



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO.377 OF 2013**

**STEPHEN K.A. SANG.....1<sup>ST</sup> PLAINTIFF**

**REV. LUKA KIPKURGAT SANG.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CHEBII BOIYO.....1<sup>ST</sup> DEFENDANT**

**SAMMY KIPSAT (Alias REUBEN KIPSAT)....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiffs herein filed two suits against the defendants whereby in E& L NO. 394 of 2013 there were four plaintiffs against two defendants, and in E&L NO. 377 of 2013 there were two plaintiffs as against the defendants. The two suits were consolidated and parties opted for arbitration, however they failed to agree and on 23<sup>rd</sup> June 2014 Munyao J. ordered that the matter proceeds for hearing.

By a plaint dated 4<sup>th</sup> July 2013, the Plaintiffs sued the defendants seeking for the following prayers:-

- a. An injunction permanently restraining the defendant his servants, agents and/or his representatives from encroaching, trespassing into, constructing upon, occupying, transferring and /or otherwise interfering with the plaintiffs' parcel of land.
- b. Costs of the Suit.
- c. Any other or further relief this honourable court may deem fit to grant.

The defendants filed a defence and counterclaim seeking for the following orders:

- a. A declaration that the land parcel in dispute belongs to the defendant.
- b. A permanent injunction directed at the plaintiff his servants, agents and/or his employees or any person acting on his behalf from entering, trespassing or interfering, moving into, using it, disturbing quiet possession and/or use by the defendant of all the land in question more particularly as per the decisions of the Tribunal and Council of elders.
- c. Costs of the suit
- d. Any other or futher reliefs that the court may be pleased to grant.

The two suits having been consolidated the lead file became ELC No 377 of 2013

**PLAINTIFF'S CASE.**

PW1 Stephen Sang testified that the suit land is ancestral that belongs to his Kaptoyoi clan which land adjudication has not been done. It was further PW1's testimony that the defendant comes from a clan known as Kobil whose members live in the East.

PW1 stated that the defendant moved onto the suit land with his goats and refused to move out. On cross-examination he stated that there was a dispute between the Kaptargok and Changach clans.

It was PW1's evidence that there were meetings to resolve the dispute and the Tribunal had stated that the parties to remain in their respective land portions that they had been occupying since time immemorial.

PW1 also stated that traditionally the boundaries were marked by stones or trees. And that the Metkei DO held a meeting and gave a verdict on 29<sup>th</sup> May 2013 that the defendant had land within the clan. Further that there was arbitration held pursuant to a court order issued on 17<sup>th</sup> March 2014 where Keiyo South Sub-County Ass. County Commissioner found that the suit land belonged to the defendant. He confirmed that he did not have a title to the land.

PW2 Luka Kipkurgat Sang testified and stated that he was brother to the 1<sup>st</sup> plaintiff Stephen Sang and the suit land belonged to them as members of the Kaptoyoi clan and that the defendant was not a member of their clan.

It was his evidence that his mother was related to the defendant by virtue of both coming from the Kobil clan. On cross-examination he stated that if land was demarcated by stones, it means the land belonged to an individual and not a clan. PW2 also stated that the suit land did not have stones and that Kobil clan belonged to the Changach clan.

PW3 Willy Kibet stated that his ancestral home was in Emsea in Elgeyo-Marakwet County and that he is a member of Kaptoyoi clan. It was his evidence that the matter was determined by the chief but the plaintiff was not satisfied with the verdict.

PW3 further testified that the defendant was from Kobil clan and each clan knew its boundaries and where to settle. He stated that the defendant was not entitled to the land. On cross-examination he stated that the Kaptoyoi clan was not registered with the Social Services and that the boundaries are marked by stones, rivers and boulders.

PW4 Kobilo Kipsang testified that the suit land is ancestral land which is marked by stones. It was his evidence that both the defendant and him belonged to Changach clan and that there have been no disputes between the Changach and Kaptaragok clan.

PW5 Nicolas Kiptarus stated that there was no clan known as Changach and that the conflict was between Kobil and Kaptargak clans. It was his evidence that the 1st plaintiff has land within the clan. Further that the suit land had not been demarcated and that Chebabwa was land that had been set aside for the clan.

PW6 John Kipkirwa, stated that nobody from Kobil clan lived on Kaptoyoi clan's land and that the land had stones.

The 3<sup>rd</sup> plaintiff Simon David Korir testified and stated that the suit land belonged to Kaptoyoi clan, owned by his grandfather Chumo Sawe and was given to his father Tuitoek Chumo. He stated that there had been a dispute between Kaptarkok and Changach, which case went on from 1971-2000.

The 3<sup>rd</sup> plaintiff testified that the Tribunal in Iten stated that each clan to live where they were living. That he was given his parcel of land in 2004 and later found that the defendant had encroached on it and yet he is from Kobil clan.

On cross-examination he stated that the 1st and 2<sup>nd</sup> plaintiffs are his cousins who belonged to the Terik clan and that the land did not have stones as each clan had their own 'Chebabwa' where they grazed their animals.

The 3<sup>rd</sup> plaintiff's witness Julius Kigen reiterated the evidence of the plaintiff and stated that the suit land belonged to Kaptoyoi clan which land is yet to be adjudicated. It was his evidence that the defendant belonged to the Kobil clan.

The plaintiffs therefore urged the court to grant the orders as prayed in the plaint and dismiss the defendant's counterclaim with costs.

### **DEFENCE CASE**

DW1 Kibii Boiyo testified that he occupied the suit land in 1940 when the land did not have title deeds. That his father stayed on the suit land which had a stone boundary that was put to act as beacons, and it was known as 'Chebabwa'. He stated that this was unalienated land which anyone could occupy.

DW1 further testified that the plaintiff claimed his share of the land and reported him to the chief where it was decided that the land belonged to the defendant. DW1 produced the proceedings at the Tribunal which deliberated on the dispute and decided that people to live as they were before and that the land belonged to the defendant.

On cross-examination he testified that the plaintiff's mother was his cousin, and they hailed from Kobil clan. He further stated that his father was already on the land.

DW2 Sammy Kipsat Tarus stated that there had been a dispute between the Kaptarkok and Changach clans where Land Dispute tribunal No. 3 of 2013 held that each person to live where they had been staying.

DW3, 4,5 and 6 reiterated the evidence of the defendants and stated that this matter had been resolved by the elders and the Tribunal. The defendants prayed that the plaintiff's suit be dismissed with costs and their counterclaim be allowed as prayed.

### **PLAINTIFF'S SUBMISSIONS**

The plaintiff filed submissions and relied on the provisions of Article 61 of the Constitution of Kenya which provides that land belonged to the people of Kenya collectively as a nation, communities and as individuals.

Article 63(2)(1)(d)(ii) defined community land that is ancestral land. Individuals or groups by virtue of membership in a social unit had guaranteed access to land and other natural resources.

The plaintiff submitted that all land in rural areas which was neither government, public nor private land is vested in the County council in trust for the residents and that every member of the community or group or family had rights in the ownership of such land.

It was his submission that the plaintiffs did not have to obtain grant of letters of administration, this is because community land could not be disposed of as provided by Article 63(4) of the Constitution. That the plaintiffs had a right individually to contest any dealings on land.

The plaintiff cited the case of **Mwangagi & 64 others Vs Wote Town Council; KLR (E & L) 616, where** Justice Wendo held as follows:

“If the land in issue is trust land then the applicants who claim to be residents of Kitui and doing business on it would have an interest in what the council does with the land and thus, they have locus standi in the matter.”

He further cited the case of **Mureithi & 2 others Vs. Attorney General & 4 others KLR (E&L) 707**, Justice Nyamu, as was then, stated as follows:

**“The clan members and their successors were sufficiently aggrieved since they claimed an interest in the parcels of which they alleged was clan and trust land. It was in order that the applicants represented themselves as individuals and the wider clan and they had the required standing to bring the matter to court.”**

The plaintiff further relied on the case of **Bahola Mkalindi Rhigo v. Michael Seth Kaseme & 2 Ors [2012] eKLR** where the court was in agreement with the above sentiments by the judges by stating that:

**“I agree with the above statements by the two Judges and hold that the Plaintiff, being a member of the Duko family and a resident of Tana River County, has the locus Standi to question the allocation of the suit property to the Defendants.**

**The interests of a particular community over ancestral land can be pursued either collectively or individually. This is a right which has been conferred on the members of the community by the Constitution and it matters not that a particular member of the community is not directly affected. A member of the community can move the court, drawing the attention of the court to a legal wrong in respect of community land as defined under the Constitution”.**

It was their submission that the land belonged to them unlike the defendants who had no right or right over the same. It was the plaintiffs' submission that the defendants had not proved the particulars of fraud they alleged were committed by the plaintiffs as provided for under section 109 of the Evidence Act.

The court was referred to the case in **Koinange & 13 Ors v. Koinange [1986] eKLR**, where it was held that allegations of fraud had to be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities The plaintiff urged the court to allow the prayers as per the plaint and dismiss the defendant's counterclaim.

## **DEFENDANT'S SUBMISSIONS**

Counsel for defendants gave a background to the case and listed the following issues for determination by the court:

- a. Whether the suit land is community land/ancestral?
- b. Whether the suit land was available for alienation?

On the first issue as to whether the suit land is community land Counsel submitted that all the witnesses were in agreement that the suit land was yet to be adjudicated and therefore gazettement as an Adjudication section is yet to be done. They stated that the suit land is ancestral hence they are entitled as of right because it belongs to their clan.

The community Land Act No 27 of 2016 defines Community land as;

**"Community" means a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes-**

- (a) Common ancestry;
- (b) Similar culture or unique mode of livelihood;
- (c) Socio-economic or other similar common

Interest;

(d) Geographical space;

(e) Ecological space; or

(f) Ethnicity.

**"Community assembly" means a gathering of registered adult members of a community convened in accordance with this Act; 2016.**

Counsel further submitted that the plaintiffs did not prove that there was any registration as provided for under the Community Land Act that the suit land is community land.

Mr. Kibii submitted that this matter was referred for arbitration and the elders made a decision in favor of the defendants whereby the plaintiffs were aggrieved by the same and appealed to the District Officer Soy North Division, Keiyo South who made a decision in favor of the defendants.

Further counsel cited Article 159(2) (c) which provides for alternative dispute resolution which was adopted to resolve the matter. The elders' decision was filed on 20<sup>th</sup> June .2014 which the plaintiffs disputed.

On whether the land was ancestral or not, Counsel submitted the elders gave their evidence at the Assistant County Commissioner's hearing, that the land was a Chebabwa and anybody could occupy the same. Further it was a common ground for all regardless of clan or family.

The report concluded that Kibii Boiyo the defendant herein to retain the land as per the produced sketch map. The elders also found that the suit land was not ancestral as there were no beacons seen by the elders.

Counsel cited the case of **Kalenyan Cheboi & Ors v. William Syter & Anor[2014] eKLR where Justice Munyao** stated in part that:

“As I stated above, there is no guiding law on how the court should approach a matter such as this.

However, since the land is held by communities, principally under tenure derived from their ancestors, and which appears to fall under customary law, traditional dispute settlement mechanisms have great utility. That is why I thought of involving the Osis, a recognized traditional panel of elders, to assist in deciding this dispute. The court is of course not bound by their opinion, but the same must be given considerable weight”

Counsel further submitted that the defendants had been in possession of the suit land for a long time, being a “Chebabwa” anybody was allowed to settle on it. Counsel therefore urged the court to dismiss the plaintiffs' case and allow the defendants counterclaim.

#### **ANALYSIS AND DETERMINATION.**

This is a dispute that pits the plaintiffs and the defendants from purportedly different clans claiming ownership of the suit land. Through a court order dated 21<sup>st</sup> March 2014, the court directed that the District Officer Soy North Division, Keiyo South Constituency to form a panel agreeable to the parties and arbitrate on the issues touching on the land herein.

The District Officer Soy North Division, Keiyo South Constituency filed his report in court on 20<sup>th</sup> June 2014 which was produced as Exhibit No 3 by the 1<sup>st</sup> Defendant. The report favoured the Defendants but the plaintiffs intimated to the court that they were not agreeable to it prompting the court to set the matter for hearing.

The issues for determination in this case is as to whether the suit land is community land/ancestral and who is entitled to it.

From the evidence on record, it is clear that the land in dispute is located in Sagatia in Emsea location. All the parties are in agreement that the said land has not been adjudicated. The court had noted this and referred parties to have an alternative dispute resolution.

On the issue as to whether the suit land is ancestral land, the Deputy County Commissioner with the help of a panel of elders had deliberated on the dispute as directed by the court and filed his report on 23<sup>rd</sup> June 2014 where the plaintiffs were not in agreement with the terms of the report. The conclusion of the report was as follows:

- a. Anybody is allowed to live or acquire land on ‘Chebabwa’ which means land that is not ancestral to anyone.
- b. All ancestral lands are marked with stones as boundary by elders and not allocated to anyone or tampered with by anyone, because they are inheritance and interference would bring a curse to anyone.
- c. Each party should be contented with what they have on this land.

d. People should stay in peace and interact regardless of the clan they belong, since it's the standard practice everywhere. Your neighbor can be a member from any clan, tribe, etc so long as he acquired the land legally or in acceptable way.

It should be noted that this matter was handled by the elders at the Tribunal with the help of a DO Soy Division and later by the Assistant County Commissioner where all these parties were present. The same witnesses testified that the land in question could be owned by anyone.

The parties herein are a community since they have a common ancestry. They are either related by blood or by marriage and were of the same ethnicity. From the evidence on record, the land being fought over is Chebabwa and anybody could settle on it. The plaintiffs agreed that the same was not traditionally demarcated which implies that it was individual not individual land.

The Constitution recognizes three categories of land, that is, public, private and community land. Article 61 of the Constitution provides as follows:

- (1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.
- (2) Land in Kenya is classified as public, community or private.

Article 63 of the Constitution, community land is defined as;

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

- (a) land lawfully registered in the name of group representatives under the provisions of any law;
- (b) land lawfully transferred to a specific community by any process of law;
- (c) any other land declared to be community land by an Act of Parliament; and
- (d) land that is—
  - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
  - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
  - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

The Community Land Act was enacted to give effect to the provisions of Article 63 of the Constitution. It therefore operationalizes the provisions of Article 63 of the Constitution. The Act defines community as a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes—

- a) Common ancestry;
- b) Similar culture or unique mode of livelihood;
- c) Socio-economic or other similar common interest;
- d) Geographical space;
- e) Ecological space;
- f) Ethnicity.

Section 12 of The Community Land Act provides for classes of community land holding that community land maybe held

- a) as communal land
- b) as family or clan land

c) as reserve land ; or

d) in any other category of land recognized under the Act or other written law

From the above classification and from the arbitration proceedings of which a report was filed in court, it is evident that the parties claim the land as clan members of the suit land. In another breath the plaintiffs claim land as individual members of a clan.

The parties confirmed that the suit land has not been adjudicated as per land Adjudication Act and it has not been declared as an adjudication section. The Community Land Act also provides for ascertainment and recognition of community land. It lays down procedures of ascertainment and such recognition.

Section 5 of the Community Land Act provides for the protection of community land rights and states that:

**Customary land rights shall be recognized, adjudicated and documented for purposes of registration in accordance with this Act and any other written law.**

It also recognizes customary land rights, including those held in common which shall have equal force and effect in law with freehold or leasehold rights acquired through allocation registration or transfer. The suit land has not been adjudicated and documented for purposes of registration in accordance with this Act or any other written law.

It would be difficult for the court to ascertain and recognize rights of these parties when there are laid down procedures to be followed for such ascertainment and recognition. This is why the court had urged the parties to use alternative dispute resolution to solve this matter. This was done in two forums and the outcome was the same that the parties continue staying in their respective portions since time immemorial.

I have considered the pleadings in the consolidated suits, the evidence and submissions of the parties together with relevant judicial authorities I find that the plaintiff has not proved their case on a balance of probabilities and the same is dismissed with costs to the defendants.

I order that the plaintiffs and the defendants stay on their respective portions as per the elders finding that they should live together as they have been living since time immemorial. The plaintiffs are hereby restrained from interfering with that arrangement of staying together in their respective portions.

**DATED and DELIVERED at ELDORET this 23<sup>RD</sup> DAY OF APRIL, 2020**

**M. A. ODENY**

**JUDGE**