



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 47 OF 2017

(formerly Machakos HCCC 163 OF 2010)

STEPHEN LESIYIA OLE KAKIYA.....PLAINTIFF

-VERSUS-

GEORGE KANTAI MPUSIA.....1st DEFENDANT

MOISARI MBUSIA MUTENTE.....2nd DEFENDANT

SHINA MOISASI CATHERINE.....3rd DEFENDANT

JOSEPHINE SASIMUA MOISASA.....4TH DEFENDANT

(Sued as the administrators of the Estate of MOISASI OLE MUTENTE SUYIANKA (deceased)).

JUDGMENT

The Plaintiff seeks the following reliefs from the four Defendants both jointly and severally.

- (a) A permanent injunction restraining the Defendants whether by themselves, their agents, employees and or servants or anybody claiming through them from interfering with L.R. NO. KAJIADO/KAPUTIEI-NORTH/813 or the Plaintiffs quiet possession thereof.
- (b) General and exemplary damages for trespass.
- (c) Kshs. 38, 000,000/= with interest at Court rates from 9th November, 2006 until payment in full.
- (d) Costs of the suit.
- (e) Interest on (b) and (d) above at Court rates from the date of filing of the suit until payment in full.

The Plaintiff's case is as follows. He is the registered proprietor of the suit land which is KAJIADO/KAPUTIEI-NORTH/813. It measures 94 hectares or 233 acres.

Neighbouring the suit land but separated by a road is L.R. KAJIADO/KAPUTIEI-NORTH/812 which is registered in the name of Moisasi Ole Mutente Suyianka who is now deceased.

The Defendants are sued as administrators of the estate of the deceased having been appointed as such in Machakos Succession Cause No. 181 of 2010.

In the 1990s, the deceased began encroaching on the public road that separates the suit land and L.R. NO. 812. Eventually, he crossed over to the Plaintiffs land and mined gypsum until he died on 21/12/2009. At the time of filing the suit on 16th August 2010, the mining was continuing.

The Plaintiff complained to the local administration but the dispute was not resolved. He then filed a dispute at the District Lands Disputes

Tribunal. This is because the deceased had uprooted the beacons that demarcated the suit land. The Tribunal decided in favour of the Plaintiff.

The award was confirmed by the Magistrates Court which ordered for a determination of the boundary. The beacons that had been removed were put back in place.

The deceased did not relent on encroachment because he removed the Plaintiffs fence again and continued mining gypsum, unperturbed by the Court Order. He contracted Jaswinder Singh Enterprises and other contractors to excavate on his behalf.

The Plaintiff made a report to the police at Isinya Police Station. The deceased was arrested and later released on condition that he put back the beacon and the fence which he promptly did.

When the deceased restored the fence and the beacon, the gulleys left on the land were a danger to both people and livestock. All the gypsum on the land was lost and exhausted and the land was no longer economically viable.

The Plaintiff instructed Njihia Muoka Rashid Valuers to carry out a valuation of the damage to the suit land.

In a valuation report dated 2nd September 2013 and produced as an exhibit in this case, the damage to the land was estimated at Kshs. 38 million.

The gypsum occurred at depth of 1.5 to 3 meters. It was mined by using Simple Stripping Open Cast Mining. The overlying black cotton and clay soils were stripped first to reach the gypsum. The mining was carried out over an area of 35 acres. The quarry mines occupied approximately 5 acres. The total volume of gypsum extracted was 6, 167 m (cubic metres). The depth of the mined yards was estimated to be 20 feet and the total mass of mined gypsum was 13, 092 tonnes.

The market value of raw/unprocessed gypsum from the field survey was Kshs. 2000/- per tonne. The loss of gypsum mineral deposit was Kshs. 26 million while damage to the 35 acres was estimated at 12, 000,000/=.

In support of his case, the Plaintiff filed the following documents;

- (1) Copy of title deed to the suit land dated 23/10/2008.
- (2) Copy of letter by District Surveyor Kajiado dated 24/10/2007.
- (3) Copy of award in land disputes tribunal case no. 2 of 2007 at Senior Resident Magistrate's Kajiado Court.
- (4) The last page of the Kajiado Dispute Tribunal award dated 9/11/2006.
- (5) Copy of letter dated 12/7/2007 by the District Surveyor Kajiado to the District Officer Isinya requesting the parties to be present during the implementation of the Court Order regarding the demarcation of the boundary between the suit land and L.R. 812.
- (6) Copy of the letter by the District Surveyor dated 14th November, 2007 saying that there was evidence of uprooting of beacons.
- (7) Copy of the valuation report dated 2nd September, 2013.

The Defendants in their joint statement of defence dated 23rd April 2015 deny that they had capacity to be sued when the case was filed on 16/8/2010. They contend that the said letters of administration of the estate of Moisasi Ole Mutente Suyianka were issued on 30/9/2010. They deny every averment in the plaint and pray for the dismissal of the suit with costs.

Each of the four Defendants recorded a witness statement dated 24/11/2017. Their four (4) statements are similar in every respect. The main features of their defence are as follows;

Firstly, they were not administrators of the estate of the deceased when the suit was filed.

Secondly, neither the deceased nor the Defendants mined gypsum on the Plaintiffs land at any time. On the contrary, it was the Plaintiff who did this on the road that separates the two parcels.

Thirdly, the Defendants say that the value of gypsum at Kshs. 38 million is highly exaggerated.

In addition to the four witness statements, the defendants filed two documents namely a copy of grant of letters of Administration Intestate dated 30th September 2010 and a copy of Title Deed for L.R. 812 dated 19/7/1999.

At the trial, the Plaintiff testified and called one witness who produced the valuation report dated 2/9/2013.

On the other hand, the first Defendant testified on his own behalf and on behalf of the other Defendants.

Counsel for the parties filed written submissions with the Defendants Counsel filing first just on 14/12/2021 and the Plaintiff's Counsel filing on 21/1/2022.

The issues raised by Counsel for the Defendants are as follows;

- (a) Whether the Defendants were administrators of the deceased's estate with capacity to be sued when the suit was filed.
- (b) Whether the Defendants encroached on the Plaintiff's parcel and excavated gypsum.
- (c) Whether the Plaintiff suffered loss and damages.
- (d) Whether the Plaintiff is entitled to the reliefs sought.

In reply to the first issue of capacity to be sued on the part of the Defendants, the Plaintiff's reply is that the plaint was amended on 1st April, 2015 when the Defendants had already been issued with a grant of representation.

Secondly, it is also urged that the letters had been applied for long before this suit was filed and the cause of action arose before the succession cause was commenced.

The Plaintiff's counsel identified only two issues for determination namely;

- (a) Whether the Plaintiff has proved his case against the Defendants and
- (b) What damages are awarded to the Plaintiff against the Defendants.

I have carefully considered all the evidence adduced by the parties in this case as well as the submissions by their learned counsel.

I agree with the Defendants' counsel that the four issues that they identified will resolve the dispute.

I find as follows;

On the first issue, I find that the Defendants had capacity to be sued. I have three (3) reasons for saying this.

Firstly, the holding in the case of **VIRGINIA EDITH WAMBUI OTIENO –VS- JOASH OCHIENG OUGO & ANOTHER (1987) eKLR** and **OMOLO SIRANGA (1982 – 88) KAR** as quoted in paragraph 13 of the Defendants' submissions dated 8/12/2021 related to an administrator's capacity to sue not to be sued. It reads as follows;

“An administrator is not entitled to bring any action as an administrator before he has taken out letter of administration. If he does, the action is incompetent”.

This is not the same thing as saying that an administrator cannot be sued before he has taken out the letters of administration. The distinction is clear.

The second reason for saying that the Defendants had capacity is because the plaint was amended after the Defendants had been issued with the letters of administration.

Finally, on this first issue, the Defendants are silent on when they applied for letters of administration. They have only stated the date of issue of the grant which is 30th September, 2010. The application must have been made earlier and failure to state when it was applied leads to the inference that the date may have been before the date of filing of the suit by the Plaintiff.

In any event, taking out letter of administration intestate in my view means applying and not being issued with. The moment one applies for, then it means that they have capacity to be sued. It goes without saying that the letters were issued to the same Defendants.

For the above stated reason, the Defendants cannot be heard to say that they had no capacity to be sued on 16/8/2010 because they had capacity.

On the second issue for determination, I find that there is ample evidence to prove that the Defendants' father encroached on the Plaintiff's land.

We have the Plaintiff's own testimony which is consistent and credible.

Secondly, we have the Plaintiff's conduct comprising of reporting the matter to the authorities including the local administration, the police, the Land Disputes Tribunal and eventually the Court.

This is the conduct of a genuinely aggrieved person who did all that he could to seek redress for a wrong done to him.

There is also sufficient evidence both oral and documentary showing there are gullies all over the Plaintiff's land.

On the third issue, I find that the Plaintiff suffered loss and damage. The land is full of gullies covering an area of 35 acres. The gullies may not be continuous but they cover an estimated area of 5 acres and they are as deep as 3 meters or 20 feet. According to the report by the surveyor as well as the plaint, they pose danger to both human and livestock.

This credible evidence supported by photographs is not controverted by the Defendants.

I find that the Plaintiff suffered loss and damage.

The evidence of the valuer on the value of the damage to the land is unchallenged by any evidence from the Defendants' side.

On the final issue, I find that the Plaintiff is entitled to some of the prayers in the Plaint but not all. The prayers for general and exemplary damages for trespass would only have been awardable if the prayer for special damages was not made.

I find that the Plaintiff would be adequately compensated if the other prayers were granted.

For the above stated reasons, I enter judgment for the Plaintiff against the Defendants both jointly and severally as per prayers (a), (c), (d) and (e) of the amended Plaint dated 27/3/2015.

Dated signed and delivered virtually at Kajiado this 14th day of March, 2022.

M.N. GICHERU

JUDGE