



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 71 OF 2015

KENNETH KAZUNGU MUTORO.....PLAINTIFF

MORRIS KATANA MUTORO.....PLAINTIFF

GEORGE KATANA MUTORO.....PLAINTIFF

COSMAS SAFARI CHULA.....PLAINTIFF

CHARO KENNETH MUTORO.....PLAINTIFF

DAVID KAZUNGU MUTORO.....PLAINTIFF

WLBERFORCE MAPENZI KAZUNGU.....PLAINTIFF

JUMAA CHULA.....PLAINTIFF

KENGA CHULA.....PLAINTIFF

MAPENZI CHULA.....PLAINTIFF

KAHINDI CHULA.....PLAINTIFF

VERSUS

CHARO DENA TSEMBII.....DEFENDANT

KAZUNGU DENA TSEMBI.....DEFENDANT

JUDGMENT

BACKGROUND

1. In their Plaint dated and filed herein on 8th May 2015 the eleven Plaintiffs herein pray for Judgment against the two Defendants jointly and severally for:-

a) A declaration that the Plaintiffs and members of their clan are the legitimate owners (of) the area measuring approximately 70 Ha between Bumbi Dam, Chapungu Primary School through Paziani Trading Centre within Kilifi/Bamba 38;

b) A permanent injunction restraining the Defendants by themselves, their servants, agents and/or any person claiming under them from cultivating, grazing, selling, offering for sale the said area measuring approximately 70 Ha between Bumbi Dam, Chapungu Primary School through Paziani Trading Centre within Kilifi/Bamba 38; and

c) Costs of the suit.

2. These prayers arise from the Plaintiffs averments in the said Plaint to the effect that at all material times to this suit they were members of Biryani Group Ranch and of the Amwandudhi Clan of Giryama Sub tribe of the Mijikenda Community while the Defendants who are also

members of the said Group Ranch hail from the Akiza Clan of the Giryama Sub-tribe.

3. The Plaintiffs aver that Biryaa Group Ranch is the registered owner of all that parcel of land known as Kilifi/Biryaa/38 measuring 13972.0 Ha. At the inception of the Ranch the founding members were settled in accordance to their Clans as a result whereof members of their Amwandudhi Clan occupied exclusively 70 Ha in the area described above for cultivation and grazing.

4. It is the Plaintiff's case that the Defendants whose ancestral land is elsewhere within the Ranch have without any legitimate cause and/or colour of right invaded, occupied and started offering for sale portions of the 70 Ha belonging to the Plaintiffs' Clan to the detriment of the Plaintiffs and their Clan members. Efforts to resolve the dispute internally by the Group Ranch has failed hence necessitating the institution of this suit.

5. In their Written Statement of Defence dated and filed herein on 30th July 2015 the two Defendants deny that the Plaintiffs are members of Biryaa Group Ranch. And while they admit that the Plaintiffs are members of the Amwandundhi Clan, they deny that the Plaintiffs and/or their Clan occupied 70 Ha of the portion of the land described as Kilifi/Biryaa/38.

6. In particular, the Defendants deny that they have invaded, occupied and/or offered for sale any land belonging to the Plaintiffs and/or that they have deprived the Plaintiffs of their quiet enjoyment and use of their land for grazing and cultivation.

7. It is the Defendants case that they were born and brought up in the same area they occupy to-date. They aver that the Plaintiffs are youngsters who do not understand the history of the Ranch and are hence mistaken in their pursuit herein.

8. Further and in addition to the foregoing, the Defendants aver that the 1st – 6th Plaintiffs had filed a case involving the suit property before the Bamba Division Land Dispute Tribunal in the year 2002 but the cases were dismissed and no appeal was preferred. It is therefore their position that this suit is res judicata and urge that this suit be struck out and/or be dismissed with costs.

The Plaintiff's Case

9. At the trial herein, the Plaintiff called three witnesses who testified in support of their case.

10. PW1-Kenneth Kazungu Mutoro is the 1st Plaintiff herein. Adopting his Statement dated and filed in Court on 8th March 2015, PW1 told the Court that he is a member No. 223 of Biryaa Group Ranch which was founded in 1977 and is the registered proprietor of Title No. Kilifi/Biryaa/38 measuring 13972.0 Ha.

11. PW1 testified that at the incorporation of the Ranch, the idea was that every Clan would cultivate and graze on its own portion of ancestral land. All along and in accordance to custom and practice of the Giryama Sub-tribe, the issue of Clan boundaries has been recognised and respected and it was well-known within the Ranch that the area measuring approximately 70 Ha between Bumbi Dam, Chapungu Primary School through Paziani Trading Centre belonged to the Amwandundhi Clan to which the Plaintiffs belong.

12. PW1 told the Court that the Defendants who belong to the Akiza Clan were admitted as members of the Ranch in 2011 and they have without any colour of right proceeded to occupy parts of the 70 Ha of land belonging to the Plaintiffs and have gone ahead to offer the same for sale to persons who are not members of the Ranch thereby creating a conflict in regard to grazing and cultivating rights.

13. PW2-Winji Kalume Risa is a neighbor of the Plaintiffs. He told the Court that he is from the Mparwa Clan and that he had grown up near the disputed area where he still lives. He testified that he knows for a fact that the land in dispute is the ancestral land of the family of Tungule Fuku who is an Amwandundhi by Clan.

14. PW3-Ronald Kenga Dzumbe is the Chairman of Biryaa Group Ranch since 1996. He told the Court that he is from the Mwangowa Clan. He testified that the area in contention belongs to the family of Tungule Fuku who is the grandfather of the 1st Plaintiff and the Amwandundhi Clan generally.

15. PW3 testified that the Giryama Community is organised through Clans and each Clan resides at a specific area. The issue of settlement by way of Clans is addressed and is provided for in the Biryaa Group Ranch Constitution.

The Defence Case

16. On their part the Defendants called two witnesses who testified in support of their case.

17. DW1- Kazungu Dena Tsembi is the 2nd Defendant herein and a brother of the 1st Defendant who he described to be unwell. He told the Court that they belong to the Wakisa Mwafondo Clan.

18. According to DW1, the Plaintiffs who are of the Amwandundhi Clan came to the area he resides and occupied land belonging to one Fondo Dena shortly after the 1st Defendant had purchased some six acres of land at Paziarani. In 2002, there was a dispute between the 1st Defendant and the Plaintiff's father at the Land Disputes Tribunal at Bamba. The Tribunal dismissed the Plaintiffs case for lack of evidence.

19. DW2-Ngumbao Nayo Mudzomba is a neighbour of both the Plaintiffs and the Defendants. He told the Court that the 1st to 6th Plaintiffs occupy about six acres of land which the 1st Plaintiff bought from one Fondo Dena.

20. DW2 told the Court that though the Plaintiffs are from the Amwandundhi Clan they were not originally from the area as their fathers had come from Kadhanzeni area. In the year 2002, the Plaintiffs father Mutoro Tungule filed a case against the 1st Defendant and 2 others in regard to the land. The case was dismissed by the Bamba Land Disputes Tribunal.

Analysis and Determination

21. I have perused and considered the pleadings filed herein and the testimony of the witnesses called by either side to this dispute. I have also considered the evidence placed before me, the submissions filed by the Learned Advocates for the parties and the authorities to which I was referred to.

22. The eleven Plaintiffs filed this suit on 8th March 2015 against the two Defendants jointly and severally seeking inter-alia a declaration that they are legitimate owners of a parcel of land measuring approximately 70 Ha situated between Bumbi Dam, Chapungu Primary School through Pazani Trading Centre which land is part of a larger parcel of land known as Kilifi/Bamba/38 registered in the name of Biryaa Group Ranch. The Plaintiffs also pray for a permanent injunction to restrain the Defendants from dealing with and/or selling the said parcel of land.

23. At the trial herein, it was not contested that the Plaintiffs all belong to the Amwandundhi Clan of the Giriyama Sub-tribe within the Mijikenda Community while the two Defendants belong to the Akiza (also referred to as the Wakisa Mwafonda) Clan of the Sub-tribe. Both the Plaintiffs and the Defendants are members of Biryaa Group Ranch, a group founded and incorporated in 1977 under the now repealed Land (Group Representatives) Act, Cap 287 of the Laws of Kenya.

24. It was the Plaintiffs' case that they are entitled to exclusive possession of about 70 Ha of the disputed parcel of land by virtue of occupation, grazing and/or farming of the land in accordance with the Giriyama customary law practices. In this regard, the Plaintiffs submitted that the Giriyama people are divided into clans and have settled along clan lines. Each Clan resides in a specific area and the customary law recognizes that the clan members may settle at a certain place and farm and/or graze their cattle at another place which place would still be considered as part of the Clan's land.

25. It is in this context that the Plaintiffs accuse the Defendants of moving from their ancestral land elsewhere and encroaching upon the Plaintiffs' clan land and without any colour of right proceeding to alienate portions thereof to third parties thereby depriving the Plaintiffs and his Clansmen of land for cultivation and/or grazing.

26. The two Defendants who are brothers deny the Plaintiffs accusations. It is their case that they were born on the disputed parcel of land and it is the Plaintiffs who are mistaken as to their entitlement. They aver that by a case filed before the Bamba Division Land Disputes Tribunal in 2002, the Plaintiffs tried to take away the same parcel of land from them but the Tribunal found no evidence of the Plaintiffs' claim and dismissed their case.

27. A perusal of the pleadings and the testimony of the witnesses herein does not make it quite apparent as to when the invasion complained of by the Plaintiffs took place. It is however apparent from the material placed before me that both members of the Amwandundhi and the Akiza Clans of the Giriyama Sub-tribe live side by side and have co-existed for many years within what is now known as the Biryaa Group Ranch.

28. While the Plaintiffs aver that they have brought this suit on their own behalf and on behalf of all other members of the Amwandundhi Clan, only the eleven of them named herein signed the consent and authority to act giving the 1st Plaintiff herein the authority to act on their behalf. There was no evidence that after the suit was filed notice was given to other members of the Clan on the institution thereof. According to PW3, the Plaintiffs are only a segment of the larger Amwandundhi Clan.

29. As it were the 1st Plaintiff did admit in cross examination herein that the 2nd -6th Plaintiffs are indeed his brothers and children. If at all the Plaintiffs were representing the entire Clan of the Amwandundhi, it was incumbent that they bring this matter as a representative suit and/or file minutes and resolutions of the Clan allowing them to bring this suit on their behalf. As filed herein, it was not very clear to me if the Plaintiffs were seeking the 70 Ha of land as the owners thereof, as defendants of their grandfather Mutoro Tungule or as members of the Clan.

30. Besides, while the Plaintiffs claim is for a parcel of land measuring about 70 Ha described to be situated within Bumbi Dam, Chapungu Primary School through Pazani Trading Centre, no surveyors or other report was produced to demonstrate the exact area of the land, the portions occupied by the Plaintiffs and the extent of the alleged encroachment by the Defendants on the disputed parcel of land.

31. As it were, the disputed parcel of land is within Kilifi/Birya/38 which parcel of land is registered under the Group Ranch's name. Being a registered area with a distinct title, the area had certainly been surveyed and there must be some mapping that was done on the boundaries which could be produced as evidence.

32. Indeed while PW3-the Chair of the Group Ranch testified as to the ownership of the portions of the land, he did not produce any official records from the Ranch showing the areas where the Plaintiffs Amwandundhi Clan and the Defendants Akiza Clan were settled. Infact during his cross-examination herein, PW3 who was indeed a crucial witness in these proceedings conceded that the Tungule Fuku (Plaintiffs) Clan members had bought the disputed land from the Defendants' Wakisa Clan by way of exchange of cows and goats. He (PW3) however conceded that he was not there during the sale and would therefore not know the extent of the land that was bought as there was no written Agreements. PW3 further admitted that the Defendants were born in the same area and that they are members of the Biryaa Group Ranch.

33. PW3's evidence in my view bolsters the Defendants case that it is the Plaintiffs who migrated from Kadhanzeni near Vitengeni area

before they purchased the six acres of the suit property from one Fondo Dena, a member of the Defendants Akiza Clan.

34. The inevitable conclusion is that I did not find any merit in the Plaintiff's case. Their claim is not only general and ambiguous, I was also unable to determine in what capacity they have brought this Claim. And given the uncontested fact that the 1st Plaintiff's father had filed a case in regard to the same parcel of land before the Bamba Division Land Disputes Tribunal in the year 2002, a dispute arising out of the same facts was evidently time-barred as at the time this suit was filed in 2015.

35. Accordingly, the Plaintiffs suit is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 11th day of July, 2019.

J.O. OLOLA

JUDGE