



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 157 OF 2013

1. ANDREW MUGANDI

2. DALMAS MNYAKA MGANDI

3. PATRICK MNYAKA CHAMBEYU

4. NYOTA MUGANDI CHAMUSUHUNI.....PLAINTIFFS

= VERSUS =

DZOMBO MAGONGO.....DEFENDANT

J U D G E M E N T

1. The four plaintiffs brought their claim against Dzombo Magongo vide their plaint dated 30th July 2013 filed on the same date. The plaintiffs pleaded that they are all members of the Kichororo family that have owned the suit land over the years. That they are also members of the Mwamdudu Mwayawa clan who have lived on the suit land for years cultivating the same and even buried their kinsmen on it.

2. The plaintiffs continued that the defendant's father was invited to live on the suit land by the plaintiffs' grandfather but the invitation was not to be construed as invitation to own the land. That in 2009 and 2010, the plaintiffs sold a portion of this land. That the defendant started laying claim to the land in the year 2008 and particulars of trespass committed by the defendant were listed as hereunder;

(i) Burning charcoal on the suit property without the plaintiffs' consent.

(ii) Carrying out quarry activities on the suit property.

(iii) Alienating and giving out the suit property as a burial site; and

(iv) Alienating the suit property and giving it out for occupation by squatters.

3. That the defendant was warned to stop the acts of trespass but he neglected to do so. That he went on to forcibly remove fences put by a party who had purchased a portion of the suit land from the plaintiffs. This resulted in the 1st plaintiff lodging a complaint with Kinango Land Disputes Tribunal Case No. 16 of 2011. However, the award by the Land Disputes Tribunal was quashed in Mombasa HC JR Misc. No 147 of 2011.

4. The plaintiffs aver that unless the defendant is restrained, the plaintiffs stand to lose their inheritance. They prayed for judgment to be entered against the defendant for;

(a) A declaration that the plaintiffs are the rightful owners of L.R No. unsurveyed plot DERI/MWANGOLOTO in Kinango District;

(b) A permanent injunction restraining the defendant either by himself, his employees, servants and/or agents from trespassing into, entering onto, committing acts of waste, alienating and/or interfering with the plaintiffs' quiet and peaceful occupation of L.R Number unsurveyed plot DERI/MWANGOLOTO in Kinango District;

(c) Costs of and incidental to this suit; and

(d) Further or other relief as may be just and expedient in the circumstances of the case.

5. The defendant filed his defence on 18th September 2013. The defendant while admitting paragraph 4 of the plaint added that he is also a member of the Kichororo clan and that he has lived on the suit land since time immemorial. Paragraph 5 of the plaint was denied and the plaintiffs put to strict proof stating that he has equal rights with the plaintiffs over the suit property.

6. The defendant pleaded further that the 1st plaintiff's father left the suit land as a young boy and only returned when the 1st plaintiff himself was also a young boy so the 1st plaintiff cannot claim to know the history of the land. That it was the defendant's refusal to consent to the sale that generated into this dispute. The defendant denied interfering with the plaintiffs exercise of his proprietary right averring that plaintiffs' individual interests cannot supersede those of the entire clan.

7. After the close of pleadings, the parties called oral evidence. The plaintiffs called 3 witnesses and the defendant called 4 witnesses. Andrew Mugandi Nuri gave evidence as **PW1**. He said he is 42 years old and is a nephew to the 2nd – 4th plaintiff. **PW1** denied that the defendant belongs to their clan. The witness said the land belonged to the family i.e. to the Kichororo family. That Kichororo had 2 wives. **PW1** continued that the defendant came from Kadzoni and was welcomed by Kichororo family and given land 5 acres to farm & build on.

8. That the defendant moved out of the land after 5 years to the Mwanyawa Clan where he was given 2 acres to build on and farm. That the defendant also buried his father on the same land. The witness produced minutes of 25/11/2008 as **Pex 1** where the elders decided the dispute between them and the defendant in their favour. Minutes of another meeting held on 3/8/2008 was produced as **Pex 2**. **PW1** further produced minutes of 30/4/2009 as **Pex 3** where they agreed to sell a portion of the land and the sale agreement dated 30/11/2010 as **Pex 4**. **PW1** said there is no relative of the defendant living on the suit parcels as the Mwamudu clan have their parcels. **PW1** concluded that he had sued the defendant for permitting other people to remove stones, burn charcoal and cut trees on the suit land.

9. In cross-examination, **PW1** said their parcels in Deri is measuring approx..500 acres and in Mwangoloto is 500 acres. That both plots have no titles and a survey has been done. The boundary is marked by a painted stone placed by their family. **PW1** denied that dispute arose when he wanted to sell the defendant's portion. That the minutes of 3/8/2008 did not have the name of the defendant as one of the people who attended. That **Pex 2** did not have the description of the plot. The minutes also did not have signature/stamp of the chief. That the Kinango Land Dispute Tribunal had found in favour of the defendant. In re-examination, **PW1** said the defendant was present in both meetings.

10. Ngala Kamanza testified as **PW2**. He said he was born in 1923 and lives in Nzinzi within Samburu. **PW2** stated that he knew the plaintiffs who are one family from Maji ya Chumbi. That he knew Chichororo who came from Mwamudu clan while the plaintiffs came from Mwamudu Mayawa clan. That the defendant come from same clan but different door with the plaintiffs. That the defendant's family was given land to stay but he later moved aside because the land is big.

11. **PW2** maintained that the defendant attended meetings held to resolve the dispute. According to **PW2**, the elders found the suit land belongs to Nuri. That the defendant does tell people to build on portions which does not belong to him and he also sell stones. **PW2** said the defendant's family were buried on the Chichororo family land.

12. In cross-examination, **PW2** stated that the defendant was given land at Maji ya Chumvi by Mzee Kichororo. That the defendant was to leave when satisfied but no time limit was set. That a dispute arose when the defendant started giving out portions of the suit land. That the plaintiffs are the grand children of Kichororo.

13. Patrick Mnyaka Chambeyu gave evidence as **PW3**. He stated that he is 65 years old and is an uncle to the 1st plaintiff and cousin to 2nd and 4th plaintiffs. **PW3** said they are neighbours with the defendant but share no family relations. That his grandfather and the defendant's grandfather have no relationship except the defendant's grandfather came and asked for a place to live. **PW3** continued that a dispute arose when they decided to sell a portion of the land to offset the funeral expenses of his elder brother. That when buyers started clearing the bush, the defendant came to stop them. According to **PW3**, the defendant lives on the neighbouring plot where he gives people permission to build without the plaintiffs' consent. The witness produced photographs as **Pex 5** showing graves of their relatives buried on the land.

14. In cross-examination, **PW3** said the suit land is at Deri and Mwangoloto and measures over 3000 acres. That the Kichororo family did collaboration with other neighbours and the defendant is one such neighbour. **PW3** confirmed there is no one with the title as it has not been surveyed. That the Tribunal found the land belongs to the Kichororo family but the defendant was to care for it. In re-examination the witness said the boundaries were placed by their elders which is then passed on to future generations. This marked the close of the plaintiffs' case.

15. The defendant gave his testimony as **DW1** on 13/8/2018. **DW1** said they come from the same clan with the plaintiff. That the suit land belonged to Chimega Ndengwa and they still live on it todate. **DW1** continued that he has lived on the land for over 70 years. That the 1st plaintiff's father had initiated a complaint before the elders of Mwangoloto but he lost the case. Further **DW1** said he won the dispute before the Assistant Chief.

16. **DW1** said the land is not owned by Kichororo clan. That he refused the sale of the land and it is what resulted in the plaintiffs claiming ownership. That the suit land belongs to Mzee Chimega who the defendant said is a cousin to his father. That he is entitled to the portion he is living on. In cross-examination, **DW1** stated that they are brothers with Nuri from the clan of Mwamudu. That he does not know a clan called Mwamudu Mayawa. That Mzee Kichororo is the same clan as the 1st plaintiff while **DW1**'s lineage is different from Kichororo. **DW1** added that his father was buried on the suit land.

17. **DW1** said that his father purchased land in an area called Mzinzi but none of his family have been buried there. The witness stated he was not aware of the sale to the church. That Chimega was older than Mzee Kichororo. That the plaintiffs' family and the defendant's

family both have their share on the suit land.

18. Josepha Mundu Dzombo gave evidence as defence witness No. 2. He is a son to the defendant and lives in Maji ya Chumvi, Mwangoloto village. He adopted his witness statement dated 16/3/2016 as his evidence in chief. In the statement, **DW2** said they have co-existed peacefully with the plaintiffs since time immemorial. That when the 1st plaintiff's father retired from Mabati Rolling Mills in 1990's, the dispute over ownership of the land started because Nuri wanted to sell the property to 3rd parties. That the 1st plaintiff took over the case when his father died. The witness recalled that his father (defendant) won the case before the local chief, village elders and later Kinango Land Dispute Tribunal.

19. In cross-examination, **DW2** said he was born in 1968 and is the 2nd born in their family. That he was of age when Mzee Nuri died although he did not attend his funeral. That Mzee Nuri's grave is within the suit land. **DW2** stated they inherited the land from their grandfather.

20. Chizigwa Msungu Ngala testified as **DW3**. He was born in 1952 in Maji ya Chumbi, Nderi village. That his father called Msungu Ngala was buried at Mwangoloto. **DW3** stated that some of his relatives are buried in Nderi while others are buried in Mwangoloto which are all within Maji ya Chumbi locality. **DW3** states that 1st plaintiff is his nephew while the defendant is a cousin to him. He described the suit land as an inheritance of the Mwamudu clan. He also adopted his witness statement dated 18/9/2013 as part of his evidence.

21. **DW3** was put to cross-examination by Zamza advocate for the plaintiffs. He stated that the 1st plaintiff is like a son to him and they both come from the Mwamudu clan. That the great grandfather was called Chimega and he is the one who owned the suit land. That if the ancestry is traced, both the plaintiffs and defendants end to Chimega. That as at now, the defendant lives in Mwangoloto but he was born in Deri.

22. Charo Kangu Mae was **DW4**. He was born at Maji ya Chumvi at the time Mzee Chirongo was the area elder. That his father moved to the area before he was born and was welcomed by Mzee Chirongo Mwamwee. That when Chirongo died, his son Peter Mwamwee and the defendant took over as in-charge of the clan land. That Chirongo belongs to the same clan as the plaintiffs and the defendant.

23. **DW4** stated further that Andrew Nuri's father moved to the area when he was already an adult. That since they belonged to the same clan as Chirongo they were welcomed. **DW4** was surprised the 1st plaintiff is saying the defendant has no right over the land while his father was never in-charge over the land. **DW4** stated he is still living at his place of birth and that the suit land belongs to the Mwamudu clan.

24. In cross-examination, **DW4** said he does not belong to the Mwamudu clan. That his father was the one welcomed to settle in the land. That in 2009, he was in the area and knew 1st plaintiff's dad while he was still alive. That he never attended any meeting of the clan. He did not know Mariakani scrap dealers. That he was not present during the take-over ceremony of Peter Chirongo as the in-charge of the land.

25. The plaintiff raised the following issues for determination which I do adopt;

(a) *Whether L.R Number unsurveyed plot DERI/MWANGOLOTO situate in Kinango District is owned by the Kichochoro family/plaintiffs?*

(b) *Whether the plaintiffs are entitled to orders as sought in the plaint?*

(c) *Who bears the costs?*

26. From the evidence adduced by both sides, the land in dispute has not been surveyed. It appears to be vast land as the plaintiffs' witnesses estimated it at 1000 acres (500 acres in Nderi and 500 acres in Mwangoloto). There was however no survey report produced to indicate how many acres is the suit land. It is also not disputed that both the plaintiffs and the defendant family are in occupation of the suit land.

27. The Court is called to determine who is the owner of the land. From the evidence of PW2 particularly his handwritten statement dated 9/6/2014, the witness stated that the defendant's father who came from Kadzoni was welcomed to the land by Chichororo in 1955. It is said he was accompanied by his wife and two sons and he was showed a place to build a hut and cultivate maize, cowpiece, millet and susum. PW2 added that Mzee Chichororo welcomed Mzee Magongo because their clan Mwamudu and Mwamudu Mayawa were close. PW2 stated that Mzee Magongo was at liberty to move out of the land he was given but it appears he never moved out.

28. The "agreement" between Mzee Chichororo and Mzee Magongo was oral. The plaintiffs denied any family relationship with the defendant although the DW3 stated that if their ancestry was traced, they both end at Mzee Chimega who was their great grandfather. However irrespective that the plaintiff and the defendant share no family lineage, the undisputed fact is that the defendant and his/their family have lived on a portion of the land for very long time with PW2 putting it from 1955. There is no evidence presented to the Court that where the defendant currently lives does not constitute part of the 1000 acres "owned" by Chichororo and which is part of the land given to the defendant's family to live on and farm.

29. No evidence was led to show that Chichororo purchased the land from Mariangulo clan. Neither was there evidence to show that the suit land was ancestral land of the Mariangulo clan. Since both Chichororo and Mzee Magongo lived on the land before independence (from 1955) it is only logical that whether or not Mzee Magongo was welcomed on the land he acquired equitable interest by virtue of his occupation/possession for a long period of time. Their interest in the land cannot be wished away as the plaintiffs are attempting to do.

30. The minutes of 25/11/2008 signed as forwarded by the Assistant Chief refers to the person to be in-charge of the land in Deri and Mwangoloto. The minutes did not give the names of the elders present or whether the parties were heard before the said conclusion was

made. It did not also say that the defendant was not entitled to the portion he was using if at all. The minutes of 3/8/2008 clearly stated that the defendant did not agree with the conclusions of that meeting. The minutes does not indicate who commenced the meeting and whether the dispute was in respect of the whole of the suit land or a portion thereof.

31. The plaintiffs are seeking declaratory orders that they are rightful owners of the unsurveyed land located in Deri/Mwangoloto. The Court would have no difficulty making that declaration if it was established that the defendant had trespassed on the portion of the land that is rightfully occupied by the plaintiffs. But in this instance, there was no evidence of intrusion/invasion of the plaintiffs' portion by the defendant. The evidence adduced does show that the defendant has always been in occupation of a portion of the suit land. Therefore, the orders can only issue in respect of the part occupied by the plaintiffs but not in regard to the whole land.

32. From the evidence adduced, I am unable to issue a blanket order of permanent injunction to stop the defendant from using the land as he is definitely entitled to a portion they have occupied from 1955 to date. The result of this finding is that the plaintiffs suit has not been proved and is hereby dismissed with costs to the defendant.

Judgement dated & signed at Busia this 16th Day of September 2020

A. OMOLLO

JUDGE

And delivered electronically via email to the parties' advocates this 21st Day of September 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE