REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil 267 of 2005 (O.S)

JOSEPH KASHAU OLOLKHUO & OTHERS (*suing*

On their behalf and all members of the Masaai Community

***Residing on* LR NO. NAROK/MAIELLA ESTATE**

NOS. 2662, 1380 *and* 8398/2) ……..……..……. PLAINTIFF

VERSUS

NGATI FARMERS CO-OPERATIVE SOCIETY LIMITED.… DEFENDANT

JUDGMENT

The 1st to the 7th plaintiffs instituted this suit by way of an originating summons against Ngati Farmers Co-operative Society Limited, the defendant. The plaintiffs state that they are suing on their on behalf and on behalf of all members of the Masaai Community residing on Narok/Maiella Estate Numbers. 2662, 1380 and 8398/2. This suit is expressed to be brought under the provisions Order XXX VI Rule 3 (d) of the Civil Procedure Rules.

By this originating summons, the plaintiffs have sought for the determination of the following questions;

1. Whether the plaintiffs have acquired title to 1626 acres on LR Number Narok/Maiella Estate number 380 by adverse possession and whether the same should be registered in the plaintiffs' names.

2. Whether the plaintiffs have acquired title to 4490.16 acres on LR Number Narok/Maiella Estate Number 2662 by adverse possession and whether the same should be registered in the plaintiff's names.

3. Whether the plaintiffs have acquired title to 3094 acres on LR Number Narok/Maiella Estate Number 8393/2 by adverse possession and whether the same should be registered in the plaintiff's names.

4. Whether the defendant should be ordered to transfer 1626 acres on LR Number Narok/Maiella Estate number 1380 to the plaintiffs.

5. Whether the defendants should be ordered to transfer 1490.16 acres on LR Number Narok/Maiella Estate number 2662 to the plaintiffs.

6. Whether the defendant should be ordered to transfer 3094 acres on Narok/Maiella Estate

number 8398/2 to the plaintiffs.

7. Whether a permanent injunction should issue against the defendant restraining it either by itself, its agents, servants or otherwise howsoever from entering, surveying, subdividing, carrying out any or any agricultural activities, or in any manner interfering with the plaintiffs peaceful and quiet occupation and enjoyment of 1626 acres on LR number Narok/Maiella Estate number 1380, 4490.6 acres on LR number Narok/Maiella Estate number 2662 and 3094 acres on LR number Narok/Maiella Estate number 8398/2.

8. Whether the plaintiffs are entitled to a declaration that they have acquired title over:

(a) 1626 acres of LR number Narok/Maiella Estate number 1380

(b) 4490.16 acres of LR Number Narok/Maiella Estate number 2662

(c) 3094 acres of LR Number 8398/2, by adverse possession and or prescription.

9. *Who sho*uld pay the costs of this originating summons?

The plaintiffs' application was supported by the affidavit of Joseph Kachau Ololkhuo which was sworn on 1st November 2005. The application was opposed by the defendant who relied on the affidavits of Patrick Karanja Mwauki sworn on 8th November 2005 and a further affidavit sworn by the same deponent on 15th December 2005. When this matter came up for hearing, directions were given that the case do proceed for hearing by way of viva voce evidence and the originating summons together with the supporting affidavit be treated as a plaint while the replying affidavit be deemed as the statement of the defence.

The 1st plaintiff gave evidence on behalf of the other plaintiffs. He said he was born in 1966 in an area called Ngambani within Nakuru District. He said that his parents and indeed his ancestors lived on Parcel Numbers Narok/Maiella Estate 1380, Narok/Maiella Estate 2662, Narok/Maiella Estate 8398/2 (*herein called suit lands*). He told the court he is suing on behalf of about 3,000 members of the Masaai Community who have been occupying the suit premises. He said this suit was brought about by the defendant's action when they attempted to carry out survey and subdivision of land within where the plaintiffs and other members of the Masaai Community have been living. As regards Parcel Number 1380, he said the Masaai Community have been occupying 1,626 acres. On Parcel Number 2662, the Masaai community had occupied 4,000 acres while the defendants occupy a mere 500 acres. On parcel Number 8398/2 the 1st plaintiff said that he and his community are in exclusive occupation. They have built four public schools and by virtue of their occupation, he asked the court to declare that they have acquired the right of ownership by way of adverse possession and accordingly be declared owners.

During cross-examination, the plaintiffs admitted that he knows one Councilor, John Ledidi who was the defendant in another suit before this court. He also admitted that the Masaai Community was given a parcel of land in that suit. The plaintiff also relied on the matters deposed in the affidavit in support of the suit and the annexure thereto. That was the summary of the plaintiffs' case.

On the part of the defendant, Patrick Karanja Mwauki, the chairman of the defendant's co-operative society gave evidence. He gave a chronology on how the society was registered in June 1964 with the sole purpose of buying land and sub-dividing it to its members. They bought the three parcels of the suit land from a White Settler and in 1974, they finalized the sale transactions. They were issued with titles in respect of the suit lands which the witness produced as exhibits. In 1995, they obtained the consent to sub-divide the land and to allocate it to their members. He told the court that the parcels of land are in Naivasha within the boundary of Narok District. When they tried to sub-divide the land, some people claiming to be of Masaai Communities whom they had given grazing rights objected. He produced a copy of an agreement entered into with members of the Masaai Community for grazing rights and for which they were to pay Kshs.3,700/-. The agreement is dated 17th December 1979. The persons licensed

to graze paid the grazing fees but stopped and the defendants therefore filed Nakuru HCCC No. 89 of 1996. The suit was heard and the defendant's claim of a total of 2,581 acres from LR Number 2662 and 1626 acres from LR Number 1380 was allowed. The defendant thereafter proceeded to subdivide the land to their members who are desirers of getting their individual titles for their shares. The defendant denied that the plaintiffs have any claim which is distinct from the claim in Nakuru Civil case Number 89 of 1996. The defendant contended that the plaintiff in this case is related to the defendants in civil case number 89 of 1996, they live together within the Ngambani area. Thus, this is case is a duplication of the matter that has already been settled in the above decision. According to the defendant, the Masaai Community was given 4,200 acres and they should be satisfied with that allocation. Also he stated that the claim by the plaintiffs that they are pursuing this matter on behalf of three thousand members, is unfounded because the true claimants are about one thousand. He said that the names of some of the plaintiffs in this case are also in the earlier case which has been determined. A court order by way of a consent order was recorded in NAKURU HCCC No. 89 of 1996 to enable the defendants carry on with their sub-division except for the parcels of land and the acreage that was allocated to the plaintiffs' community.

As regards Parcel Number 8398/2, it has not been occupied by the defendants although they have sold part of this land to a power generating company. Subsequently some members of the Massai community started grazing on all the parcels of land. The defendants said that they have built five primary schools within the suit land and one secondary school and a hospital. The defendants' denied that the plaintiffs have been in an adverse possession and they have any varied claim over the suit land.

From the above evidence several issues have been raised to wit;

Ø Whether the plaintiffs have been in occupation of the suit land

Ø Whether the plaintiffs have proved that they are in adverse possession which is advance to the interest of the defendants

Ø Whether this suit is *res judicata* and the issues were determined in Nakuru HCCC 89 of 1996

Ø Whether the plaintiff in this suit have a distinct claim over the suit land

Ø Whether and when the defendants starting showing disapproval of the plaintiffs' occupation

Ø Whether the plaintiffs have proved their claim to the required standard

Ø Who should pay the costs of this litigation

I have taken into consideration the evidence adduced in this matter, the pleadings and the documents produced in evidence. I have also gone through the defendant's written submissions and the authorities cited which I will make reference to, as I attempt to resolve the issues in controversy.

Firstly, I will consider whether this matter is *res judicata* for reasons that another suit being HCCC 89 of 1996 determined the same matters in relation to the suit land. The issue of *res judicata* touches on jurisdiction of this court and therefore it is important to determine it first.

Under the provisions of Section 7 of the Civil Procedure Act

"*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a formal suit between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*"

The plaintiff's in this case claim to be agitating this claim on behalf of the Masaai Community residing within the suit land. The three parcels of land cover an area of about 16,000 acres out of which the

plaintiffs said they are occupying 1,526 acres of Parcel Number 2662 and the entire 8,000 acres of Parcel Number 8398/2.

Out of this claim, a decision of this court in Nakuru HCCC No. 89 of 1996 determined the issues relating to Parcel Numbers 1380 And 2662. This was followed by a consent order recorded by Ngati Farmers Co-operative Society and Councilor John Ledidi with sixteen other defendants. The consent order was recorded on 31st day of May 2005 in the following terms;

1. That the plaintiff herein Ngati Farmers Co-operative Society be and is hereby allowed to proceed with survey work on LR Number Narok/Maiella Estate number 2662 and LR Number Narork/Maiella Estate number 1380 except the following portion: -

(a) 2581 acres of LR Number Narok/Maiella Estate number 2662 and 1620 acres from LR Narok/Maiella Estate number 1380.

2. That the OCPD Naivasha and D.O Naivasha to provide security during the survey work.

Besides the above suit, the defendants claim that the plaintiffs have filed another suit being Nakuru HCCC No. 206 of 2005 where they are seeking acquisition and possession of the following parcels of land;

(a) 1626 acres on LR Number Narok/Maiella Estate number 1380.

(b) 3090acrs on LR Number Narok/Maiella Estate number 8398/2.

(c) 4490.16 acres on LR Number Narok/Maiella Estate number 2662.

In addition to the above suit, there is a pending application to review the decree in Nakuru HCCC NO 89 of 1996 to include more acres from parcel no 2662 and 8398/2 in the judgement.

The question that this court has to address is whether the plaintiffs in the name of the Masaai Community are agitating and re-agitating the same claim over and over in the same court. According to the defendant, the co-operative society, proceeded to carry out the survey work but the plaintiffs went round the consent order and filed this present suit in order to circumvent and frustrate the subdivision.

The 1st plaintiff's evidence is that, this suit is brought on behalf of about 3,000 members of the Masaai Community. It is only the 1st plaintiff who gave evidence in this matter and he also swore the supporting affidavit. The Nakuru HCCC No. 89 of 1996 was also a representative suit on behalf of the same community. During the hearing, the plaintiff admitted that the earlier suit was also brought for the benefit of his community members who are residing on these suit lands. *Are the Plaintiffs thus duplicating the same cause of action, if they are the same community for which orders were made in the earlier suit?* This matter is further compounded by the fact that the term 'Masaai Community' is broad, it is an amorphous term and not a legal person and to sustain a claim of this nature, this court must ascertain the real legal interest of each of the claimants. The 1st plaintiff who gave evidence on behalf of the other claimants could not even ascertain for himself the portion of land he has been in occupation.

In this regard, apart from the fact that some plaintiffs are different and Parcel Number 8398/2 which is within the same area has been added to this suit, I find that the issues in controversy in this suit were substantially the same issues that were litigated upon in Nakuru HCCC No. 89 of 1996. The plaintiffs are litigating for the same claimants and over the same subject matter.

Should this court be wrong on the above finding, the next issue to address is whether the 1st plaintiff has proved the claim of adverse possession and whether this suit is sustainable in law. The principles governing the granting of orders of adverse possession were articulated in several of the Court of Appeal decisions. I particularly wish to make reference of the descision in the case of Kweyu Vs Omuto [1990]

KLR page 716 where the Court of Appeal stated;

"*In deciding the issue of adverse possession the primary function of a court is to draw inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of facts, the question of whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts."*

See K.J. Rustomji on the Law of Limitation and Adverse Possession, Volume II, 5th Edition at pages 1374 and 1375. At pages 1366 and 1367 this author has the following to say:

"*By adverse possession is meant a possession which is hostile, under a claim or color of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Color of title is that which is a title in appearance, but not in reality). Adverse possession is made out by the Co-existence of two distinct ingredients: the first, such a title as will afford color; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or color of title") mean nothing more than the intention of the dispenser to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a color of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, down publicly and notoriously."*

The 1st plaintiff said that he had been in occupation of the suit land from 1966 from when he was born. The 1st plaintiff's evidence does not show the particular portion of land that he has been occupying, him and his family he merely states that the community has been occupying the whole of the suit land except for 500 acres. His claim is general it is not specific and it is not clear who he is representing and who are in adverse possession. The claim by the other plaintiffs and the persons whom the 1st plaintiff said he was representing are not also specified by material particulars. It is stated in the general terms that the plaintiffs and the Masaai Community have been occupying the suit land since time in memorial.

On the part of the defendants, they denied having granted permission to the plaintiffs apart from by way of an agreement which was entered with four individuals from the Masaai Community granting them annual grazing rights and for which annual rent was supposed to be paid. Once this rent was not paid, the defendants filed HCCC No. 89 of 1996. Secondly, the defendants stated that about 5000 acres of Parcel Number 1380 has already been sub-divided and allocated to members of their Society. The members have undertaken developments for many years, they have built homes for their families and if the plaintiffs' orders were to be given, the defendant's members who are the lawful owners of the suit lands will suffer irreparable loss.

Thirdly, the defendants stated that it was only, early in the year 2005 when a number of people who were evicted by the government from the forest attempted to settle on Parcel Number 8398/2. He annexed photographs which depicted recent developments and persons migrating on Parcel Number 8398/2. He denied that Parcel Number 8398/2 has been in exclusive occupation by any plaintiff or member of the Masaai Community.

Lastly, it was the defendant's evidence that the plaintiffs have not been in continuous and uninterrupted occupation of the suit land as alleged due to the ongoing court cases some of which were of criminal nature for trespass to land.

Having evaluated the above evidence, the question I have to ask myself is whether the defendants as the legal owners of the suit land have lost possession of their land so that their title can be defeated by the plaintiffs' claim.

From the evidence before the court, the plaintiff has not established that they have been in continuous, uninterrupted possession of the suit land. Their evidence as I stated above, is in general terms, it defeats common sense how one plaintiff can variedly pursue an amorphous claim generally for a community and for unspecified rights.

Having evaluated all the material that was placed before me l have come to the inescapable conclusion that the present claim is a re-agitation of the same matter that has been determined by this court before, the claim as set out by the plaintiff has not been proved .The 1st plaintiff's evidence has not sufficiently established a claim and I hereby dismiss this suit with costs to defendant.

Judgment read and delivered on 17th day of November 2006.

MARTHA KOOME

JUDGE