarded....That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence".

I totally agree with the sentiments of the Court of Appeal in the above quoted decision, I also agree with the Defendant's submissions that mesne profits are special damages which must be specifically pleaded and proven before they can be awarded.

In the instant case the plaintiff did not assign any figures and/or rate to his claim for mesne profits, without such figures and/or rate his claim that the land is let at Ksh.6000/= cannot be said to be in support

of his pleading. Moreover, no evidence by way of valuation or lease agreement was produced to prove the alleged rate. For these reasons the plaintiff claim for mesne profit fails. This court cannot rely on figures which appear to be plucked from the abacus and make them the basis of an order for mesne profits.

What orders should the court make?

From the evidence adduced in this suit, and in particular the M.O.U signed between the plaintiff and the Defendant, it is clear that the parties herein had agreed on what would happen in the event any one was in breach of the terms of that M.O.U. For instance, in clause 7 of that M.O.U the parties had agreed as follows:-

"After the portion of land paid for shall have been excised, the Vendor (read the Plaintiff) shall be at liberty without any recourse to the courts or tribunal to retake possession of any portion currently illegally occupied but not having been paid for."

The evidence led in this suit is to the effect that the Defendant had only paid Kshs. 210,000/= as at 29th December, 2003 (the completion time). That means had the parties complied with the agreement entered into, the Defendant would be entitle to a portion of land equivalent to the amount then paid. Thereafter, the Defendant was under a contractual obligation to remove its members from the suit property to pave way for Plaintiff's possession of the remainder of the seven acres claimed by the Plaintiff.

For the foregoing reasons, I find and hold that the Defendant is in breach of its contractual obligations. Consequently, I make the following orders:-

1. The Defendant to facilitate the hand over of the remainder of the seven acres encroached on by its members to the Plaintiff subject to excision of the equivalent for the payment of Kshs.210,000/=.

2. If the plaintiff had already taken possession of the remainder of the seven acres, an order of injunction to issue, and is hereby issued to restrain the Defendant by itself, its members and/or agents from interferring with the plaintiffs quiet possession, occupation, and use of all that piece of land known as L.R NO. 10445/5.

3. The Defendant to bear the costs of this suit.

Dated and Signed this 16th day of May, 2014 at Nakuru.

H.A OMONDI

JUDGE