



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 80 OF 2002

ERASTUS K. WAMEYA..... 1ST PLAINTIFF
BERNARD OJILONGO AMILA..... 2ND PLAINTIFF
MARTHA AMALO..... 3RD PLAINTIFF
CHERWA FRED OYOLLO..... 4TH PLAINTIFF
FRANCIS OJILONGO MAKOKHA..... 5TH PLAINTIFF
BARNABAS EJAKAIT..... 6TH PLAINTIFF
SHADRACK ORONI..... 7TH PLAINTIFF
CROMWEL W. MANYONGE..... 8TH PLAINTIFF

VERSUS

JOTHAM WABOMBA..... 1ST DEFENDANT
NGOBOLELE FARMERS CO. LTD..... 2ND DEFENDANT

J U D G M E N T

INTRODUCTION

1. This suit was originally filed by five plaintiffs. One of the plaintiffs **Amila Cherwa** died and was replaced with his personal representatives who are the **second to fifty plaintiffs**. The seventh plaintiff **Shadrack Oroni** and the eighth plaintiff **Gromwel W. Manyonye** as well as the first defendant **Jotham Wabomba** subsequently died but they were never substituted with their personal representatives. The names of the three were struck off the record shortly before the hearing of this suit started.

2. The original five plaintiffs including the first defendant (deceased) were tenants in common in equal shares of **L.R. No. 5366** which was **408 acres** and was commonly referred to as **Kaptama Estate** (suit land). The suit land was transferred into the names of the six owners on **22/3/1963**. In or around **22/11/1973**, the deceased who was the first defendant in the present case sold his **one-sixth undivided share** to the **second defendant** herein. The deceased did not however transfer the sold portion to the

second defendant prompting the second defendant in the present case to file ***Eldoret HCCC No. 3 of 1974*** against him seeking transfer of the sold portion. The deceased filed a defence (statement of admission) in which he admitted the plaintiff's claim (now the second defendant).

3. The second defendant obtained consent to transfer one-sixth undivided share of the deceased to itself on **1/2/1974**. It would appear that there was no transfer effected following the granting of the consent. According to documents filed herein, the six owners of L.R. No. 5366 took a loan from Land and Agricultural Bank of Kenya. It would appear that the six had problems in repaying the loan owed. They brought in the second defendant who helped in repaying the loan between **13/3/1974** and **11/5/1977**. The documents filed in this file further show that the second defendant incorporated the six registered owners of the suit land. The membership was now **68 members**.

4. In **1978** the second defendant filed ***Eldoret HCCC No. 315 of 1978*** against the six registered owners of the suit land. On **10/1/1985** a consent was filed compromising the suit. In that suit the parties recognized the fact that there were 68 members. The consent gave details of how the suit land was to be shared. It would appear that implementation of this consent became a challenge. Each party wanted to have the consent set aside. It is apparent that there was a subsequent consent filed in the above mentioned case. The same was challenged in court and in a ruling dated **26/8/1996**, but delivered on 30/9/1996, Justice Nambuye set aside the consent which had been endorsed by the Deputy Registrar.

PLAINTIFF'S CASE

5. I have already given a background of this case which captures the plaintiff's case as well. The plaintiffs are contending that the second defendant is only entitled to one-sixth of the suit land. They want to have the second defendant's members evicted from **340 acres** and they be confined to the **68 acres** which they bought from the deceased. The first plaintiff who testified on behalf of the rest of the plaintiffs stated that though they entered into a consent on **10/1/1985** with the defendants, this consent was set aside by a subsequent consent which was endorsed by a Deputy Registrar. According to this witness the fact that the consent which was endorsed by the Deputy Registrar setting aside the one of **10/1/1985** was set aside by Justice Nambuye who did not reinstate the one of **10/1/1985**, the second defendant's members have no basis upon which they are occupying the entire suit land.

DEFENDANTS CASE

6. The second defendant through its Chairman **Simiyu Kapchanga** testified that the company bought the suit land from **Andrew John Kerr**. The company had **68 members**. They named the farm as **Kaptama Estate**. They then allowed six of their members to have their names appear on the title documents. The directors of the company went to the Agricultural Finance Corporation and secured a loan in 1966. This loan was fully repaid and a second one taken in 1974. The AFC advertised the suit land for sale. The members somehow managed to repay the loan and that is why they named the farm **Ngobolele** which loosely translated means one that is taken away but always re-claimed.

7. In **1978** the company filed a suit against the five persons who were appearing on the title documents. This was in ***Eldoret HCCC No. 315 of 1978***. A consent was recorded settling the matter. Following the consent an application was made to the land control board for consent. Consent of the land control board was given. Surveyors came to the ground and the process of subdivision was completed. The AFC gave the title to the company together with discharge of charge. The provincial administration wrote letters confirming that the land belonged to the company. As the company was waiting for its members to get individual titles, the company was served with summons in this case.

ANALYSIS OF EVIDENCE

8. There are certain uncontested facts in this matter. These include the fact that the title to the suit land is in the name of the original six members who held it as tenants in common in equal shares. There is also no contention that the second defendant sued the deceased in ***Eldoret HCCC No. 3 of 1974*** and that the deceased admitted the second defendant's claim in that suit. Though neither the plaintiffs nor the

defendants came out clearly on the consent which the parties herein signed which set aside the one of 10/1/1985, a reading of the ruling dated 26/8/1996 which was delivered on 30/9/1996 shows that the consent was set aside. The Judge had this to say regarding the consent endorsed by the Deputy Registrar. This is the consent which had set aside the one of 10/1/1985:-

“For the reasons given sufficient cause has been shown to review the consent endorsed by the Deputy Registrar on 28/4/94 which is set aside. The consent endorsed by both counsels will be removed from the record and the contents of the same will have to be brought to the attention of all those concerned for endorsement. After the same has been modified or endorsed by the parties the parties will appear before the Judge on a date to be agreed upon them to have the same endorsed as varying the earlier consent of 10/1/85.

In view of what I have stated, I will not order the consent of 10/1/85 as reinstated in view of this court's order of 23/2/88 referred to”.

9. Mr. Kiarie for the plaintiffs in his submissions asked the court to determine on what basis the defendant and its members were on the suit land. The defendant and its members are on the suit land based on the consent entered on 10/1/1985. Though there is submission by the plaintiffs that the said consent was set aside and or it was never reinstated, there is no weight in such submissions. The consent filed by both counsel in ***Eldoret HCCC No. 315 of 1978*** vide a letter filed in court on 14/3/1994 which was subsequently endorsed by the Deputy Registrar on 28/4/1994, was set aside in a ruling dated 26/8/1996 and delivered on 30/9/1996.

10. The consent which was set aside vide ruling of 26/8/1996 is the one which had set aside the one of 10/1/1985. The import of this ruling was that the parties had reverted to the position obtaining on 10/1/1985. The defendants were therefore forced to remain on the land pursuant to that consent.

11. There was a bit of confusion when the Judge stated in her ruling that she was not reinstating the consent of 10/1/1985 in view of the advise given to the parties on 13/2/1994. The parties had been advised to go and talk because it turned out that the consent of 10/1/1985 was proving to be a challenge in its implementation. However this notwithstanding, the consent remained as it was on 10/1/1985 pending talks between the parties with a view to reaching another consent which will vary it. The ruling is very clear and there was no need for the Judge to say expressly that the consent had been reinstated. Once she allowed the setting aside of the consent which had been endorsed by the Deputy Registrar it went without saying that the consent of 10/1/1985 stood. It cannot therefore be argued that the consent of 10/1/1985 was set aside or was never reinstated.

12. The Judge was trying to give the parties time to bring up a proper consent to vary the one of 10/1/1985. It is apparent that the parties never took the advise of the Judge as there were no talks to come out of the deadlock or to do a consent which would have varied the one of 10/1/1985.

13. The second defendant had properly obtained one sixth of the suit land through ***Eldoret HCCC. No. 3 of 1974***. When the company again filed ***Eldoret HCCC. No. 315 of 1978*** and entered into a consent, the effect of that consent of 10/1/1985 was to nullify what they had already got in the early case. This is because they shared out the remaining 340 acres amongst 68 members including those they had sued. The balance of 68 acres was shared out by giving an acre each to some 56 persons and the balance of 12 acres was reserved for public utilities. This sharing is the one which was contained in the consent of 10/1/1985 which is valid to date. Unless the consent of 10/1/1985 is properly varied through another one as advised by the Judge, the plaintiffs have no basis of claiming that the defendants are only entitled to one sixth of the suit land.

DECISION

14. For the reasons given hereinabove, I find that the plaintiff's suit cannot succeed. The same is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Kitale on this **8th** day of **July, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Kiarie for Plaintiff.

Court Assistant – Winnie.

E. OBAGA

JUDGE

8/7/2015