



**REPUBLIC OF KENYA
HIGH COURT AT NAKURU**

Civil Case 33 of 1996

NAROK MUOROTO CO LTD PLAINTIFF

VERSUS

KIWEKINYA CO LIMITED 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

REGISTRAR OF LANDS, NAROK DISTRICT 3RD DEFENDANT

JUDGMENT

The plaintiff filed this suit on 23/1/1996 through Olando & Company Advocates. It averred that it was the registered owner of parcel of land known as L.R. NAROK.TRANS-MARA/OLOLUNGA/169 measuring about 64 hectares which it had subdivided into 93 portions for its individual members after it obtained the relevant consent of Trans-Mara Land Control Board on 12/9/95. Separate title deeds were processed to be issued by the Registrar of Lands, Narok District, the third Defendant. The Plaintiff further stated that the first Defendant, the registered owner of a parcel of land known as NAROK/TRANS-MARA/OLOLOLUNGA/206 were interfering with the issuance of title deeds to the Plaintiff's Company's members in respect of the Plaintiff's parcel of land when there was no boundary dispute between the Plaintiff and first Defendant.

The Plaintiff therefore prayed for an order of injunction to restrain the first Defendant from interfering with the issuance of separate title deeds to its members. The Plaintiff also prayed for an order directing the 3rd Defendant to issue separate title deeds to share holders or members of the Plaintiff Company as well as general damages, costs, interest or any further order the court deemed fit to grant. Together with the aforesaid plaint the Plaintiff filed an application by way of a Chamber Summons and prayed for an order of injunction to issue restraining the 1st Defendant from interfering with issuance of separate title deeds to members of the Plaintiff company by the third Defendant in respect of the Plaintiff's parcel of land until the application was heard and determined. The Plaintiff also prayed that the third Defendant be ordered to issue title deeds to the members of the Plaintiff company as per a ruling on a land boundary dispute by the Narok Land Registrar, one J.W. Oduor which was dated 19/9/1995. On 19th February, 1996 the Attorney General, the second Defendant, filed a Memorandum of Appearance but never filed any defence. On 6th March, the first Defendant entered appearance and filed its defence through S.K. Ritho & Co Advocates. The first Defendant also filed a replying affidavit and grounds of opposition to the Plaintiff's application for injunction as aforesaid. The third Defendant also filed a replying affidavit to the Plaintiff's application. The affidavit was sworn by one JUNIUS MWALIMU EZEKIEL NJURE, who was then a Senior Land Registrar in charge of Rift Valley Province who had investigated the boundary dispute and filed his report. The application was heard and a ruling delivered on 22nd March, 1996 when it was dismissed with costs.

Olaly Cheche & Company filed a notice of change of advocates for the Plaintiff on 16th January, 1997 in place of Olando & Co advocates. They filed an application seeking to restrain the first Defendant from cultivating, wasting, damaging, alienating or remaining upon L.R. NO NAROK/TRANS-MARA/OLOLOLUNGA/206 until the hearing and final determination of the application. They also sought an order to compel the Chief Land Registrar to determine the boundary dispute between L.R. NAROK/TRANS-MAR/OLOLOLUNGA/206 and L.R. NO NAROK/TRANS-MARA/OLOLOLUNGA/126 and 170. They also prayed that the Chief Land Registrar be ordered to issue title deeds to the divided portions exercised from L.R. NAROK/TRANS-MAR/OLOLOLUNGA/206.

The first and the third Defendants opposed the said application and on 12th October 1996 a consent order was recorded by all the parties and its terms were as follows:-

“1. That the Chief Land Registrar in the Ministry of Lands and Settlement Department of Lands with the necessary Neutral Police Security is hereby ordered to determine the boundaries of parcel numbers NAROK/OLOLOLUNGA/206, 194, 193, 192, 191, 169 and 126 within ninety days from the date of service of this orders to the Chief Land Registrar.

2. That the costs of the Chief Land Registrar and Neutral Police Officers who shall provide security to the Government officers as they perform their duties shall be borne by the first Defendant who shall immediately deposit with the Chief Land Registrar the necessary funds on request by the Chief Land Registrar and the said cost, shall be costs in the cause.”

The boundary was determined and a report filed on 14th July, 2000. Following the report of the boundary determination, the first Defendant filed on 23/2/2001 an amended Defence and counter-claim. In the counter-claim, it prayed that:-

- (a) The Plaintiff be declared a trespasser to the first Defendant’s parcel of land L.R. NO. Narok/Cis-Mara/Olololunga/206 and be ordered out of it,
- (b) The Plaint to be struck out as disclosing no cause of action against the 1st Defendant.
- (c) The Plaintiff to pay damages, compensation for destroyed properties and costs of re-establishing the boundaries and interest at bank overdraft rates at 35% p.a. from the date of filing the suit.
- (d) Costs of traveling by car and other incidentals from Nairobi to Nakuru and from Nakuru to Nairobi from the date of filing the suit and interest at the rate of 35% from the date the suit was filed.
- (e) An order of eviction against the Plaintiffs from the aforesaid land.

The first Defendant filed a request for interlocutory judgment against the Plaintiff for failing to file defence to counter-claim. That was on 4/5/2001 but it does not seem to have been entered.

On 16th December, 2002 the first Defendant advocate fixed the matter for hearing and served a hearing notice upon the Plaintiff and the Attorney General.

When the matter came up for hearing on 11th November, 2003, Mr Kirru Advocate appeared for the first Defendant and Mr Mutuku Senior State Counsel appeared for the Attorney General. The Plaintiff did not appear at all and its suit was dismissed with costs for want of prosecution. This was after the first Defendant informed the court that it was not admitting any part of the Plaintiff’s claim.

Mr James Kihara Kinyanjui, PW1 testified on behalf of the first Defendant. He stated that the Plaintiff had entered into the first Defendant’s land during the tribal clashes. The land was described as NAROK/CISMARA/OLOLOLUNGA/206 which was registered in 1980. He produced a certified copy of the titles as well as the Registry index map. He stated that in 1996 the Plaintiff sub divided its land which was four parcels away from the first Defendant’s land and that was when they encroached into the first

Defendant's land. When the first Defendant became aware of the said encroachment, PW1, as the first Defendant's Managing Director, for and on behalf of his company went to Narok Land's Registry and placed a restriction against the Plaintiff's title and requested that the boundaries be re-established and that is what provoked the Plaintiff to file this suit. PW1 further testified that efforts to re-establish the boundaries were frustrated by the Provincial Administration who incited the people around. Four officers from the lands office Nairobi were sent to Narok to find out why the boundaries were not being re-established and they realized there was a security problem. The first Defendant came to court to seek for an order for provision of security. The order was granted on 20th March, 2000 and the Senior Land Registrar went to re-establish the boundaries on 12th and 13th July, 2000 and prepared a report. He found that the first Defendant had no common boundary with the Plaintiff and indeed there were four plots between them. The Plaintiff's representatives were on site when the boundary re-establishment was being done. It was established that the Plaintiff had actually trespassed into the first Defendant's land.

The second witness called by the first Defendant, Mr Junius Mwalimu Ezekiel Njue was a Deputy Chief Land Registrar. He was in-charge of Rift Valley Province from 1991 to 2000. He testified that sometimes in the year 2000 he was served with a court order dated 12th October, 1999 which required the boundaries between the Plaintiff and the first Defendant to be re-established. He stated that he went to the site and carried out the work in the presence of the Plaintiff and the first Defendant. He confirmed that the Plaintiff had encroached into the first Defendant's land. He further stated that he was given Kshs 50,000/0 by the representative of the first Defendant and he paid Kshs 20,000/- to Narok Police Headquarters and was issued with a receipt which he gave to DW1 together with the balance of Kshs 30,000/-. He testified that he saw some houses which had been destroyed but he did not know who destroyed them. He told the court that the Plaintiff's claim was not honest.

The Attorney general adopted the testimony of DW2 and did not call any witness. From the evidence of DW1 and DW2, it is not in doubt that the Plaintiff trespassed into the first Defendant's land. The boundary re-establishment exercise confirmed that there was no common boundary the Plaintiff and the first Defendant. There was actually four parcels of land between the parties. The boundary re-establishment was done in the presence of both parties and the Plaintiff was told or knew about the outcome. They have never challenged the report of DW2. The first Defendant complied with the provisions of Section 21 and 22 of the Registered Land Act Cap 300 Laws of Kenya. The sections aforesaid set out clearly the procedure to be followed when there is a dispute regarding boundaries for lands governed by the Act. The learned counsel for the first Defendant referred the court to the case of **WAINAINA GITHACURI & MUGU KURIA VS WATENGA WAWERU HCCC NO 3921 OF 1990 (NAIROBI)** where Justice Bosire, as he then was, re-affirmed that the power to fix a boundary is vested with the Land Registrar and that boundary disputes should also be solved by the Land Registrar. I concur with that finding.

I therefore declare the Plaintiff to be a trespasser to the first Defendant's parcel of land known as L.R. NO NAROK/CIS MARA/OLOLOLUNGA/206 and I order that he removes himself from the areas marked in the report of the Deputy Chief Land Registrar as point G-H and C-D failing which it be removed by the court Bailiff under the supervision of the police for purposes of providing security. If the Plaintiff shall fail to remove itself peacefully as hereinabove ordered, the cost of any forceful removal shall be borne by the Plaintiff and the same shall be liable for taxation.

With regard to the third prayer in the counter-claim, the first Defendant prayed for damages for trespass, compensation for destroyed properties and costs of re-establishing the boundaries and interest at bank overdraft rates of 35% per annum from the date of filing this suit. He stated that the cost of the houses that were damaged was Kshs 100,000/- but did not produce any proof of the said sum. I therefore unable to award the same. The first Defendant prayed for Kshs 150,000/- as the cost of re-establishing the boundary. It could not prove the same except Kshs 20,000/- which DW2 testified that he paid to the police and was given an official receipt. I therefore award judgment for Kshs 20,000/- as the cost of re-establishing the boundary. Interest on the aforesaid sum shall accrue at court rates with effect from the date when it was paid out until payment in full.

Having been established that the Plaintiff maliciously and intentionally trespassed in to the first

Defendant's land and remained in occupation of a reasonable portion thereof and the Plaintiff being still in illegal occupation, the first Defendant's claim for damages for trespass is justified. The first Defendant did not give to the court any methodology of assessing such damages, but doing the best I can, I will assess such damages on a yearly rate at Kshs 50,000/- per year and so award Kshs 400,000/- as damages for trespass.

The first Defendant also stated that he spent about Kshs 80,000/- moving to and from Narok in following up the issue of the boundary dispute. However, he produced no evidence of the expense. The same is therefore disallowed. The costs of this suit are awarded to the first Defendant as against the Plaintiff and interest on the same and on the sum of Kshs 400,000/- shall accrue at court rates.

Dated and delivered at Nakuru this 11th day of December, 2003.

DANIEL K MUSINGA

Ag. JUDGE