



REPUBLIC OF KENYA

High Court at Garissa

Civil Case 9 of 2011

ABDULLAHI HAJI MOHAMED.....1ST PLAINTIFF

HABIBA ALI NUR.....2ND PLAINTIFF

ZEINAB MOHAMED ABDI.....3RD PLAINTIFF

VERSUS

ABDULLAHI DAGANE BARE.....DEFENDANT

JUDGEMENT

1. By a plaint dated 11th April 2011 and filed on 12th April 2011, the three plaintiffs are seeking a permanent injunction restraining the defendant by himself, his employees, agents or servants and whosoever acting on his behalf from interfering trespassing and/or encroaching “Harage Marmutu Farm” within Garissa Municipality pending the hearing and determination of the suit; an order of eviction directed at the Defendant; general damages; costs of the suit and any other or further relief as the court may deem fit and just to grant.
2. The plaintiffs describe themselves as family members of Harage family. They state that they were allocated land known as Harage Marmutu Farm measuring 500 acres in 1982 by the County Council of Garissa. They state that they have been in occupation and have been utilizing the Farm for agricultural activities including bees keeping, dairy farming, camel rearing, and growing subsistence crops for food. They claim that the defendant approached them during a dry spell and requested to be allowed to utilize temporarily a section of the farm and they accepted. They state that the defendant started putting up structures on the farm, developing it, leasing it out to strangers and allowing other people to till the land without consent of the plaintiffs. They contend that this has exposed them to substantial loss and damage, hence their claim.
3. On his part the defendant denies in its entirety the plaintiffs’ claim. In his defence dated 18th May 2011 and filed on the same day, the defendant claims that he occupies and works on his land known as Baraka Farm and not on the plaintiffs’ land as claimed. He contends that in 2009 he allowed the 2nd and 3rd defendants to keep their bee hives on his Baraka Farm since the two did not have land where they could keep the hives and that the plaintiffs filed this suit after the defendant asked the 2nd and 3rd plaintiffs to remove the bees hives from his land. He states further that the land belonging to the Plaintiffs’ family was taken over by the Government of Kenya and given to the Prisons Department for which the plaintiffs are seeking compensation. The defendant claims that the plaintiffs have no cause of action and asked the court to dismiss the case with costs to him.

4. The 1st plaintiff is said to be brother in law to 2nd plaintiff and brother to 3rd plaintiff. The defendant is said to be brother in law to the 1st plaintiff. The evidence in support of the case for the plaintiff is that Harage Farm, initially measuring 500 acres belonged to the late father to 1st and 3rd plaintiff; that their father had occupied it since colonial times (some evidence puts the year as 1950); that the GK Prison Department took 300 acres of the land leaving 200 acres; that the defendant and the 1st plaintiff's younger brother Roble Haji Mohamed (2nd defence witness) were given temporarily 10 acres from Harage Marmutu Farm by the 1st plaintiff's late father to cultivate (evidence does not agree on the acreage given as the 3rd plaintiff says it was 5 acres); that the women family members formed themselves into a group and started a bees keeping project on the Farm; that the defendant told them to vacate the land claiming that it was his land. This gave rise to a dispute that was referred to the District Administration and later to this court.

5. The plaintiffs produced in court in support of their case a list of various documents (Exhibit 1 to 18 all inclusive) including the record of the meeting of Garissa County Council dated 29th July 1982. Minute number 17/82 (Ex. 11) of that meeting shows a resolution by the Council to give Marmutu land measuring 500 acres. (The record shows an alternation of that Minute by adding by hand Harage to Marmutu. The alteration has not been countersigned and no evidence either in chief or in cross examination was adduced to address the alterations). The list of exhibits includes various correspondences exchanged between the administration, the parties and other government departments. They show that Harage Marmutu Farm initially measured 500 acres but 300 acres was taken by the GK Prisons leaving 200 acres; Part Development Plan (Ex. 4) in respect of the land taken over by the Prisons; letter dated 21st June 2003 (Ex. 7) from the Harage family complaining about occupation of their land by GK Prisons; letter from District Commissioner dated 18th July 2003 to Garissa County Council asking the Clerk for an alternative land for the Harage Family (Ex. 8) and other correspondences calling for a meeting of the parties by the local administration regarding the dispute.

6. The evidence in support of the defence case is that the defendant does not occupy the plaintiffs' land. Instead he occupies his land known as Baraka Farm which he bought together with his friend Roble Haji from one Sulleiman Ali Kune on 14th September 1992; that he developed the land by planting fruits and vegetables and put up a house on it; that the 2nd plaintiff approached him on 13th December 2009 and asked him to allow her to put beehives on his land but he refused to allow her because she was not accompanied by a man being fearful that a dispute may arise with her over the land; that she later came with a man, Khalif Abdi who testified as witness for the defendant, the defendant allowed them after recording an agreement; that after about two years he told them to vacate his land but they refused to vacate; that they took the matter to the Chief and asked him to resolve the matter to allow them to remain on the land until they got an alternative place; that the defendant was asked by the Chief to allow them; that he allowed them one more week but after that time they refused to move and took the dispute to the District Officer where they claimed the defendant had occupied their land.

7. The defendant produced in support of his case what he says is an agreement he recorded with one Sulleiman Ali Kune who is alleged to have sold him Baraka Farm. This handwritten document shows the agreement was recorded on 14th September 1992 and the purchase price is indicated as Kshs 5,000 (Exhibit 1). The defendant also produced Part Development Plan dated 24th May 2004 showing Baraka Farm (Exhibit 3); an agreement between the defendant and 2nd Plaintiff and other people including Khalif Abdi Ali allowing them to keep bees in Baraka Farm (Exhibit 4); a letter from the Ministry of Agriculture dated 21st November 1992 to the effect that Baraka Farm belongs to the defendant (Exhibit 5); letters dated 24th August 1995 and 9th November 1995 from Wetangula & Co. Advocates (Exhibits 6 and 7 respectively) on the issue of compensation of Harage Marmutu Farm by the Government; letter by Roble H. Mohamed dated 27th October 2009 to the Vice President and Minister for Home Affairs for compensation in respect of 500 acres of Harage Marmutu Farm (Exhibit 9).

8. The parties did not agree on the issues but from their pleadings my understanding of the issues is as follows:

- i. Whether Harage Marmutu Farm exists and its size.
- ii. Whether the defendant has trespassed on Harage Farm.
- iii. Hand in hand with issue number two above is the existence of Baraka Farm and its relationship, if any, with Harage Farm.

9. Our Evidence Act (Cap 80 Laws of Kenya) is specific on the issue regarding proof of facts. The relevant sections are Section 107, 108 and 109.

a) 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

b) (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

c) 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

d) 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

10. The above sections of the Evidence Act can be summarized by the phrase, “**he who alleges or he who asserts must prove**” or full Latin maxim “**Ei incumbit probatio qui dicit, non qui negat**” which translates to “the [burden of the proof](#) lies upon him who affirms, not him who denies”. The plaintiffs before this court have the legal burden of proof to show that what the facts they assert truly exist. For them to get the orders they are seeking, they must discharge the legal burden of proof and evidentiary burden by adducing evidence in proof of the facts they are asserting exist. The standard of proof has been long settled that in a civil case, the standard of proof is one on a balance of probabilities. There are myriad of locally decided cases on this issue. On the same issue of the standard of proof in civil cases, **Lord Denning J, in Miller v. Minister of Pensions [1947] 2 All ER 372** had this to say: “**It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not.**”

11. Does Harage Marmutu Farm exist? Going by the minutes of the meeting of the Garissa County Council dated 29th July 1982 minute 17/82 (Exhibit 11); letter dated 26th August 1982 from the Acting Clerk, County Council of Garissa to one Ahmed Haji Mohamed informing him of approval of his application for 500 acres of land at Marmutu (Exhibit 10); Letter dated 18th January 1996 from the County Councils of Garissa to Wetangul & Co. Advocates confirming allocation of that land to Harage Family (Exhibit 6) and other correspondences I have no doubt that this Farm existed. The existence of the Farm was not an issue in this case because both parties admit it existed. I wish however to point out that the plaintiffs relied on photocopied documents to support ownership. This was not opposed by the defence. Majority of these documents bear original stamp of the County Council but they are copies. The plaintiffs did not seek to call for the originals which must be in the custody of the County Council or the Municipal Council of Garissa.

12. The original size of the Farm is indicated as 500 acres. It is not in dispute that the GK Prisons, Garissa took part of that land. The dispute is the size taken by the Prisons. The plaintiffs assert that the Prisons department appropriated 300 acres of the land leaving a balance of 200 acres. The defendant claims the whole land was taken over by the Prisons. It is upon the plaintiffs to prove that the Prisons appropriated 300 acres and left them 200 acres and that the defendant is occupying this section. The documents tendered in evidence on this issue are plaintiffs’ exhibits a copy of a Part Development Plan (Exhibit 3). The original was not produced and the maker did not testify. It shows an approved PDP dated 7th July 1996 indicating Harage Marmutu Farm measuring 81 hectares which translates to 200 acres. I need not

belabour the point that the original PDP was necessary and the maker of the same document crucial to the plaintiffs' case. As the document stands, this court is not able to confirm its authenticity especially when taken together with evidence contained in the other documents. Plaintiffs' exhibit number 4 is a PDP in respect of the Prisons land which is indicated as 125 hectares equivalent of 308.9 acres. This document is not signed nor approved. It is also in the copy. The maker was not called to testify and therefore its authenticity cannot be confirmed by this court. There is no PDP of the original parcel allocated to Harage family to ascertain the acreage. Exhibits 7, letter from Harage Family signed by A. H. Mohamed to the chairman Sub DAC complaining about the allocation of Harage land to the Prisons; letter dated 18th July 2003 from the District Commissioner Garissa to the Clerk, County Council of Garissa asking the Council to allocate Harage family an alternative land because their land had been taken over by the Prisons (Exhibit 8) and the letter dated 22nd July 2003 from the County Council of Garissa to the District Commissioner Garissa in response to the earlier letter explaining that the Council did not have vacant land to compensate Harage family (Exhibit 5) do not mention the acreage of the Harage land they refer to. Defence exhibit 6, a letter from Wetangula & Co. Advocates on behalf of Harage family to the then Minister of Home Affairs and National Heritage was asking for compensation of the Harage family on account of 500 acres of land taken over by the Prisons Department. It does not refer to 300 acres but 500 acres taken by Prisons. A further letter dated 27th October 2009 from Harage family written by Roble Haji Mohamed (Exhibit 9) to the then Vice President and Minister for Home Affairs is asking for compensation for the entire 500 acres and not 300 acres. The plaintiffs are alleging collusion between the defendant and Roble Haji Mohamed to defraud them of the family land. This allegation of fraud would require a standard higher than that of a balance of probabilities and lower than proof beyond reasonable doubt. I do not have evidence proving this allegation (**see Ratilal Fordhanbhai Patel v. Lali Makenji [1957] and Koinange & 3 Others v. Koinange [1986]**).

13. The 1st plaintiff in his evidence in chief and during cross examination stated that the Harage Farm belonged to his late father Haji Mohamed Abdi Bare and he had occupied it since 1950 or during colonial times. The same evidence was given by Zainabu Mohamed the 3rd plaintiff and sister to 1st plaintiff. This seems to contradict evidence including documentary evidence that the land was allocated to Harage family as per the minute 17/82 of 29th July 1982 (Ex. 11) in 1982 upon an application for the same. It did not come out in evidence why it was necessary to allocate to Ahmed Haji Mohamed land that already belonged to his family unless perhaps regularise and formalize the allocation.

14. On the issue of trespass by the defendant the 1st plaintiff testified that the defendant was given land (10 acres) by their late father to occupy temporarily. The 2nd plaintiff too stated that the defendant was given the Harage family land temporarily and problems started when the 2nd plaintiff and her group of bees keepers put beehives on the section temporarily occupied by the defendant. This is when the defendant told them to vacate that section and the dispute over the land emerged. The 3rd plaintiff puts the acreage given to the defendant to utilize temporarily as 5 acres. Both 1st and 3rd plaintiffs vehemently denied existence of Baraka farm but 1st plaintiff contradicted himself by stating that they (Harage family) gave 10 acres of their land to Baraka farm. He also contradicted himself further when he produced exhibit 16 what he called a list of members of Baraka Farm and said he is also a member of Baraka farm whose name is included in that list. It is worth noting that the 1st plaintiff was uncooperative during cross examination to an extent of cautioning him several times to cooperate and answer questions.

15. This issue of trespass on Harage Farm by the defendant must be considered hand in hand with the other issue of the existence of Baraka Farm. The case for the defendant is that he does not occupy Harage Farm but his own farm known as Baraka. He alleges to have bought this land from Sulleiman Ali Kune who did not testify. He produced exhibit 1, a sale agreement in support; he also produced PDP marked exhibit 3 showing an area marked as Baraka farm. It is purportedly prepared by one J.M Kamunde and drawn by P.N Mbithi both of whom did not testify. This court is therefore not able to confirm the authenticity of the signature appended to the document. The defendant testified that the 2nd plaintiff approached him to allow her and a group of bees keepers a place to do so but at first the defendant refused. However when the 2nd plaintiff went back with a man, Khalif Abdi who also testified for the defendant, the defendant allowed them to do so. They recorded an agreement to that effect (exhibit 4).

This is the handwritten document dated 13th December 2009. The defendant also produced as an exhibit a letter dated 21st November 1992 from the District Agricultural Officer showing he is the owner of the Baraka farm. On the face of these documents and in the absence of any evidence challenging their authenticity and given that it is the plaintiffs to prove their case, Baraka farm exists. I will not go to the extent of considering proof of the ownership of Baraka farm by the defendant in the absence of a counter claim by the defendant requiring me to do so. Suffice it to state that there is evidence establishing existence of Baraka farm. The relationship of Baraka farm to Harage farm, if any, has not been established.

16. Both counsel for the plaintiffs and the defendant made written submissions and highlighted them orally. In the submissions counsel is asking for Kshs 2.5 million as general damages. In support of that amount, counsel relies on Mary Chelangat Chesirsirv. Charles Ruto & 2 Others (2005) eKLR and Amirali Hassanali Mohammed & Another v. John Odera Nyang'ang's (2010) eKLR. In the former case the plaintiff was granted orders for vacant possession of the suit property and permanent injunction against the defendant as well as Kshs 20,000 general damages while in the latter case, undefended the judgement does not indicate if the plaintiff was granted general damages. Be that as it may, for a party to get the prayers they are seeking, they have to prove the case to the required standard. Have the plaintiffs tendered evidence to prove they are entitled to the prayers they are seeking, and also the general damages? Other than stating that they had bee hives on the land they purport to be theirs, there is no evidence on how much loss they suffered to qualify for general damages.

17. After my careful consideration of all the evidence tendered, the numerous documents produced in support of rival claims it is my finding that the case for the plaintiffs does not carry a reasonable degree of probability to enable me to say **“I think it is more probable than not that the defendant has trespassed on Harage Marmutu farm”**. I have given my reasons above in this judgement. It has not been established on a balance of probability that 200 acres of Harage Marmutu farm remained after the Prisons department was allocated 300 acres. There lacks a PDP of the whole of the land allocated to Harage family to ascertain the acreage and further this court is not able to confirm the authenticity of the documents relied on to prove the acreage alleged remaining after Prisons allocation. There lacks evidence on a balance of probabilities, too, that the defendant is occupying Harage Farm and not Baraka Farm. From my analysis of the evidence and my apprehension of the same the probability that the defendant occupies Harage Farm and the probability that he occupies Baraka Farm which he claims to own seem equal and when this happens, then the plaintiff has not discharged the burden of proof (see Miller v. Minister of Pensions case above).

18. I wish to point out that the evidence in this case was not properly presented. The documents relied on were copies whose authenticity or veracity could not be ascertained; key witnesses especially those who could testify in respect of the documents in question were left out and there were no witnesses summoned from the GK Prisons and both the County Council and Municipal Council of Garissa shed more light into this dispute; some family members including the one named as Ahmed Haji Mohamed who the 1st plaintiff refers to as his brother and who the County Council of Garissa addressed informing him that his application for land (Harage Farm) had been approved did not testify. It is a known fact that courts of law work with the materials placed before them. I am afraid to state that the materials placed before me to work with in determining this case were inadequate as pointed out in this judgement.

19. In conclusion, the plaintiffs have failed to prove their case on a balance of probability. The consequence of this is that the claim fails in its entirety and is hereby dismissed. Given the nature of this claim, I hereby order each party to bear their/his own costs. I wish also to state here that the defendant did not file a counter claim together with his defence and therefore the issue of ownership of Baraka farm has not been resolved. I find this necessary to mention to avoid a situation where the defendant may claim to have won the case. He is ably represented by counsel and therefore in safe hands as regards the way forward in respect of his claim. Those are the orders of this court.

S. N. MUTUKU
JUDGE

Dated, signed and delivered today the 15th April 2013 in open court in the presence Mr. Mose for Mr. Omboga for the plaintiffs and the plaintiffs and Mr. Onono for Mr. Muyondi for the defendant and the defendant.