



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 219 OF 2014

(FORMERLY KERUGOYA ELC NO. 523 OF 2013)

BENSON NGUNGI KIRONJO (*Suing on*

behalf of MUGWE CLAN).....**PLAINTIFF**

VERSUS

JOEL KITHAKA MARINGA (*Being sued*

on

behalf of NGUI CLAN).....**DEFENDANT**

JUDGEMENT

1. By a plaint dated 24th January 2006 and amended on 17th July 2017, the Plaintiff sought the following reliefs;

a. That Block number 148 in Gichiche Adjudication Section belongs to the Plaintiff's Mugwe Clan.

aa) A declaration that the undated decision by the Siakago Land Disputes Tribunal in Claim No. 330 of 2008 and the subsequent decree adopting the same in Siakago Principal Magistrate's Court Land Disputes Tribunal Case No. 35 of 2010 were null and void for contravening clear provisions of the law.

bb) That there be a permanent injunction restraining the Defendant, his agents, clan members, servants and/or anyone claiming through him from entering, cultivating, selling or dealing in any manner whatsoever with land known as Block No. 148 in Gichiche Adjudication Section.

b. Costs.

2. It was alleged in the body of the amended plaint that all that portion of land known as Block 148 in Gichiche Adjudication Section in Mbeere District (hereinafter known as the *Block 148*) rightfully belonged to members of the Plaintiff's Mugwe clan and that they were in actual occupation thereof. It was also pleaded that vide an undated decision the Siakago Land Disputes Tribunal had, in violation of the law, declared the Defendant's clan to be the owner of the suit property.

3. The Defendant filed a statement of defence dated 29th June 2018 in which he denied the Plaintiff's claim in its entirety. It was contended that Block No. 148 legally belonged to Ngui clan as per the Adjudication records prepared under the **Land Adjudication Act** (hereinafter called *the Act*). It was

further pleaded that members of the Plaintiff's Mugwe clan did not present any claims or objections with respect to Block 148 during the land demarcation and adjudication process.

4. The Defendant denied the jurisdiction of the court to entertain the suit. It was pleaded that the court had no *primary* jurisdiction by virtue of **section 30 of the Act** since the Plaintiff had not obtained the consent of the Land Adjudication Officer (hereinafter *LAO*) to file the instant suit.

5. It is evident from the proceedings that the original Plaintiff, Samuel Kivuti Ciriba, filed the instant suit on behalf of members of the Mugwe clan to which he belonged. Upon his demise, Benson Ngungi Kironjo, his son, was substituted as the Plaintiff. On the other hand, the Defendant, Joel Kithaka Maringa, was sued on behalf of the Ngui clan which also claims ownership of Block 148.

6. The material on record shows that both Mugwe and Ngui clans have had a long running dispute over Block 148 and other Blocks within Gichiche Adjudication Section in Mbeere Sub-county. They have previously litigated their disputes before various courts and tribunals. Of special note is that Mugwe clan appears to have obtained a favourable award from the Gachoka Land Disputes Tribunal in LDT Claim No. 14/2008 whereby they were awarded Block 148. The Defendant's clan, Ngui, also appears to have obtained a favourable award in Siakago LDT Claim No. 330 of 2008 with respect to the same Block.

7. The record further shows that the award in favour of the Plaintiff's clan was set aside by the High Court but there is no indication of the award in favour of the Defendant's clan having been set aside.

8. At the trial hereof, the Plaintiff testified on behalf of Mugwe clan and called one more witness before closing his case. The Plaintiff simply adopted his witness statement dated 23rd June 2017 as his sworn testimony. He also relied upon the documents listed in his list of documents dated 23rd June 2017 which were admitted by consent of the parties.

9. The Plaintiff did not appear very familiar with the land adjudication process and the nature of the dispute. The Plaintiff simply took over the case upon the demise of his father who was the original Plaintiff. The Plaintiff was born around 1976 and that was long after the land demarcation and adjudication process had commenced. He mainly relied upon the documents which were in the possession of his late father. It was his evidence that Block 148 was still in the occupation of members of Mugwe clan specially members of Mucari family.

10. The Defendant testified on behalf of Ngui clan. He also called 3 other witnesses in support of his defence. The Defendant adopted his witness statement dated 29th June 2018 as his sworn testimony. He also relied upon all the documents listed in his list of documents dated 29th June 2018 which were admitted by consent of the parties. His evidence was to the effect that during the land demarcation and adjudication process members of his clan claimed and were given Block Nos. 131, 136 and 148. He denied knowledge of any claims by Mugwe clan respecting those Blocks and stated that no such claim were ever recorded in the adjudication register.

11. It was the evidence of the Defendant that half of Block 148 had been demarcated and allocated to Ngui clan members. It was also his evidence that the claims by Mugwe clan first arose in the 1990s.

12. The Defendant called the LAO responsible for the area in dispute. Her name was Speranza Njiru Marete who testified as DW 1. She produced certified copies of the adjudication records for Blocks 131, 136 and 148. The entries in the interest column in respect of Block 148 read both *Ngui clan* and *Ruthari Ranch*. She was of the opinion that the entry of the name of *Ngui* clan appeared like a suspicious addition.

13. The LAO finally stated that the determination of interests in Block 148 had not been concluded due to the ongoing court case and that the parties were allowed to come to court since the LAO could not determine the dispute.

14. Upon conclusion of the hearing on 19th July 2018, the Plaintiff was granted 30 days to file and serve his written submissions whereas the Defendant was given 30 days upon service to file and serve his. The record shows that the Plaintiff filed his submissions on 18th December 2018 whereas the Defendant filed his on 16th January 2019.

15. It would appear that the parties did not file an agreed statement of issues for determination. Each of the parties simply formulated their own issues in their written submissions. The court shall, therefore, frame the issues for determination on the basis of the pleadings, sworn evidence, and the documents produced by of the parties as provided for under **Order 15 Rule 2 of the Civil Procedure Rules**.

16. In the opinion of the court, the following issues arise for determination in this suit;

- a. Whether or not the court has jurisdiction to entertain the suit.
- b. Whether the Plaintiff has demonstrated its claim over Block 148 falling within Gichiche Adjudication Section.
- c. What is the validity of the award of Siakago LDT Claim No. 330 of 2008 as well as LDT Claim No. 14 of 2008?
- d. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
- e. Who shall bear the costs of the suit.

17. The issue of jurisdiction was raised by the Defendant in his statement of defence. It was submitted that under **section 30 of the Act**, no person shall institute a suit and no court shall entertain a suit with respect to any land the subject of an adjudication without written consent of the LAO. The Defendant further submitted that the Plaintiff had not tendered any such written consent at the trial.

18. The other aspect of jurisdiction raised was that if any claim or issue of ownership with respect to Block 148 was pending, then such claim or issue could only be determined by the LAO under **section 10 of the Act**.

19. Although the Plaintiff did not produce a specific letter of consent from the LAO for the purpose of instituting the instant suit, the court has noted from the Plaintiff's list of documents that the LAO had indicated in his letters that consent would be granted to the parties to seek legal redress in court in case they failed to resolve the dispute amicably. When the LAO (DW 1) testified at the trial hereof, she stated that the parties were allowed to come to court because the office was unable to resolve the dispute.

20. The court is of the view that the totality of the evidence on record indicates that the LAO allowed the Plaintiff to seek legal redress before a court of law. The official letters and the oral evidence of the LAO were both to the same effect. In the opinion of the court, the object of **section 30 of the Act** was not defeated nor violated. The application of the section calls for a purposive interpretation as opposed to a merely legalistic and pedantic one.

21. The court is also unable to agree with the Defendant's submission that any claim or dispute concerning Block 148 at this stage should be determined by the LAO under **section 10 of the Act**. The court has perused the letter dated 27th April 1994 by the LAO to the Director of Land Adjudication and Settlement (hereinafter *the Director*) in which the history of the dispute was articulated. It is evident that the dispute concerning the various blocks then in dispute was fully ventilated culminating in appeals to the minister under **Section 29 of the Act**. Those appeals were heard by the then Special District Commissioners in 1986/1987.

22. It was only in 1990 that an anomaly was noted relating to the boundaries of Block 135 and 148. The anomaly related to the plotting of the boundaries on the P.I.D which the LAO considered he had no power

to rectify. In those circumstances, it could not be said that this court is deprived of jurisdiction to entertain a dispute of that nature especially where the LAO has conceded in court that the office was unable to resolve the dispute and that they advised the parties to move to court. The court, therefore, finds that it has jurisdiction to entertain the dispute within the meaning of **section 13 of the Environment and Land Court Act No. 19 of 2011**.

23. The 2nd issue is really the main issue in controversy in this suit. Both the Plaintiff's Mugwe clan and the Defendant's Ngui clan are claiming ownership of Block 148. The Plaintiff sought to demonstrate ownership by relying upon what his advocate called "*objection proceedings*" in document No. 14 of the Plaintiff's list of documents. The document is dated 20th April 1995 and it does not, in fact, relate to objection proceedings under the Act. It relates to proceedings chaired by a Chief or District Officer in Gachoka Division. In the event, such a document cannot form the basis of ownership for reasons to be stated with respect to the 3rd issue.

24. The Defendant, on the other hand, contended that according to the rough book of the adjudication record, his clan was recorded as the beneficiary of Block 148. The relevant extract of the rough book, however, indicates that there are 2 entries in the interest column. The entry has both Ngui clan and Ruthari Ranch. Although the LAO considered the entry of Ngui clan as suspicious, the court shall not make a definitive determination on that issue since it shall not be necessary for the disposal of the suit.

25. So, what is this entity known as Ruthari Ranch? According to the letter dated 11th October 1995 from the Director, Ruthari Ranch was a proposed goat ranching scheme by 3 clans namely, Ngui, Mugwe and Ikandi. Each of the 3 clans contributed some land for that purpose. The scheme apparently never took off hence each of the 3 clans were to get back their respective contributions of land. It would appear that whereas Ikandi and Ngui got back their land, Mugwe clan did not theirs. It would also appear that at some point the ranch land was comprised in Block 140 before the clans shared out the land. Even though the Defendant disputed the Mugwe clan contributed land to Ruthare Ranch, the court is satisfied on the basis of the material on record that it contributed.

26. The court has further taken note of the contents of the said letter dated 11th October 1995 from the Director to the LAO in Embu that during the land demarcation process Block 135 was recorded in the name of Mugwe clan whereas Block 136 was recorded in the name of Ngui clan. The Director's letter dated 14th July 1995 sheds more light on the genesis of the dispute and the origin of Block 148. He stated in paragraph 7 of the letter that;

"During demarcation, blocks 135 and 136 existed as separate units. We fail to understand how Mr Eliaza Maringa Mbiruri managed to organize for the creation of Block No. 148 in his name and which is said to have absorbed the whole of Block 136 and half of Block 135. Please clarify this allegation."

27. It would also appear from the material on record that at a meeting held on 25th January 1994 at which members of the disputing clans and officials of the Department of Land Adjudication and Settlement were present it was resolved that the original boundaries between Block 135 and 136 be reinstated. It is clear from the letters from the Director that the demarcation officer was, for some unknown reason, unwilling to implement the decision and reinstate the boundaries. The Director sounded frustrated by the failure of the officers on the ground to act diligently in order to resolve the dispute.

28. The court is inclined to take the view of the Director on the genesis of the dispute herein. It would appear that the Chairman of the Ngui clan (the Defendant's father) was out to defraud members of Mugwe clan of their land. It would appear that he orchestrated the creation of Block 148 where he caused himself and his clan members to be recorded as beneficiaries. The court is satisfied that the creation of Block 148 seriously encroached upon Block 135 which belonged to Mugwe clan. This anomaly remained undetected until 1990 when the Plaintiff's clan sought to sub-divide their Block No. 135. That is when they discovered that the boundary separating what was initially Block 135 and 136 was deep inside Block 148! That is the anomaly which the LAO thought he had no power to rectify according to his letter of

27th April 1994.

29. The court is, therefore, satisfied that some land belonging to Mugwe clan is comprised in Block 148. However, Mugwe clan is not entitled to the entire Block. It is evident that Block 148 consists of land originally comprised in Block 136 (which belonged to Ngui clan) and about one half of land comprised in Block 135 (belonging to Mugwe clan). That probably explains why some parts of Block 148 are currently occupied by members of Ngui clan while other parts are occupied by members of Mugwe clan. The court shall, therefore, make an appropriate order to secure only the portion of land which rightfully belongs to Mugwe clan.

30. The 3rd issue concerns the validity of the awards of the Land Disputes Tribunals (hereinafter *Tribunals*) which made awards in favour of the disputing clans. As indicated earlier, the award in favour of the Plaintiff's clan and all consequential orders were set aside by the High Court. The reasons for such nullification are obvious. The Tribunal had no jurisdiction either under the **Land Disputes Tribunals Act, 1990** or the **Land Adjudication Act** to entertain the matter and to make any award.

31. The provisions of **section 2 of the Land Disputes Tribunals Act, 1990** (repealed) defined land as follows;

“Land means “agricultural land” as defined in section 2 of the Land Control Act, whether or not registered under the Registered Land Act, but does not include land situated within an adjudication section declared under the Land Adjudication Act or the Land Consolidation Act or land which is the subject of determination by the Land Registration Court under the Land Titles Act,”

32. It is, therefore, evident that Block 148 in Gichiche Adjudication Section fell within an area declared to be an adjudication section hence the Tribunals had no jurisdiction to entertain the dispute. The same reasoning would apply to the award made in favour of the Defendants as well. The court is of the opinion that both awards were null and void *ab initio* and of no legal consequence.

33. As was held in the case of the owners of **Motor Vessel Lillan ‘S’ Vs Caltex Oil (Kenya) Ltd [1989] KLR 1;**

“...jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence...”

34. Similarly in the case of **Macfoy Vs United Africa Co. Ltd [1961] All ER 1169**, it was held, *inter alia*, that;

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

35. The 4th issue is whether the Plaintiff is entitled to the reliefs sought in the amended plaint. The first relief basically seeks a declaration that the suit property i.e. Block 148 rightfully belongs to Mugwe clan. As the court has found, the Plaintiff's clan is not entitled to the entire Block 148 because that Block contains land meant for both Mugwe and Ngui clans. The court shall therefore make an order to safeguard the interest of Mugwe clan currently comprised in Block 148 in accordance with the provisions of **section 13 (7) of the Environment and Land Court Act**. The court is of the view that the solution may lie in the restoration of the original boundaries of Block 135 and Block 136.

36. The court has noted from the communication of the Director dated 14th July 1995 to the LAO that one

of the viable solutions to the dispute between the two clans was a restoration of the boundaries between Block 135 and 136 as they originally existed before the creation of Block 148. The Director had even demanded an explanation on why the demarcation officer had not effected the directive on restoration of the boundaries.

37. The 2nd relief being sought is a declaration that the award of the Tribunal in Siakago LDT No. 330 of 2008 and all consequential orders were null and void. As the court has already found, the Tribunal had no jurisdiction whatsoever to entertain the land dispute and to make the award. It would, therefore, follow that the award and all consequential orders are null and void. The court is, therefore, satisfied that the second relief should be granted in full.

38. The 3rd relief seeks an injunction against the Defendant and members of his clan to restrain them from howsoever dealing with Block 148. The court is not inclined to grant this order. The court has already found that the Plaintiff's clan is not entitled to the entire land comprised in Block 148. Their share is approximately one half which shall be ascertained upon rectification of boundaries. The court is, therefore, of the opinion that granting an injunction at this stage would be premature.

39. Before concluding this judgement, the court would like to consider one matter which arose during the hearing. When the LAO (DW 1) was called to testify, the Plaintiff's advocate objected to the witness being called on the basis that he had not been alerted in advance that the LAO would testify hence he needed an adjournment to enable him seek instructions from the Plaintiff. The court rejected the request for adjournment and allowed the LAO to testify. The court was not satisfied that there was a legitimate reason to preclude the LAO from testifying and producing certified copies of the adjudication records. The records to be produced had long been served with the Defendant's list of documents. The Plaintiff's advocate had sufficient time to seek further instructions from his client well before the hearing. In any event, it would not have served any useful purpose to stand down the witness in order to allow the advocate take further instructions before any evidence being tendered by the LAO. It would have made sense if an adjournment had been sought after the testimony of the LAO so that the Plaintiff's advocate may take instructions on such evidence.

40. The 5th and final issue for determination is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful party should normally be awarded the costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has noted that both parties herein are acting in a representative capacity. They are representing their respective clans in the long standing land dispute. The court is of the opinion that the appropriate order to make is for each party to bear his own costs.

41. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved his case to the required standard. Although Mugwe clan is not entitled to the entire Block 148, they are entitled to about one half of it which shall be determined as shall be ordered hereinafter. Accordingly, there shall be judgement for the Plaintiff in the following terms;

- a. The Plaintiff's clan is not entitled to the entire land comprised in Block 148 but to approximately one half thereof. That portion shall be ascertained by the restoration of the original boundaries between Block 135 and Block 136 in Gichiche Adjudication Section.
- b. The LAO and the County Land Surveyor, Mbeere shall cause the restoration of the original boundaries between Blocks 135 and 136 in Gichiche Adjudication Section within the next 90 days and file a report in court within that period.
- c. A declaration is hereby issued that the undated decision of the Tribunal in Siakago LDT Claim No. 330 of 2008 and all the consequential orders and resultant decree are null and void.
- d. All the other prayers sought by the Plaintiff are hereby declined.

e. Each party shall bear his own costs.

42. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of FEBRUARY, 2019

In the presence of Ms Ndorongo holding brief for Mr Andande for the Plaintiff and Mr Njagi for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

08.02.19