Kisiriri Community (Suing through Thomas Leskei – Chairman, Jane Lowasa – Treasurer & Wilson Leleshao – Secretary v Jennings & 3 others (Environment and Land Appeal 8 of 2021) [2023] KEELC 957 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 957 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT AND LAND APPEAL 8 OF 2021

AK BOR, J

FEBRUARY 9, 2023

FORMERLY NYERI ELC APPEAL NO. 25 OF 2020

BETWEEN

KISIRIRI COMMUNITY (SUING THROUGH THOMAS LESKEI – CHAIRMAN, JANE LOWASA – TREASURER & WILSON LELESHAO – SECRETARY .... APPELLANT

AND

HARRY GEORGE JENNINGS .... 1ST RESPONDENT

LUCY WAMBUI JENNINGS .... 2ND RESPONDENT

OCS RUMURUTI POLICE STATION .... 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE .... 4TH RESPONDENT

JUDGMENT

1. Being dissatisfied with the judgment of the honourable Chief Magistrate, Ms. Lucy Mutai delivered on 19/8/2020 in Nanyuki CMCCC No. 47 of 2018, the appellants brought this appeal on the grounds set out in the memorandum of appeal dated 20/8/2020 which they filed on 24/8/2020. The grounds are that the trial Magistrate erred in law when she failed to consider the provisions on eviction set out in sections 152 B to 152 I of the *Land Act*; that the court failed to exercise its discretion to award damages to the appellants whose property was wrongfully destroyed through the illegal eviction process carried out by the 1st and 2nd respondents; the court failed to clearly declare who was the legal and equitable owner of the suit property; and that the court failed to distinguish the Jennings Farm which is different from the land occupied by the appellants.

2. The appellants sought to have the impugned judgment set aside, the 1st and 2nd respondents' defence and counterclaim dismissed and substituted with the prayers sought in the plaint dated 7/5/2018. They also sought the costs of the appeal.

3. The appeal was canvassed through written submissions. Parties filed written submissions which the court considered. The appellants filed their submissions on 2/9/2022 while the 1st and 2nd respondents filed theirs on 21/9/2022. The appellants submitted that in May 2018 and with the assistance of the 3rd respondent, the 1st and 2nd respondents carried out an illegal eviction that gave rise to the proceedings before the Chief Magistrate. The appellants contended that they previously lived as neighbours with the 1st and 2nd respondents on the land in Laikipia County.

4. They contended that the eviction of members of the Kisiriri community from that land was carried out mala fides and illegally since the demand letter issued by the 1st and 2nd respondents' counsel was not the notice contemplated by section 152 of the *Land Act*, and urged that the process prescribed by that section was not adhered to. They argued that the Learned Magistrate should have exercised her discretion by awarding them damages due to the fact that members of the community lost their homes which were destroyed making them destitute yet the process through which they were evicted was illegal. They urged that the entire process was an abuse of the legal process and was carried out in an inhumane manner with women, elderly people and children being left out in the cold after their houses were torched down, destroyed or completely vandalised by the 3rd respondent at the command of the 1st and 2nd respondents.

5. Further, they contended that the Jennings Farm had well established beacons and was not part of the suit land. That despite visiting the scene twice and ascertaining the boundaries of the two parcels of land, the trial court failed to make a finding in the judgment that the suit land was distinct and separate from the Jennings Farm. They urged this court to clearly distinguish the two parcels of land in this appeal.

6. The appellants challenged the 1st and 2nd respondents' contention that they were riparian land owners and argued that even if they were, the proper process of eviction was not followed when they were ejected from the suit land. They maintained that the 1st and 2nd respondents could not have initiated the eviction process because they were not agents of the Water Resources Management Authority (WARMA) nor of the National Environment Management Authority (NEMA).

7. Additionally, they argued that the riparian area was not demarcated, that no impact assessment report was done to warrant their eviction from the land and that there was no community sensitisation on the issue. The appellants maintained that the land which they occupied was beyond the stipulated 30 metres and that in actual fact was estimated as being 800 metres from the river. Further, they contended that they had proved that the area was not riparian since there was a permanent Catholic Church as well as Kisiriri Primary School erected on that land. The appellants relied on *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR on what this court has to consider when sitting on appeal.

8. The 1st and 2nd respondents argued that the eviction process was an operation conducted by the Government of Kenya as deponed in the affidavit of the 3rd defendant sworn by the Officer Commanding Rumuruti Police Station on 22/5/2018, and that it was therefore malicious of the appellants to accuse them of using the police to forcefully evict and burn down their property. They argued that their involvement of the police in the matter was prompted by the illegal grazing, trespass, malicious damage and forcible detainer of their private land known as the Jennings Farm by the community. They argued that the compensation of Kes 20,000,000/= which the appellants seek against them was not justifiable.

9. They emphasised the importance of environmental protection, more so in wetlands and other riparian areas. They cited sections 2, 9, 42, 108 and 111 of the *Environmental Management and Co-ordination Act* (EMCA) on the role NEMA plays in environmental management, the powers of the court and NEMA to issue restoration orders and the provision on protection of rivers, lakes, seas and wetlands. They pointed out that article 69 of the *Constitution* behoves every person to play a part in the protection of the environment.

10. The 1st and 2nd respondents submitted that the appellants failed to exhibit any documents to prove ownership of the land which they claim to own or the property they contend was destroyed during the police operation. They maintained that the appellants' suit was devoid of any subject matter capable of preservation by injunction. Further, that the appellants failed to prove that a distinct and separate portion of land existed between the 1st and 2nd respondents' Farm and Rivers Pesi and Ngare Narok. They relied on section 107 of the *Evidence Act* and the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR.

11. The 1st and 2nd respondents further submitted that as riparian owners with natural rights ex jure naturae, they were entitled to the use of the water from River Ngare Narok and Pesi River. They added that the disputed land was riparian and therefore subject to control by the relevant authorities. They cited rule 116 of the *Water Resources Management Rules, 2006*. They contended that article 69 (1) (a) of the *Constitution* required the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and to eliminate processes that were likely to endanger the environment. They adverted to the various definitions of riparian land including the *Black's Law Dictionary* which defines riparian to mean relating to or located on the bank of a river or a stream.

12. They submitted that the appellants had encroached onto their farm as well as the riparian reserve where they had built structures and were rearing large herds of livestock. That over the years, the appellants had prevented the riparian owners from utilising or benefitting from the riparian reserve.

13. The issue for determination is whether this court should allow the appeal and set aside the decision of the learned magistrate delivered on 19/9/2020 and whether it should dismiss the 1st and 2nd respondents' counterclaim and instead grant the orders sought in the plaint. The prayers which the appellants sought in their claim which they filed in court on 7/5/2018 included a declaration that the appellants were the rightful owners of the part of land along River Ngare Narok and River Pessi; a permanent injunction to restrain the 1st and 2nd respondents from encroaching, evicting, destroying, fencing or otherwise dealing with the suit land; compensation for the destruction of the appellants' houses and structures; general damages and costs.

14. Being a first appeal, this court has a duty to re-evaluate and examine afresh the evidence tendered before the trial court and then reach its own conclusion while bearing in mind that it did not have the benefit of seeing or hearing the witnesses who testified at the trial.

15. In the impugned judgment, the learned magistrate referred to the evidence of Wilson Leleshan who stated that there was a river between the place which the appellants occupied and the Jennings Farm. He added that the appellants were given that land by retired President Moi. He stated that the court visited land and confirmed that members of the community lost property.

16. According to the witness, the land was 800 metres from the Jennings Farm and was large enough for the appellants to occupy without trespassing onto the Jennings Farm. He confirmed that they had never engaged a surveyor to determine the boundaries for the land. He also confirmed that the Jennings Farm was not fenced and relied on the exhibit indicating that the catchment area was occupied by pastoralists.

17. Jane Lowasa who gave evidence for Kisiriri Community did not know the acreage of the Jennings Farm but was emphatic that in fact it was neighbouring communities who grazed their cattle on the Jennings Farm and not members of Kisiriri Community. She claimed that the 1st and 2nd respondents destroyed their property. She conceded that the Jennings Farm was in existence at the time the community was allocated the suit land. She asserted that when they were evicted they lost a lot of property which they could not list in the pleadings.

18. Ebrahim Lesing Nyeusi confirmed that the suit land was given to the community by retired President Moi, and that they planted food crops and had erected churches and a primary school on the land. He recalled that on 28/4/2019 the respondents destroyed their property and went on to state that police officers who destroyed their property were acting on instructions from the 1st and 2nd respondents. He claimed that he lost property worth Kes 800,000/= but did not provide evidence to support that sum. He did not have any document from NEMA or WARMA confirming that the land they occupied did not form part of a wetland and admitted that no professional survey had been carried out on the land which they occupied.

19. It was the evidence of the 2nd respondent that the appellants had blocked the wetland thereby denying them the effective use of their land. She claimed that the appellants had occasioned her loss amounting to Kes 995 million. She stated that she was forced to replace her beacons twice after they were removed by the appellants. She claimed that the forest on her land was cleared by the appellants yet previously her land had forest cover and some wild animals. She blamed the appellants for removing the beacons from her land and bringing down her fence.

20. She claimed that not only had the appellants occupied public land but that they had also encroached onto her land. She acknowledged that the appellants' property was destroyed, but maintained that that was only after they were given a notice to vacate the suit land. She denied hiring the police to evict the appellants from the land and went on to state that during the eviction, her security guard and sniffer dog were killed. She claimed that her life was in danger and urged that the appellants should be evicted from her property and the wetland which they occupy.

21. John Wakiaba Waithaka, a neighbour of the 1st and 2nd respondents stated in evidence that the government attempted to evict the appellants from the swampy area in 2018 by setting their structures on fire. He maintained that there was no land between the swamp and the Jennings Farm.

22. The NEMA County Director for Laikipia, Mr. Jackson Maina gave evidence to the effect that the Ewaso Ngiro swamp existed within Laikipia County and that it was well defined. He stated that he was in court because EMCA prohibited activities such as construction of structures on wetlands, disturbance of water tunnels and rivers as well as the introduction of animals to wetlands.

23. He stated that in 2019 NEMA issued a 30-day notice to allow public participation on the conservation of wetlands and clarified that the particular wetland which is the subject of this appeal requires protection because it supports around 2,000 people. He elaborated that when a community violates regulations for the protection of wetlands, NEMA uses other agencies like the police to evict the particular community since every citizen had a duty to protect the wetlands.

24. Peter Kamande Nguru, the WARMA Officer in charge of Ewaso Narok catchment area gave evidence. He told the court that there was a wetland in Rumuruti whose river drained into the Ewaso Ngiro River. He gave the riparian area as starting 30 meters from the highest watermark into the mainland. It was his position that one cannot live on riparian land without owning the land adjacent to it. He elaborated that breach of WARMA rules could lead to prosecution or removal from occupation and that WARMA uses the police to enforce its regulations.

25. The appellants sought compensation in the sum of Kes 20 million which they contended would restore their lives to normal. They could not list the properties which they lost during the eviction. The 1st and 2nd respondents acknowledged that there was need to find a lasting solution to the dispute while protecting their right to enjoy private property. They maintained that the appellants had not only encroached on the riparian land but also their and.

26. The learned magistrate summarised the main issue for determination as being whether the appellants had established ownership of the land which they occupied. She observed that the appellants did not have any ownership documents for the land they occupied. Further, that they did not dispute that the land fell between Pessi and Ngare Narok Rivers and the Jennings Farm owned by the 1st and 2nd respondents. The court found that the appellants did not own the land between the Jennings Farm and the Pessi and Ngare Narok rivers.

27. While dealing with the appellants' prayer for a permanent injunction, the learned magistrate relied on authorities dealing with interlocutory injunctions as opposed to those on permanent injunctions.

28. The court took note of the information provided to it that the suit property was part of a wetland and riparian land and that the relevant authorities had attempted to evict the appellant from the disputed land. It stated that it could not injunct the eviction of the appellants from the suit land because to do so would amount to granting the appellants rights which did not exist.

29. The Learned Magistrate declined to award the appellants the sum of Kes 20 million which they sought as compensation owing to the fact that they did not list the properties destroyed and the court stated that it had no way of proving the extent of the damages. The court pointed out that it considers all evidence brought to it however bulky or lengthy it might be. It reiterated that special damages must be pleaded and strictly proved yet the appellants had merely mentioned that their property was destroyed. The Learned Magistrate could not establish whether the figure of Kes 20 million was a true reflection of the property destroyed and whether each appellant lost property of an equal value.

30. In allowing the counterclaim and granting an injunction in favour of 1st and 2nd respondents, the court was alive to the fact that the Jennings Farm was defined by a title deed and demarcated with beacons. The court declined to award the 1st and 2nd respondents damages for trespass and illegal occupation as well as mesne profits because those were not proved.

31. The appellants urged the court to find that the trial court erred when it failed to consider the provisions on eviction set out in sections 152B to 152 I of the *Land Act*. This new ground was introduced in the appeal and was not taken up before the trial court. The respondents did not address this issue in their submissions. Without any evidence being tendered and tested, it is impossible for this court to determine on appeal whether or not the law on evictions set out in the *Land Act* was complied with during the eviction of the appellants from the suit land. That matter should have been dealt with in the trial.

32. The NEMA County Director for Laikipia and the WARMA Officer in charge of Ewaso Narok catchment area stated in their evidence that the Ewaso Ngiro swamp existed within Laikipia County and that it was well defined. They also confirmed to the trial court that the suit land was swampy and gazetted as a wetland, thus making it unavailable for settlement without WARMA's express approval.

33. The appellants stated in their evidence that the land they occupied had never been surveyed. The officers from the two environmental entities also confirmed that they use the police to enforce their regulations and to evict communities living in endangered wetlands.

34. The court notes that the appellants made the OCS Rumuruti Police Station and the Inspector General of Police parties to the suit. It would seem that they abandoned their claim against the police and opted to only pursue their claim against the 1st and 2nd respondents. The uncontroverted evidence led before the trial court was that the eviction of the appellants from the suit land was undertaken by the police. It was not proved that the police were acting under the directions of the 1st and 2nd respondents when they evicted the appellants from the suit land.

35. Contrary to what the appellants urged in their submissions, the onus to prove that they owned a distinct parcel of land which exists between the Jennings Farm and Rivers Pessi and Ewaso Narok fell on them and not on the respondents. The appellants did not call a surveyor to confirm that a parcel of land does exist between the Jennings Farm and Rivers Pessi and Ewaso Narok, and further, that that parcel of land does not form part of the wetland. The Learned Magistrate cannot be faulted for finding that the appellants failed to prove the existence of a right over the contested property.

36. *EMCA* defines wetlands as areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with flowing or static water that is fresh, brackish or salty and includes areas of marine water whose depth at low tide does not exceed six metres.

37. Section 42(1) of *EMCA* prohibits the carrying out of specified activities in relation to a river, lake, sea or wetland in Kenya without NEMA's approval. Such activities include erecting structures, disturbing the wetland, introducing plants or animals in the wetland, blocking or draining the wetland. The Cabinet Secretary is enjoined by subsection 3 to issue orders or standards for the management of wetlands touching on the management, protection or conservation measures in respect of areas at risk of environmental degradation.

38. The *Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Management) Regulations* of 2009 apply to all wetlands in Kenya irrespective of whether they are on private or public land. The objectives of those Regulations are to provide for the sustainable use of wetlands and their resources in Kenya, promote the integration of sustainable use of resources in wetlands into the local and national management of natural resources for socio-economic development, and to ensure protection of wetlands and the conservation of water catchments and control of floods.

39. Regulation 10 required NEMA to have prepared and then maintain an inventory of all wetlands in Kenya and to cause measures to prevent and control degradation of such wetlands. The inventory should have certain specified details and the boundaries of the wetland are to be shown on the maps of Kenya. Regulation 11 gives the permitted use of wetlands, which does not include settling on the wetland and erecting structures as the appellants claim to have done ostensibly on the authority of the late retired President Daniel Moi.

40. The President could only make grants or dispositions of any rights or interests in or over unalienated government land under section 3 (a) of the repealed *Government Lands Act*. No evidence was tendered to show that the suit land constituted unalienated government land which the late Former President could have made a grant to the appellants as they contended. Even if it were so and the President could make a grant, then the land so granted would have been surveyed and a title or titles issued to the grantees under the law. It is doubtful that the law which was applicable then empowered the President to allocate wetlands as the appellants claim he did. The appellants confirmed that they did not have titles over the suit land and that it was not surveyed.

41. Regulation 14 places the duty to prevent the degradation or destruction of the wetland on every owner, occupier or user of land which is adjacent or contiguous to a wetland; and to maintain the ecological

and other functions of the wetland. This is to be done with the advice of NEMA. Failure, refusal or neglecting to protect a wetland is an offence under that Regulation. The regulations define an occupier as a person in possession or control of any land in which there is a wetland, riverbank, lakeshore, seashore or beach front. By virtue of this regulation, the law imposed on the appellants and the 1st and 2nd respondents the duty to prevent destruction of the wetland lying between the Jennings Farm and Rivers Pesso and Ewaso Narok.

42. The *Ramsar Convention on Wetlands*, which Kenya signed on 5/10/1990 and ratified on 5/6/1991 forms part of our laws pursuant to article 2 (6) of the *Constitution*. The *Convention* provides a framework for the conservation and wise use of wetlands and their resources. One of the objectives of the Convention is to stop the encroachment and loss of wetlands.

43. Article 69 of the *Constitution* enjoins the state to ensure the sustainable exploitation, utilisation, management and conservation of the environment, which wetlands are part of. It is also required to eliminate processes and activities that are likely to endanger the environment. There is no doubt that the settlement of communities on wetlands would endanger the environment yet wetlands play an important role as they enhance water quality, control erosion, maintain stream flows and sequester carbon. They also provide a home to species some of which are endangered. Wetlands which are a rich habitat for biodiversity can mitigate climate change.

44. Wetlands play a fundamental ecological role and therefore require protection. There is need to restore the altered wetland that was the subject of this dispute and to employ environmentally sound management and sustainable use of the wetland with a view to conserving it and its biodiversity. A copy of this judgment is to be given to NEMA and WARMA so that they can take steps to mitigate the impacts of the activities on the wetland.

45. Since NEMA is mandated by Section 9 of *EMCA* to undertake programmes to enhance environmental education, it should create awareness among Kenyans on the critical role that wetlands play. NEMA should also ensure that the exploitation of wetlands by riparian land owners for agricultural purposes does not lead to degradation of the wetlands.

46. The appellants failed to prove that they owned or had any rights over the suit land to warrant grant of the orders sought in the plaint. On the other hand, the 1st and 2nd respondents demonstrated that they own the Jennings Farm.

47. In the court's view, the appellants recourse is to be found in part IX of the *Land Act* and they ought to pursue the national government to implement a settlement programme to provide them access to land for shelter and livelihood as provided in section 134 of the *Land Act*. That Section gives the manner in which land for settlement programmes is to be acquired by the national land commission where public land is not available. The procedure for identifying and verifying beneficiaries is also set out and by whom. section 135 establishes the land settlement fund board of trustees as the body responsible for the provision of access to land to squatters, displaced persons and for conservation among other causes.

48. The appeal lacks merit and is dismissed. Each party will bear its own costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 9TH DAY OF FEBRUARY 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Solomon Mukhama for the appellants

Ms. Wangechi Wangare for the 1st and 2nd respondents

Ms. Stella Gakii - Court Assistant

No appearance for the 3rd and 4th respondents