



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 82B OF 2013**

**BEJA MNYIKA .....PLAINTIFF**

**VERSUS**

**HARANGA NYIRO..... 1<sup>ST</sup> DEFENDANT**

**MOHAMED RUWA ZECHA .....2<sup>ND</sup> DEFENDANT**

**KIBUNDIRO NYIRO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

(Suit by plaintiff claiming that he owns the land in dispute and that the defendants ought to be evicted from it and pay mesne profits for the duration of use; plaintiff also seeking orders for his portion to be surveyed and he be issued with title; evidence showing that the land is within a Group Ranch which is yet to be dissolved; no private rights within a Group Ranch; in any event, plaintiff not demonstrating any membership of the Group Ranch; title to individuals in a Group Ranch only issuable once the Group Ranch is dissolved and the land distributed to members; plaintiff's suit dismissed)

1. This suit was commenced through a plaint which was filed on 10 October 2013. In the plaint, the plaintiff has averred that he is the owner of a parcel of land situated at Mikwani B, Mwereni Location, Msambweni District, Kwale County, having obtained the same under the customary law of inheritance according to Duruma traditions. It is pleaded that the title to the land is held in trust for its members by Mwereni Group Representatives. He mentioned that he had a previous case over the same land with one Kesi, being Mombasa HCCC No. 258 of 2009, which the latter lost. The plaintiff contends that the defendants have unlawfully invaded his land. In the suit, he seeks the following orders :-

- a. Mandatory injunction/eviction of the defendants.
- b. The parcel of land concern (sic) be surveyed from the original group representatives and be issued with a distinct title deed.
- c. Mesne profits at the rate of 4,000/= (per acre per month) till eviction and settlement thereon.
- d. Any other relief(s) the court may deem necessary to meet the ends of justice.
- e. Costs and interest at court rates.

2. The defendants entered appearance and filed defence. They pleaded to be strangers to the suit Mombasa HCCC No. 258 of 2009. They denied trespassing on the land but stated that they have been entering and cultivating the land as clan members and members of Mwereni Group Ranch, the registered proprietor of the land. They pleaded that they have every right to the suit property as clan members and members of the Group Ranch to the exclusion of the plaintiff. They pleaded that they are all members of Mwalukuta Clan which was allocated the land and that the plaintiff was born in Kilima Ndogo Village which is in a different location from the suit land and is a member of Mwabeja clan who were allocated a portion of the Group Ranch but in a different area. They pleaded that the plaintiff is abusing his position as former Councillor of Msambweni location. They averred that the plaintiff's individual interest, if any, cannot supercede those of the entire clan.

3. Before the hearing of the case, the court (Omollo J), directed that the land be visited by the Executive Officer of the Court who proceeded to do so on 3 September 2015 and filed a report. I have seen the report which mentions that the disputed land runs into hundreds of acres and that the officer covered the whole of the central part of it which appeared to be most contested. He noted that the land is settled by friends and relatives of the plaintiff and defendants. He observed houses built by relatives of both the plaintiff and the defendants. The plaintiff

showed a home which was at the centre of the land. The 1<sup>st</sup> defendant had a home on the “upper side” of the land separated from the “suit land” by a main road. The home of Mohamed Ruwa Zecha was noted to be on the western side next to Mwereni Trading Centre. The home of the 3<sup>rd</sup> defendant was also in the centre of the disputed land.

4. In his evidence, the plaintiff stated that he is a resident of Mikwani B, in Kilimangodo Sub-Location in Mwereni Location. He stated that the defendants are of Duruma descent in Mwalukuta Village whereas he is from the Beja clan. He testified that they received the Mwalukuta clan as guests who requested for a place to live. The first Mwalukuta member was one Zecha who was given land by the plaintiff’s great grandfather because they married from the same family. He stated that when Zecha died, his children brought some members of their clan from Kinango. He stated that there are 10 clans and each clan knows its boundary. He stated that when he became of age, he was shown his share of the land and he cleared the land and built his home. When he finished his house he was sued by the 2<sup>nd</sup> defendant in the year 2009. He stated that the Group Ranch officials heard the dispute and made a decision in February 2010 awarding him the land. Subsequently, he received another complaint presented through the District Commissioner. He also presented a complaint of his own as the 2<sup>nd</sup> defendant was demolishing the graves of his relatives. He made another report to the Group Ranch Secretary who wrote to him a letter. The dispute between himself and the 2<sup>nd</sup> defendant was also presented to the Chief. He stated that the defendants are on the land. He stated that he resides on the same side of the road as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants whereas the 3<sup>rd</sup> defendant is on the opposite side. At some point he was paid KShs. 42,500/= for selling gravel to some third parties. Cross-examined, he stated that he served as Councillor from 2002 to 2007 for Mwereni Ward. He admitted being sued in the case Mombasa HCCC No. 250 of 2009 on the claim that he was on the land of Mwadzime clan. He stated that the portion where the 2<sup>nd</sup> and 3<sup>rd</sup> defendants reside belong to his clan and is not entirely his land.

5. DW-1 was Haranga Nyiro the 1<sup>st</sup> defendant. He is brother to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He stated that they belong to the Mwalukuta Clan. He testified that they were born on the land that they currently reside on it and that this portion of land belongs to the Mwalukuta Clan. He testified that the plaintiff is from the Mabeja clan from Kilimangondo area which is far from the disputed land. He stated that it is the plaintiff who came and trespassed into their land. He stated that when the plaintiff invaded their land, there were mangoes and cashewnut trees planted by his grandfather, and he denied that the land was a bush. He produced several documents in support of their case including some letters from the Chief, Village Chairman, and some licence agreements entered into by the plaintiff. There was also produced, a list of persons said to have illegally invaded the land, which list includes the name of the plaintiff, and a list of persons said to be members of the Group Ranch. Cross-examined, he stated that when the plaintiff invaded the land, they reported to the Chief, who came to the land but has never issued a verdict. He was aware of a dispute before the Group Ranch between the Mwalukuta and Mabeja clan but he was not aware of any verdict. He stated that there is a criminal case that was still pending at the time he gave evidence. He stated that it is the Mwalukuta clan members living on the disputed land. He denied that the Mwalukuta clan was invited by members of the Mabeja clan and that it was the Mabeja clan who were invited.

6. DW-2 was Thomas Masai Mwangeka. He had a statement which he adopted as his evidence. He stated that he was born in Kilimangondo Village in Mwereni Location. He served as Chief from 1980 to 1990. He stated that the disputed land belongs to the Mwalukuta clan to which the defendants belong. He stated that the plaintiff is of the Mabeja clan and that his home is in Kilimangondo Village about 20 kilometres away which is where he (plaintiff) resides. He stated that in the year 2009 the plaintiff started claiming a neighbouring plot when he served as a councillor and later started claiming the land in dispute. A meeting was held and they asked the plaintiff to leave the land but he did not agree with the decision.

7. After DW-2 had testified, counsel for the defendant asked for an adjournment in order to peruse the file Mombasa HCCC No. 258 of 2009. The adjournment was granted but there was no appearance at the next court session and the court directed that the defence case be closed. The Court subsequently directed counsel to file written submissions. I have only seen the submissions of Mr. Gichana, learned counsel for the plaintiff which submissions I have taken into consideration.

8. The case of the plaintiff is that the disputed land belongs to him and that the defendants are trespassers. I observe that the plaintiff did not avail any document of title to the land that he claims to belong to him and it does appear that the disputed land is yet to be individually parcelled out. Indeed, what emerged in the proceedings is that the land in dispute actually falls within a Group Ranch. Group Ranches were held by Group Representatives in trust for their members and their administration was governed by the Land (Group Representatives) Act, Cap 287, Laws of Kenya (repealed by the Community Land Act, Act No. 27 of 2016). The nature of holding of Group Ranches is that they are communal lands without any member of the Group Ranch having an individual title or an individual right to any part of the Group Ranch. In other words, all members hold the land communally without there being any private right to any part of the Group Ranch. There could be some arrangements for people to settle in some specific areas for their homesteads and privacy, but such arrangement would still be subject to a final distribution of the land after the Group Ranch is dissolved. Disputes concerning such temporary arrangements are ordinarily settled by the Group Representatives but they are only meant for purposes of harmony within the Group Ranch and cannot be final on the ownership, which as I have mentioned, would need to await the dissolution of the Group Ranch and distribution of the land to members.

9. Since the land falls under a Group Ranch, the dispute herein is governed by the Land (Group Representatives) Act (repealed) which was in operation at the time that this suit was filed. I am not aware of any provision within the said Act which provided for exclusive ownership of a portion of land within a Group Ranch to an individual. To that extent, I do not see how the plaintiff’s case can succeed. As I mentioned earlier, the plaintiff does not have title to the disputed land. He cannot therefore claim exclusive private rights to it, since the land was communally held. Even then, the plaintiff could only succeed in this case if he demonstrated that he was a member of the Group Ranch. He did not avail to me the membership register of the Group Ranch nor demonstrate that he is a member of the Group Ranch. Group Ranches were required under Section 17 of the repealed statute to have a list of members. That provision of the law was drawn as follows :-

17. Register of members(1) Every group shall maintain a register of its members (including those under disability) in such form as the registrar may require or as may be prescribed, containing the name of each member, the date he became a member, his qualifications for membership and, on his ceasing to be a member, the date on which and the circumstances in which he ceases to be a member, and in the case of a member under a disability the name of his guardian, the nature of his disability and (if he is a minor) his age.

10. If at all the plaintiff was entitled to any private rights within the Group Ranch, then as a threshold issue, he needed to provide proof of

membership of the Group Ranch of which he has not so provided. He did not offer any membership number, membership card, or the membership register, to demonstrate his membership in the Group Ranch. I do not therefore see how he can claim to have a right of any portion of land within the Group Ranch whereas he has not proved that he is a member of the Group Ranch. He cannot therefore succeed in his prayer to evict the defendants from the land.

11. There was a lot of evidence given by the parties regarding their clans and origins but this evidence to me is not particularly relevant to the determination of this case. So long as one is genuinely a member of a Group Ranch, his origin may not be very material.

12. The plaintiff has a prayer that the disputed land be surveyed and he be issued with title. I cannot grant that prayer, for individual titles to Group land can only be issued after the Group Ranch is dissolved. Ordinarily, such land, upon dissolution of the Group Ranch, would be subject to adjudication under the Land Adjudication Act, Cap 284, Laws of Kenya, which has an elaborate process that leads to individual titles, or the Group Ranch itself can engage a surveyor to carve out individual titles to the members. I cannot do away with this process and order the plaintiff alone to be issued with title.

13. The plaintiff has also claimed mesne profits at the rate of KShs. 4,000/= per acre per month. The plaintiff cannot succeed in this prayer for he has not demonstrated any right of ownership of the disputed land. But even if he had demonstrated ownership, which he has not, I would not have awarded this prayer for there was not tendered any proof of the acreage occupied by the defendants, or how the quantification of KShs. 4,000/= per acre was arrived at. No evidence was ever led to support this claim for mesne profits.

14. I really do not see the point of saying any more. Based on my above findings, the plaintiff cannot succeed in his claim and his suit is hereby dismissed with costs to the defendants.

15. Judgment accordingly.

**DATED AND DELIVERED THIS 27 DAY OF OCTOBER 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**