



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 36 of 2012

KISHAMBA “B” GROUP RANCH PLAINTIFF

V E R S U S

HAMISI MWAKIO & 54 OTHS DEFENDANTS

RULING

- 1) It is said that the Plaintiff is a body Corporate created and registered under the provisions of The Land (Group Representatives) Act Cap 287 Laws of Kenya (hereinafter the “Act”) and owns vast land known and described as Sagalla/Kishamba “B”/1 (**the suit property**).
- 2) In a plaint dated 5th March 2012 and filed on the same day, the Plaintiff brings this action against the 55 Defendants who it claims are in unlawful occupation of the suit land. The Plaintiff seeks the following orders-

“(a) An injunction restraining the Defendants, their agents and/or servants from entering and/or occupying the land or any portion therein.

(b) An eviction order on the Defendants, their agents and/or servants from the property.

(c) A declaration that the property belong to the Plaintiff.”
- 3) Filed together with the plaint is an application for injunction dated 5th March 2012 in which the Plaintiff seeks that the Defendants be restrained from entering, dealing, selling and/or interfering with the suit property pending the hearing and determination hereof. This decision is the answer to that application.
- 4) In support of its contention, the Plaintiff put forward an affidavit sworn by Eng. Benson Mwakina on 5th March 2012. He is said to be the Chairman of The Group Ranch. Annexed to that affidavit is a copy of the Title Deed to the suit property which is a whopping 10,864 hectares registered in the name of the Plaintiff. It is alleged that the Defendants, in December 2011, invaded and trespassed on the suit property and proceeded to erect permanent structures. The Defendants do not have any colour of right and that they infact have acknowledged their illegal status in letters written the Plaintiffs Advocate Msinga (sic) & Co.
- 5) All the 55 Defendants save for the 7th and 16th Defendants were represented by the firm of Oddiaga & Co. Advocates. Those 53 Defendants tell a common story and their position was articulated in the affidavit sworn by the 3rd Defendant Boniface Munuve Ngungi on 16th April 2012. They claim that the land they occupy lies in Ndara “A” Adjudication Section and not in land belonging to the

Plaintiff. Secondly, they have been in occupation since 2009. Then it is also said as follows-

“16. THAT in any event some of us are members of Kishamba “B” the Plaintiff and the Plaintiff is totally acting in bad faith and this is obviously a show of ought right hatred and malice towards us.”

6) The claim by the 7th Defendant is different. He is the son of Mohammed Mwambogha, now Deceased. In a nutshell, it is said by the 7th Defendant that the Deceased was a founder member of the Ranch and so he is automatically a member of the Plaintiff. It is his averment that past Chairmen (Eliud Mwamunga & John Kivure) recognized his family’s membership of the Group Ranch.

7) The 16th Defendant never filed any affidavit in response.

8) As a prelude to determining the application the Court must consider the Defendants challenge on the propriety of the proceedings. It was the view of Defence Counsel that this being a representative suit it is stillborn as no leave of Court was sought and obtained prior to its commencement. It is admitted by the Defendant that the Plaintiff is a body corporate set up under the provisions of The Act.

9) This is what Section 8(i) of that Act provides in respect to the Plaintiff’s capacity to sue in the Corporate name-

“8. (1) The issue of a certificate of incorporation of group representatives shall, subject to this Act and any regulations made under it and to the conditions, limitations and exemptions in the certificate of incorporation, confer on the group representatives power to sue and be sued in their corporate name, and to acquire, hold, charge and dispose of property of any kind, and to borrow money with or without giving security.”

It is clear, the Plaintiff may sue or be sued in its Corporate name. This power is expressly conferred by this provision. A suit by the Plaintiff is a suit by a body Corporate and not a representative action. The members of the Group Ranch have come together and formed a Body Corporate. The provisions of Order 1 Rule 8 of The Civil Procedure Rules in respect to representative action would therefore not apply. I am willing to accept that the suit filed in the name of the Plaintiff is properly brought. In addition, I find that in the absence of evidence to the contrary, the affidavits sworn by Eng. Benson M. Mwakina which are said to be done on the authority of the Plaintiff are made with due authority.

10) I turn now to the substance of the application. The

Plaintiffs contention against the Defendants is that they have unlawfully invaded the suit property without any colour of right. Section 17 of The Act obligates every Group Representative to maintain a register of its members. That Section provides-

“17. (1) Every group shall maintain a register of its members (including those under disability) in such form as the registrar may require or as may be prescribed, containing the name of each member, the date he became a member, his qualifications for membership and, on his ceasing to be a member, the date on which and the circumstances in which he ceases to be a member, and in the case of a member under a disability the name of his guardian, the nature of his disability and (if he is a minor) his age.

(2) If subsection (1) of this section is contravened, each officer of the group shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding one year or to both such fine and such imprisonment, except in a case where the officer satisfies the court that he exercised due diligence to prevent the contravention and that the contravention occurred by reason of matters beyond his control.

Section 4(1) of The Act requires the Registrar of Group Representatives to keep a register of Group Representatives. By dint of Regulation 3 of The Land (Group Representatives) (Prescribed Information)

Regulations 1970 one of documents to be kept by the Registrar is a register of members.

11) A Register of Members is not of small significance. It is important evidence of the membership of a Group. This is what Section 24(1) of The Act provides-

24. (1) In any legal proceedings, a paper purporting to be a copy of or an extract from any register or document kept by the registrar, and purporting to be certified by the registrar as a true copy or extract, shall be admissible as *prima facie* evidence of the contents of the register or document. (my emphasis)

12) Noteworthy, however, is that whilst alleging that the Defendants are not its members, the Plaintiff did not produce the Register of its members which is required to be maintained under Section 17. The result is that in the absence of any other evidence or concession by the Defendants the Plaintiff will not have established, on a prima facie basis, that the Defendants are strangers.

13) For this reason the Court finds, without more, that no prima facie case has been proved against the 7th and 16th Defendants. The 7th Defendants Defence is on the basis that he is a member. That has not been displaced. On the other hand the 16th Defendant has neither filed a Defence nor a Replying Affidavit. No interlocutory judgement has been requested or obtained against him. So on his part there is neither an admission or denial. I would therefore hold that in respect to the two Defendants there was need for the Plaintiff to prove that indeed they are not members.

14) The other 53 members relied on Mr. Ngungi's affidavit. The affidavit raises two alternative defences. One is that they are owners by virtue of the adjudication process under The Land Adjudication Act (Cap 284). This is what they say in paragraph 15 of that affidavit-

“15. THAT I together with others here have been allocated land rightfully in what is known as Ndara “A” Adjudication Section and I and the others have put up developments and this was done in the knowledge that this was an Adjudication area. Annexed marked “B4” some copies of the receipts paid and development put on the Plot.”

15) In the same breath, but without any specifics, they claim that some of them are members of the Plaintiff group-

“16. THAT in any event some of us are members of Kishamba “B” the Plaintiff and the Plaintiff is totally acting in bad faith and this is obviously a show of ought right hatred and malice towards us.”

16) On this issue the Courts attention is drawn to letters annexed and marked BM-2 to that affidavit. These are letters in which the authors are requesting for negotiated settlement with Plaintiff. The authors include the 3rd, 5th, 6th, 9th, 10th, 14th, 15th, 18th, 29th, 31st, 34th, 37th, 43rd, 45th and 48th Defendants. One such letter is that of the 9th Defendant reproduced below-

**“Pamphil Mwakio M.
P.O. Box 285-80300,
VOI**

20.01.2012

**THE CHAIRMAN
KISHAMBA ‘B’ GROUP RANCH
P.O. BOX 218-80300
VOI**

Dear Sir,

RE: NOTICE TO VACATE AND DEMOLISH STRUCTURES

I wish to draw your attention to the above matter. I am in recipient of above notice dated 12th January 2012 Ref: M/CIV/K/058/L.2011 from Musinga & Company Advocates under your instructions and would wish to state as follows;

1. That, I have not declined to enter into an agreement with the Birikani Community who are members of Kishamba 'B' Group Ranch through their management committee on transmission to you.
2. That, the time I purchased the said Parcel of land, the vender proved to me beyond any reasonable doubt that the land belonged to him. I have the copy of the purchase agreement signed by him.
3. That, I strongly believe that the notice is in contravention of the spirit of peace and living in harmony among the communities in this country. I have been living in harmony with the Birikani Community since I entered the said plot. I also acknowledge that the said plot is in the Kishamba 'B' Group Ranch and that Birikani Village is also in the Ranch. It is my humble request that you will listen to my plea and give me an ear so that we can sit down with you, so as to reach on to an agreement that will allow us to live together in harmony.

Yours faithfully,

Pamphil Mwakio M.

c.c

Musinga & Co. Adv. – Mombasa office

District Land Adjudication and Settlement Officer – Taita/Taveta County

D.C. – Voi District

Birikani Representative – Kishamba 'B' Group Ranch"

For this group of 15 Defendants there seems to be twin acknowledgements; that they occupy land that is within the suit property and that they are not members of the Plaintiff. On the strength of their own letters, which are not denied, the Plaintiff has established a prima facie case against only this small group of 15 Defendants.

17) So am I to allow the application against them? The application is in the nature of restraining orders which includes stopping the Defendants from entering or dealing with the suit property. But it does seem that the Defendants have occupied the land for some time now, since 2009 it is said. No wonder prayer (b) of the plaint is for eviction of the Defendants from the suit property. To grant the order of injunction as prayed would be to order eviction summarily. The application before me is not one for a mandatory injunction. The Court will not oblige to a request whose unstated goal is to achieve an eviction.

18) For the various reasons the application must fail. The application of 5th March 2012 is hereby dismissed with costs.

Dated and delivered at Mombasa this 24th day of October, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Wachira holding brief for Matheka for the Plaintiff

Okemwa for the Defendants

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**