



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 123 OF 2007

JACKSON R. K. CHEPKWONY.....PLAINTIFF
VERSUS

MICHAEL KIPKORIR LANGAT.....DEFENDANT

JUDGMENT

The Plaintiff Jackson Robert Kipngetch Chepkwony, lives and works for gain in Nakuru as Revenue Officer with the Kenya Revenue Authority. The Defendant, Michael Kipkorir Langat the Defendant, is a peasant farmer, who resides and earns a living on a parcel of land which the Plaintiff claims was allocated to him, and for which he has title Number NAKURU/TINET SOTIK SETTLEMENT SCHEME/460 comprising approximately two decimal zero hectares (2.0 Ha) (*the suit land*).

In a Plaint dated 2nd June 2007 and filed on 7th June 2007, the Plaintiff prays for -

- (1) *an order of eviction (of the Defendant) from the suit land, and a perpetual injunction restraining him, his recognized agents, servants and/or employees from entering, trespassing, remaining in or in any way howsoever interfering with the plaintiff's suit land,*
- (2) *general damages and mesne profits,*
- (3) *costs of the suit and interest.*

In his Defence dated 19th June 2007 and filed on 25th June 2007, the Defendant denied the Plaintiff's claim and stated that the suit was premature because he had referred the dispute to the Olunguruone Division Land Disputes Tribunal for determination, and that in any event the Plaintiff had not challenged the reference to the said tribunal.

In preparation for the hearing of the case the Plaintiff filed a list of documents he would rely upon but the Defendant did not file any. The Defendant was invited by letter dated 8th January 2010 to attend court for purposes of fixing a hearing date on 21st January 2010. The Defendant failed to attend. A hearing date was therefore taken in his absence, and notice thereof was served upon him on 9th April 2010, and an Affidavit of Service of such service was sworn by the process server, Wilson Wanjohi and was filed, on 6th July 2010. With these antecedents, the matter proceeded to hearing ex parte on 7th July 2010. Mrs Gatei, learned counsel for the plaintiff led him in his evidence-in-chief.

The evidence is familiar in these parts of **Bonde La Ufa** (*Rift Valley - Province*). The Plaintiff is a

member of the **Ogiek Community** whose abode was originally the forests dotting the central and southern parts of the Province. In its efforts to lead members of this hunter and gatherer group to the settled lifestyles of their neighbours, the Government in its wisdom or lack of it, determined to enumerate the 18 clans of the **Ogiek community** for the purpose of allocating each member, a parcel of land within Tinet Forest.

The Plaintiff testified that he was one of the lucky ones who was allocated land on the basis of the 18 Ogiek clans. He belonged to the **Kaptoo Clan**, and that his clan, like every other Clan, had a Settlement Committee with a Chairman and that Charles Rono, the Chairman of his Kaptoo Clan, was also the Chairman-General of the entire Ogiek Clans.

He further testified that the Settlement Committee headed by the said Charles Rono kept a register of members of the Kaptoo clan. A survey was carried out in 1996 by a Government Surveyor based in Nakuru and that each clan was allocated an area of about 50 acres from area to area, until all the 18 clans were allocated land in the various areas of Tinet Forest.

The allocations procedure, the Plaintiff testified, required each member of the clan to be shown his area physically on the ground, while the surveyor took particulars including the ID Number of the allottee. The Plaintiff testified that he was allotted parcel number 460, and he was informed that documentation of titles would follow, and he would be advised of any charges payable.

The Plaintiff further told the court the area was densely forested, and that when he returned to the area two years later in 1998, together with the elders and workers to commence clearing his portion, he found to his surprise that someone else had settled on the land. This stranger is the Defendant in this suit. It was established on being questioned that he was not a member of the Kaptoo clan of the Ogiek community, and was not one of the members of the community allocated land in the area.

The Plaintiff was candid enough in his testimony that there were at the time, many illegal loggers and settlers in the area. The elders asked the Defendant to move out of the suit land but the Defendant declined, and that since the Plaintiff was then working in Mombasa, it was not possible for him to clear the land, it was a difficult area to reach and that he did not go back to the land until the year 2005 when he was informed by the clan elders that titles were ready, and that he was eventually issued with Title Number **Nakuru/Tinet Sotik Settlement Scheme/460** on 12.10.2005 by **H.E. the President Mwai Kibaki**.

Handed with the weapon of title to land, the Plaintiff, established that the Defendant was still occupying and leasing part of the suit land to persons in the area. Efforts by the Area Chief and the Police to persuade the Defendant to vacate the suit land did not succeed till the matter went to the local District Officer who too was not successful. Frustrated with the failure of all his efforts, the Plaintiff laid further complaint at the feet of the Police, who had the Defendant charged with the offence of forcible detainer - under Section 91 of the Penal Code (*Cap. 63, Laws of Kenya*). That matter is still pending determination in Molo SRM Criminal Case No. 7620 of 2008. In the meantime, the Plaintiff had already this suit, the subject of this judgment.

ANALYSIS OF EVIDENCE AND ISSUES

In a Statement of Issues dated 20th June 2009, and filed on 22nd June 2009, the Plaintiff's counsel raised six issues -

- (1) *who is the owner of the land?*
- (2) *Does the Defendant have any interest and/or claim over the suit land!*
- (3) *Should the fact that this suit is undetermined before a land disputes tribunal be an obstacle to the sustenance of this suit?*
- (4) *Does the Land Disputes Tribunal have jurisdiction over the matter?*

- (5) *Are the actions of the Defendant legal?*
- (6) *Who should bear the cost of the cut trees?*

I have already set out the evidence herein at length. I will therefore proceed to answer each of the questions or issues raised by the Plaintiff's Advocates commencing with the last issue.

Who should bear the costs of the cut trees

The Plaintiff led no evidence as to the number or value of the cut trees. A claim for mesne profits is a claim in trespass against an occupier of premises who remains in possession after the termination of his interest in those premises, to recover damages suffered by the Plaintiff as a result of his having been out possession. Damages under this head are generally assessed by reference to, or on the basis of a rent representing fair value of premises during the relevant period of occupation. See for instance **MOUNT CARMEL INVESTMENTS vs. THURLOW [1988] 1 W.L.R. 1978.**

The situation here is one of sheer trespass. To succeed on a claim for mesne profits the plaintiff need to lead evidence as to number of trees, the quantity of timber or charcoal harvested from each tree, and the fair value thereof. In other words "*mesne profits*" must not only be suffered but the extent thereof must also be shown in evidence. In the absence of any such evidence, this leg of the claim must fail. I so hold.

ARE THE ACTIONS OF THE DEFENDANT LEGAL

Trespass is illegal and may lead to prosecution for a criminal offence, or damages as already discussed.

DOES THE LAND DISPUTES TRIBUNAL HAVE JURISDICTION OVER THE MATTER

The issue here concerns ownership to land, and not a right to work upon, occupy, or mere trespass to land or any of the other matter listed in Section 3(1) of the Land Disputes Tribunals Act 1990 (No. 18 of 1990).

Under Section 159 of the Registered Land Act (Cap. 300 Laws of Kenya) the High Court has exclusive jurisdiction to determine questions of ownership of land. With this holding question 3 above is also answered - in the negative.

DOES THE DEFENDANT HAVE ANY INTEREST AND/OR CLAIM OVER THE SUIT LAND

The circumstances under which the Plaintiff was allocated the land and obtained title thereto have been outlined in the Plaintiff's evidence. The Defendant lays claim to the land through some reference to a Land Disputes Tribunal which has no jurisdiction to determine the question of land ownership under the law. The Defendant is a pure opportunistic settler, and trespasser. He has no lawful claim to the suit land.

WHO IS OWNER OF THE SUIT LAND

From answers to the other questions raised by the Plaintiff's counsel, and the Plaintiff's evidence referenced at length above it is the Plaintiff and not the Defendant who is the owner of the suit land.

CONCLUSION

In the result therefore the plaintiff has established proof beyond the bounds of probability that he obtained title to the suit land without any deceit or false representation or fraud. He is on the evidence entitled to the orders in the plaint, namely prayers (a) and (c) thereof.

For reasons I have discussed, he is not entitled to prayer (b) of the plaint.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 22nd day of October 2010

M. J. ANYARA EMUKULE
JUDGE