



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 325 of 2008

- 1. COL. JOSSIAH LANDY MRASHUI**
2. SAMUEL KALEMA MRASHUI.....PLAINTIFFS
VERSUS
1. JOHNSON MWANDAWIRO
2. CLEMENT MULEWA RUGHENDO
3. MARIAM WANJALA MWANYEZA
4. GODFREY KIZAKA
5. JOHN MWAWANA
6. MWAMBURI MWAKANGULU
7. DANSON MWASENGA.....DEFENDANTS

RULING

This was a suit lodged by **COLONEL JOSSIAH LANDY MRASHUI** and **SAMUEL KALEMA MRASHUI** in their capacity as the legal representatives of the estate of the late **LABAN MRASHUI** (hereinafter referred to as '*the deceased*') against the eight (8) defendants seeking the following orders:

“(a) A declaration that the property known as

plot No. Ronge/Nyika 522 is wholly and solely owned by the estate of the late **LABAN MRASHUI** and that the defendants’ occupation of the same is unlawful, illegal and an affront to the sanctity of ownership.

(b) A mandatory injunction compelling the defendants, their families, servants and/or agents to vacate and deliver up to the plaintiffs, in vacant possession, **ALL THAT** parcel of land known as plot No. Ronge/Nyika 522 which they are presently occupying.

(c) A permanent injunction restraining the defendants by themselves, their families, servants and/or agents from going into or in any way whatsoever entering and/or interfering with or any part of **ALL THAT** parcel of land known as Ronge/Nyika 522 situated within Ronge Location, Taita/Taveta District.

(d) Damages

(e) Costs of this suit

(f) Interest on (d) and (e) above at court rates from the date of judgment until payment in full

(g) Such other or further orders as the Honourable court may deem fit and just to grant.”

The defendants on their part filed a defence dated 31st November, 2009 which defence also included a counter-claim. A close look reveals that no filing fee was paid for this defence (I will address this later). **MR. ODONGO** Advocate appeared for the plaintiffs whilst **MR. MWANYUMBA** was on record for the defendants. The suit was set down for hearing on 23rd August, 2012. On that date only the 2nd plaintiff and his lawyer was in court. The defendants having been properly served through their advocate Mr. Mwanyumba were not represented in court at all. The matter therefore proceeded in their absence.

At the heart of the dispute is a parcel of land known as **Ronge/Nyika 522** situated within Ronge Location in Taita/Taveta District (hereinafter referred to as the '*suit land*'). **PW1 SAMUEL KALEMA** who was the 2nd plaintiff told the court that the suit land belonged to his late father **LABAN MRASHUI**. Upon the death of his father on 4th July, 2006 the 2nd plaintiff and his brother **COL. JOSIAH LANDY MRASHUI** (the 1st plaintiff herein) were appointed as administrators of his estate. **PW1** told the court that their efforts to administer the estate have been hampered and/or frustrated by the defendants' illegal occupation of the said land. All attempts to have the matter settled amicably having failed, the plaintiffs filed this present suit.

As stated earlier the defendants did not appear on the hearing date despite having received proper notice of the hearing date. As such the 2nd plaintiff proceeded to present the case in support of their suit. **PW1** told the court that the suit land belonged to his late father. He has produced in court a copy of the title to Ronge/Nyika 522 bearing the name of '*Laban Mrashui*' as the sole proprietor Pexb2. In addition **PW1** has produced a certificate of official search dated 13th January, 2010 confirming that '*Laban Mrashui*' is the registered proprietor of the suit land.

Following the death of Laban Mrashui on 4th July, 2006 letters of administration were granted to his two sons (the two plaintiffs herein). A copy of the certificate of grant was exhibited in court **Pexb1**. The plaintiffs aver that despite having this legal proof of ownership, the defendants have invaded the suit land and have proceeded to construct thereon. It is quite clear from documentation availed to this court that there has been a long-standing dispute between the parties over ownership to the suit land which dispute began even during the lifetime of the deceased. The dispute culminated in several interventions. The defendants were given a hearing on 12th May, 1999 by the Land Adjudication Committee of Elders who found in favour of the plaintiffs. A final appeal was heard by the Minister for Lands & settlement. The proceedings of that appeal were produced by **PW1** as an exhibit **Pexb3**. The decision of the Minister was as follows:

DECISION

“The decision of the Land Adjudication Officer is therefore set aside. Plot No. 522 to revert to Laban Mrashui. The decision of the Land Adjudication Committee of Elders is hereby upheld.”

It is quite clear therefore that the defendants have had ample opportunity to ventilate their claim to the land but their claim was found to be untenable and the suit property found to belong to the plaintiffs' father. Despite this finding the defendants persist in their occupation of the land, even despite the fact that they each have their own parcels of land within the same area. Their continued occupation of land which rightfully has been found to belong to the plaintiffs amounts to illegal trespass.

As stated earlier, the defendants filed their defence and counter-claim dated 31st November, 2009. However no filing fee was paid with respect of the same. As such, this defence and counter-claim is not properly on record and cannot be considered by the court. If the defendants and/or their advocate had appeared on the hearing date then this anomaly could have been corrected by simply requiring the defendants to pay the filing fee before being heard. However, due to the failure of the defendants to attend the hearing, this anomaly could not be rectified.

This court is mindful of the provisions of Article 159(2)(d) of the Constitution of Kenya which mandates a court to administer justice without undue regard to technicalities. However, even if this defence and counter-claim were found to be properly on record, no evidence has been adduced in support of the

same. The defendants have tendered no proof that they have been in occupation of the suit land for seventy (70) years as they allege. **PW1** told the court that the defendants are not in any way related to the plaintiffs thus the claim that the land was held in trust does not arise. The defendants fault the manner in which the adjudication hearings were conducted but they have not bothered to make use of any legal channel to challenge the decision awarding the suit land to the plaintiffs' father. I find that the defence merely raises a series of allegations none of which is proved either by evidence or the documentation on record. The counter-claim was not prosecuted at all and I do hereby dismiss the same with costs to the plaintiffs.

All in all, I am satisfied that the plaintiffs have proved a legal claim to the suit land on a balance of probability and entitled to unhindered possession, use and occupation of the suit land. I therefore grant prayers (a), (b) and (c) of the plaint dated 13th November, 2008. Prayers (d) seeking damages was not canvassed before me and I make no orders in that regard. I further award the costs of this suit to the plaintiffs.

Dated and delivered in Mombasa this 28th day of March, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Odhiambo h/b Mr. Odongo for the Plaintiffs

No appearance for the Defendants

Court Clerk Mutisya