



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 23 OF 2013**

**LONYANGOLE NGURANYANG.....PLAINTIFF**

**VERSUS**

**ABRAHAM LONYANGAT.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff commenced this suit vide a plaint dated 25/2/2013 and filed in court on the same date. The plaintiff seeks the following orders against the defendant:

(a) **An order for eviction of the defendant, his servants and/or agents from fifty (50) acres at Kakoruron, Riwo location within Kongelai Group Branch, West Pokot.**

(b) **Costs of the suit.**

(c) **Any other relief the court deems fit and just to grant.**

2. The defendant filed his defence dated 27/1/2015 on the same date.

3. On 9/5/2013 request for judgment was filed and on 20/5/2013 the matter was fixed for formal proof for 3/7/2013. On 3/7/2013 the defendant was absent though served and the case proceeded *ex-parte*. The plaintiff's case was closed on that date. Judgement was delivered on 26/8/2013. An order of eviction of the defendant and an award of in favour of the plaintiff were issued.

4. On 26/9/2014 the defendant filed an application seeking that the judgment entered 26/8/2013 be set aside and the defendant be given leave to file and serve defence out of time. Ruling was delivered on 19/1/2015 and the judgment delivered on 26/8/2013 and all other consequential orders was set aside. The defendant was granted unconditional leave to defend the plaintiff's claim. The suit was to be set down for hearing within 14 days.

**THE PLAINTIFF'S CASE**

5. The plaintiff pleaded in the body of the plaint that he is the owner of a 50 acre parcel situate at **Kakoruron** in Riwo location which was allocated to him by the **Kongelai Group Ranch**; he fled from that parcel in the **1990s** due to insecurity however upon return to the land in **2005** he found the defendant had trespassed and settled upon the suit land; he involved provincial administration and clan elders to effect the removal of the defendant from the land in vain; the defendant was arraigned in court and convicted in **Kapenguria Criminal Case No. 583 of 2009**.

**THE DEFENDANT'S DEFENCE**

6. The defendant filed his statement of defence in this suit on 27/1/2015. In that defence the defendant denied that the plaintiff is the owner of **50 acres** comprising of the suit land. He claimed entitlement to the land by virtue of his father's membership in the group ranch where he was registered as member No. **315**. In addition he averred that the land is not demarcated amongst the members and that it generally belonged to the group ranch, being part of that parcel known as **West Pokot/Kongelai/1**. The claim of insecurity that is alleged to have occasioned the plaintiff's migration is also denied and it is averred that both parties have been occupying their respective parcels within the group ranch, with the plaintiff's parcel being "miles away" from where the defendant's parcel is located. The defendant concedes that various criminal cases were preferred against him in the years 2006 and 2009 and that his conviction in **Kapenguria Criminal case No. 583 of 2009** was quashed on an appeal in **Kitale HC Criminal Appeal No. 91 of 2012**.

## THE EVIDENCE OF THE PARTIES

### The Plaintiff's Evidence

**7. PW1, Lonyangole Nguranyang**, the plaintiff testified on **16/10/2018**. His evidence is that he lives at Kakolong in West Pokot; that he was allocated land at Kongelai Group Ranch vide **P. Exhibit 1**, a letter of allotment dated **3/2/1988**; that when his father was alive the plaintiff still lived on the suit land; that during a time of insecurity the plaintiff migrated and when he came back he found the defendant had built on the land; that a dispute before the chief and local elders was determined in the plaintiff's favour; that he has sought the help of the local administration to remove the defendant from the suit land but in vain. In cross-examination he admitted that the defendant's father whose name is Losiakemer is entitled to land in the Group Ranch but added that Losiakemer's land was across the river on the Konyanga side while the plaintiff's was on the Kakolon side; that the land was demarcated by elders in the absence of surveyors.

**8. PW2, Keke Ekudo Ngolengiro** testified on **16/10/2018**. His evidence is that he is the Assistant Chief, Simatwa sub location in West Pokot; that the plaintiff and the defendant are known to him; that the plaintiff and the defendant informed him on **26/1/2016** that they wanted to settle the dispute whereupon the defendant would vacate the suit land by the end of the year and move to his proper portion and the agreement **P. Exhibit 5** was reduced to writing. However on being cross-examined by Ms. Chebet he stated that the land is situated in a sub-location which is under a different assistant chief.

**9. PW3, Samuel Loitiywo**, testified on **22/10/2018**. His evidence is that he was the Chairman of the Kongelai Group Ranch between **1982** and **2012**; that the plaintiff was granted land and shown the boundaries by the committee that PW3 chaired; that the defendant's father was a member and he was also shown his own parcel; he corroborated the plaintiff's evidence that a stream separates the two parcels and that a dispute had arisen which was resolved in **2005** in favour of the plaintiff and that the finding arising therefrom was that the defendant had failed to join his father on his land located elsewhere away from the suit land yet the defendant himself was not a member of Kongelai Group Ranch.

**10.** According to **PW3** the defendant is still in occupation of the suit land. Under cross-examination by Ms. Chebet he maintained that group members were only shown boundaries to their parcel without confirmation of the acreage thereof and that the panel of elders unanimously voted to award the land to the plaintiff during the determination of the dispute. The plaintiff then closed his case.

### The Defendant's Evidence

**11. DW1, Abraham Lonyangat Losiakemer**, the defendant, testified on **19/11/2018**. He stated that his land is in Kakolol in the Kongelai Group Ranch and that his father was member **No. 315** and that he was allocated land in **1987** within the group ranch; he produced a letter of allotment in favour of his father as **D. Exhibit 2**. He maintained that by **1987** when the land was being pointed out to him and others the plaintiff was living at Aminito where his land is located and that his son still lives on that land. He testified that before **2006** the plaintiff was not in possession of the suit land. He further averred that the plaintiff settled on the suit land in **2006** by use of force. He stated that the plaintiff caused him to be arrested and while he was in remand the plaintiff settled on the land. He was convicted of one offence and on appeal he was acquitted. He produced a copy of the criminal appeal judgment as **D. Exhibit 3**. He testified that after his acquittal he was arrested again and taken to the chief's camp where he was not given a chance to defend himself. He denied having signed an agreement to move out of the land and maintained that **PW2** is not the chief of his sub-location and his chief is called David Yarangiro of Kapchemukot location. Upon being cross-examined by Ms. Arunga he testified that the suit land was pointed out to his father in his presence and that they settled on the land long ago and the boundaries pointed out then have never changed. He denied that he ever entered into any agreement with the plaintiff as per **P. Exhibit 5** and denied receiving **P. Exhibit 4** which required him to move out of the plaintiff's land. He claimed that at one time he was arrested along the way and taken a *baraza* where he was unable to call any witness.

**12. DW2, Lokwara Riongoluk** testified on **23/9/2019**. His evidence is that the defendant is Losiakemer's son; that he allocated Losiakemer land in **1987** in the absence of the plaintiff who has land elsewhere; that the plaintiff settled on the defendant's land by use of force; that he recognizes **D. Exhibit 2** the allotment letter to the defendant, upon which he affixed thumb print as the 2<sup>nd</sup> committee signatory in the list; that the land belonging to the fathers of the defendant and plaintiff never bordered each other. He maintained that the suit land belongs to the defendant's father. However upon cross-examination by Ms. Arunga he recognized **PW3** as having served at one time as group chairman. In his recollection, **PW3** served for only a short while and he was not present when **DW2's** committee pointed out the suit land to the defendant's father. He appears to be unaware of most of the proceedings mentioned by the plaintiff in his evidence. He maintained that the plaintiff's land is located in Aminito.

**13. DW3, Lomakale Limasia** testified on the same date as **PW2**. He testified that in **1987** he was part of the sub-committee which demarcated land in favour of Losiakemer Mekee in the presence of the defendant and that in **2006** the plaintiff forcefully occupied the said land. According to him the suit land belongs to Losiakemer and the plaintiff's land is situated at Aminito.

**14. DW4, Chepochemuma Agurianyng** testified on **14/10/2019**. He adopted his statement dated **9/3/2019** as his evidence-in-chief in this matter. His evidence is that the defendant is her nephew and the plaintiff lived in the Tinei area in Suam; that she has lived on the land parcel in dispute since she was young till she got married; that the land was demarcated to Losiakemer the defendant's father in the absence of the plaintiff who was living in Tinei where his family was; the land is still occupied by Losiakemer's children to date.

**15.** The plaintiff filed his submissions on **28/10/2019**. The submissions of the defendant were filed on **22/11/2019**. A notable issue raised in the defendant's submissions is that the plaintiff has no right to sue in the present case and that this suit should therefore be dismissed.

## DETERMINATION

### Issues for Determination

16. I have considered the pleadings, the evidence of the parties and their submissions. The issues that arise from the pleadings in this suit are as follows:-

(a) *Whether the plaintiff has the right to sue the defendant in the present case.*

(b) *Whether the suit land was demarcated in favour of the plaintiff or the defendant's father and whether the defendant has right to occupy the suit land.*

(c) *What orders should issue?*

**(a) Whether the Plaintiff has the right to sue the Defendant in the present case:**

17. The defendant raises an objection to the suit in his submissions which is only a logical progression from **paragraph 5** of the defence dated **27/1/2015** which states that no exact acreage and boundary to the suit parcel of land was specified and all the members are mere shareholders to the property belonging to the group ranch. His defence had therefore intimated that he would raise that issue.

18. The defendant cites **Section 8(1) of the Land (Group Representatives) Act** as well as the case of **Daniel Nomagul Kande & 20 Others -vs- Kamanda Holdings Ltd & 44 Others 2017 eKLR** to support his claim.

19. The provisions of **Section 8(1) of the Land (Group Representatives) Act** were swept away by the repeal of that Act by the **Community Land Act No. 27 of 2016**.

20. However **Section 16** of the **Community Land Act** provides as follows:

**Subject to this Act-**

(a) **the registration of a community as the proprietor of land shall vest in that community the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

(b) **the registration of a community or a person as the proprietor of a lease shall vest in that community or person the leasehold interest described in the lease, together with all implied and express rights and privileges belonging or appurtenant thereto and subject to all implied or express agreements, liabilities or incidents of the lease.**

21. **Daniel Nomagul Kande & 20 Others -vs- Kamanda Holdings Ltd & 44 Others 2017 eKLR** is distinguishable from this case on the basis that the issue raised in the preliminary objection in that suit was whether the plaintiffs had capacity to sue in their own name whilst claiming interest vested under the **Land (Group Representatives) Act *on behalf*** of Losesia Group Ranch; in the instant suit the plaintiff claims that he is litigating in regard to his own interest in a portion of the land owned by the Group Ranch, and not as against the Group Ranch but as against an occupant of the suit land; further, that parcel has apparently been demarcated on the ground by elders, upon whom land adjudication mechanisms usually rely to determine member's entitlement to land.

22. This court has perused through the evidence of the parties and come to the conclusion that there was demarcation of land at the group ranch level whereby members were shown which portions to occupy and their boundaries.

23. It is also clear from the record that there are two parcels mentioned in the dispute, one which some evidence intimates to be owned by the defendant's father and which is located far away from the suit land, and the suit land which is in dispute.

24. This court therefore finds that there is nothing in the provisions of **Section 8(1) of the Land Group Representatives Act** or **Section 16** of the **Community Land Act** (repealed) that could be invoked to bar the plaintiff from pursuing his claim against the defendant in the instant suit.

**(b) Whether the suit land was demarcated in favour of the plaintiff or the defendant and whether the defendant has right to occupy the suit land:**

25. The land is admittedly situate within the Kongelai Group Ranch. It is currently occupied by the defendant. However despite his occupation, there is evidence that it has been the subject of a protracted dispute between the plaintiff and the defendant. Whereas the plaintiff is a member of the Group Ranch in his own right, available evidence confirms the defendant is not a member but can only claim under a third party, his father, who was not enjoined in these proceedings; it turned out that in the proceedings in the defendant's criminal case appeal, he was said to be deceased.

26. As already observed before in passing, this dispute had overflowed to the criminal courts where the defendant was convicted upon the complaint of the plaintiff; however the defendant furnished sufficient evidence to show that his conviction was quashed on appeal which evidence was not controverted by the plaintiff.

27. One of the grounds that the defendant relied on in the successful appeal was that the group ranch land was yet to be subdivided and that the registry index map had not been prepared, and that this situation left the determination of boundaries to conjecture; further, he had put forward the statement now contained in his defence as a ground of appeal, namely that the suit land herein is not registered but is part of all that land held on behalf of the entire group ranch.

28. In its judgment in the appeal the High Court rightly pointed out that the solution to the current parties' disputes lay with the registered owners, that is the Kongelai Group Ranch or the civil courts and certainly not the criminal courts.

29. Though non-registration of the suit land in the names of any of the parties formed a crucial part of the decision quashing the defendant's conviction, in this case it ought to play a negligible role; there are persons in occupation of the land even if it is not registered and the conflict that has arisen between them requires to be resolved for once and for all, if only to maintain peace on the ground.

30. In my view the evidence of **PW3, Samuel Loitiwo** and **DW2, Lokwara Riongoluk** is crucial in this matter in so far as they are the elders, persons who claim to have been instrumental in the demarcation of the land in favour of the parties respectively. **PW3** claims the land was demarcated in favour of the plaintiff while **DW2** claims the same was demarcated in favour of the defendant. However **DW2's** evidence is hardly supported by any other evidence while **PW3's** evidence seems to corroborate the documentary evidence produced by the plaintiff as **P Exhibit 1, P Exhibit 3** and **P Exhibit 4**.

31. There is no doubt that **P Exhibit 4** shows that the elders debating the matter knew what parcel the dispute was about as well as its geographical location and extent, and they awarded it to the plaintiff. Whether the land was officially subdivided and registered or not should not therefore hinder this court from making findings as to whom was entitled to the land. It is true that **D Exhibit 2** seems to imply that Losiakemer Mukee, who has been said to be the defendant's father was allocated land.

32. I do not for once doubt that the defendant's father was a member of the Group Ranch for that fact has been confirmed by the records. What is in issue is whether the suit land was demarcated in his favour. On this issue it can be seen at **paragraph 5 of P Exhibit 2** that the elders resolving the dispute between the parties herein were of the opinion that the defendant should have joined his father on the land that his father had been allocated by the group ranch.

33. This court may not know the criteria by which members were acknowledged and admitted as members of the Group Ranch, but one thing is clear: the defendant was not acknowledged as a member or a member entitled to land in his own right. The burden was on the defendant to demonstrate by way of concrete evidence that he was so entitled. Having however failed to do so and having demonstrated that his father was a member, he failed to demonstrate that the suit land was ever demarcated in favour of his father, so as to enable him to claim occupation of the same under the latter's name. The preponderance of the evidence in this case seems to point to the fact that his father owned land elsewhere and that is the land that the defendant should be claiming.

34. Therefore I find that the suit land was demarcated in favour of the plaintiff and not the defendant's father and the defendant has no right to occupy the suit land.

***(b) What Orders should issue?***

35. This court having found that the land was demarcated in favour of the plaintiff, the defendant has no right to occupy the same. The eviction orders sought are therefore merited.

**CONCLUSION**

36. Consequently this court finds that the plaintiff has established his claim against the defendant on a balance of probabilities. I therefore enter judgment in favour of the plaintiff against the defendant and I issue the following orders:

**(a) An order for eviction of the defendant, his servants and/or agents the suit land that he currently occupies situate at Kakoruron, Riwo location within Kongelai Group Branch, West Pokot which was demarcated in favour of the plaintiff by the Committee.**

**(b) The defendant shall bear the costs of the suit.**

**Dated, signed and delivered at Kitale on this 10<sup>th</sup> day of February, 2020.**

**MWANGI NJOROGE**

**JUDGE**

**10/2/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Kiarie holding brief for Chebet for defendants

Ms. Arunga for the plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJORGE**

**JUDGE**

**10/2/2020**