



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ENVIRONMENT AND LAND COURT NO. 247 OF 2016

JOSEPH BENWA EWOI 1ST PLAINTIFF

ESTHER EKAI PATRICK2ND PLAINTIFF

JAMES LOTINI EDAPAL3RD PLAINTIFF

VERSUS

ALAKE TADICHA..... 1ST DEFENDANT

JOSEPH KANGETHE GATHIRU..... 2ND DEFENDANT

ABDIKADIR GUYO BUKICHA..... 3RD DEFENDANT

EKAI ESUNYEN4TH DEFENDANT

ALFRED TINAN..... 5TH DEFENDANT

NGAWASA ESEKON 6TH DEFENDANT

LONGIRO LOBUN7TH DEFENDANT

JUDGMENT

Introduction

1. The suit herein was commenced by way of a plaint dated 23rd November 2016 which was amended on 13th December 2016. The plaintiffs are seeking the following orders from this court;

I. A permanent injunction restraining the defendants themselves, families, agents, servants or any other person acting at their behest from entering, dealing in any manner or interfering with the plaintiffs' use and occupation of the land registered as KAMBI GARBA/786 in Isiolo.

II. Cost of the Suit and Interest.

2. The defendants filed a joint statement of defence on 17 April 2018 whereby they aver that plaintiffs documents are forgeries and that plaintiffs are not the registered owners of the suit property. They also aver that they filed a suit **ELC NO. 58** of 2013, where they obtained orders stopping any allocation or registration of the suit land.

3. On 14.12.2018, an application was filed to enjoin the Isiolo County government as an interested party in this suit, where by the application was allowed on 9.5.2017. However, this party did not file any pleadings or documents and it did not participate in the actual trial of the suit.

Plaintiffs Case

4. The plaintiffs herein contend that the suit land belongs to the family of one Kokiro (Deceased). PW1, JOSEPH BENWA EWOI is the 1ST

plaintiff. He gave evidence and he also adopted his statement dated 21.11.2016 as his evidence. He avers that the suit land which measures approximately 20 acres situated within Isiolo Township belongs to the family of their father, Kokiyo. They have owned this land since time immemorial and that he holds the suit land in trust for himself, 2nd, and 3rd Plaintiffs who are his sister and his uncle respectively.

5. In support of their case, plaintiffs produced as Exhibits the documents in their list dated 21.11.2016 as Exhibits 1-6 respectively.

6. PW2 ESTER EKAI, the 2nd plaintiff is a sister of 1ST plaintiff. Her evidence is similar to that of **PW1**. She adopted her statement dated 13.9.2017 as her evidence in chief. She avers that they have been in possession of the suit land since 1993, but the first plaintiff was given the land by their father in 1991. PW3 JAMES LOTIN EDAPAL is the 3rd plaintiff. He adopted his statement dated 12.7.2017 as his evidence. He identified himself as a brother in law of Patrick Kokiyo (Deceased). He avers that when Kokiyo died, he is the one who was left in charge of the family. They then agreed as a family that the land would be registered in the name of 1st plaintiff.

7. PW4 NICHOLAS ASURAN adopted his statement dated 12.7.2012 as his evidence. He avers that he is the chairman of council of elders of the Turkana community and he is also a former chief of west location where the suit land is situated. He avers that the suit land belonged to Patrick Kokiyo, the father of 1st plaintiff. PW5 LAWRENCE KAMARU AKORI adopted his statement dated 12.7.2017 as his evidence. He avers that he is a neighbor of the plaintiffs. He avers that the suit land was occupied by Kokiyo and his family and that the land has never been community land.

The Defendants Case

8. **DW1 EKAI ESUNYEN** is the 4th defendant. He adopted his statement dated 16th April 2018 where he stated that he was born and brought up in the suit land. He has been living therein where he has extensively developed his portion which he was given by his grandfather. He has constructed a semi-permanent house. He further states that plaintiffs herein are total strangers and have never stepped on the suit land. On 2013 they (defendants) sued the county council of Isiolo restraining them from demarcating the said land and thereafter they came to learn of this suit and where they were served with court papers. DW1 prays that the suit land be reverted to the original owners who total to about 200 families.

9. **DW2 KEYANAI MARIO** also adopted his statement dated 16th April 2018 where he stated that he had been living on the suit land and has developed his portion extensively. He avers that as a pastor he requested the community elders to give him the land to build a church in 1984. He built a church, school and hospital through help of well-wishers. A borehole was also drilled. DW2 avers that plaintiff's father was a member of his church as a church elder. In that capacity, Kokiyo was given a portion to stay as a preacher which he did until his death. The elders who gave DW2 land to construct the church are the defendants and as such the plaintiffs cannot claim church plot as it serves the community.

10. **DW3 LOROT NICHOLAS EWATON** also adopted his statement dated 16th April 2018 where he stated that he was elected as the chairman of the community's land committee on 29th December 2012. The community since 1902 has lived at Isiolo in the following areas; Epiding/Kijito, Kambi Adome/Shambani, Lotiki and Aramachi. Since then, the community has used the land for grazing its livestock, human settlement, boreholes, schools and churches, burial sites shrines etc. and still uses the land to date.

11. In the year 2012 at around December the community came to learn that the county council of Isiolo had through its meetings passed resolutions to alienate, allocate and give legal interest of the said lands or parts of the said land to other persons, companies, institutions and/entities other than the community that owns the suit land. The council instructed the Isiolo district planner to prepare PDP's (Part Development Plans) which he did and went ahead to gazette one such PDP. It is clear then that the council intends to dispossess the community of its lands by allocating it to third parties other than the community.

Analysis and Determination

12. I have carefully perused through the evidence adduced herein and the submissions of the rival parties. I frame the issues for determination as follows;

a. Whether this suit is res judicata?

b. Whether this court should grant the permanent injunction being sought by the Plaintiffs?

Res Judicata

13. The defendants in their submissions argued that this suit is res judicata on the basis that there is a similar suit which was filed by parties herein seeking for an order stopping the part development Plans(PDPS) in ELC case No. 58 of 2013. The 4th defendant in this suit is also the 9th Plaintiff in ELC No. 58 of 2013, where the orders were issued stopping the PDPS in that area known as EPINA/KIJITO, KAMBI ADOME/SHAMBANI LOTIKI and ALAMACHI. The plaintiffs on the other hand argued that it has not been shown that there was another suit between the plaintiffs and the defendants over the suit property. It is further argued that plaintiffs' names are not mentioned in the said order and the subject matter of this suit is not shown anywhere.

14. **Section 7 of the Civil Procedure Code** provides that;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim,

litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

15. In the case of **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others Nrb. CA 36 of 1996**, the court stated that;

“In order to rely on the defence of res judicata there must be:

- (i.) a previous suit in which the matter was in issue;**
- (ii.) The parties were the same or litigating under the same title.**
- (iii.) A competent court heard the matter in issue;**
- (iv.) The issue has been raised once again in a fresh suit.**

16. I find that indeed a suit no Meru ELC NO 53 OF 2013 did exist, where by Lorot Nicholas Ewaton (DW3 herein) and 9 others had sued the County Government of Isiolo, The isiolo district physical planner and the Attorney General as the defendants. This suit was transferred to Isiolo Chief Magistrates’ court on **17.1.2018**, hence further particulars cannot be ascertained from the said file. However, I find that the Interested party (County Government of Isiolo) did file an application on 14.12.2016, whereby they state that the other suit was filed on 20.4.2013, where orders were sought to stop the County Government from preparing the PDPS. Even if the interested party did not participate in this trial it is clear that the suit does exist. The plaintiffs here cannot feign ignorance of the same. Court documents are public documents which can be inspected to ascertain their existence. Part of the documents which plaintiffs have relied on in their case herein is a PDP allegedly issued on 1.10.2015. It was hence issued during the pendency of the other suit. It follows that any judgment that may be given herein has the potential of being in conflict with the judgment in the Isiolo case. For instance, if this court finds that plaintiff’s case is merited, and in the Isiolo case, the plaintiffs therein also succeed, the ensuing the orders would be absurd! A court of law ought to issue orders that bring logic and finality in a dispute, and not to throw fireworks in the mix. The provisions of section 7 of the civil procedure act were meant to cure such absurdities. I am inclined to believe that the subject matter herein is the same as in the Isiolo matter. And considering that the Isiolo case was filed in 2013, then this suit is certainly Res judicata.

Whether this court should grant the permanent injunction being sought by the Plaintiffs?

17. Plaintiffs herein claim that 1st plaintiff is the Registered owner of the suit land. The 1st plaintiff stated that he inherited the land from his father in 1991 to hold in trust for himself and 2nd and 3rd plaintiffs. DW1 similarly claimed that he was born and brought up on the suit land. Additionally he has extensively developed his portion where he has constructed a semi-permanent home. DW2 reiterated the same and laid claim on the suit land as he has extensively developed it as a church. The defendants admitted that the plaintiff’s father was an elder at the church and was given land to live on in the year 1984. To support their claims the plaintiffs produced copies of receipts for payment of rates, certificate of beacon, minutes and documents of development plan.

18. Article 61 of the Constitution provides that;

“(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”.

19. Thus a claimant of land in Kenya ought to adduce evidence to support the category of land the suit land falls under. The plaintiffs claim that the land is registered in 1st plaintiffs name is not supported by clear and firm evidence. In the previous land regime (before 2012), registration of land fell mainly under the **Registered Land Act Cap 300 and Registration of titles act cap 281** (Repealed) etc. The land doesn’t appear to have been registered under any known law. That however does not mean that a claimant did not have any rights and interests in land. Land could also be acquired through a process known as allotment, where by the Commissioner of lands would eventually issue the claimant with a title either under **RLA** or **RTA**. One could also get land through the adjudication process whereby ascertainment of rights and interests in land were carried out through two main statutes that is the Land Consolidation Act and the **Land Adjudication Act**. In this process, the customary land rights evolve and change to individual tenure system where the end process is the issuance of titles. There is still another process which was known as the setting apart under section 117 of the old constitution and under the Trust land Act. One could also acquire rights and interests in land through settlement fund trustees.

20. Going through the documents and evidence of the plaintiff one is not able to tell under which process the claim falls under. I will explore the various possibilities in which plaintiffs could claim the land. Plaintiffs claim that this has been their land since time immemorial. If that be the case, then the claim would be based on customary land rights. This means that such rights and interests in the suit land would have to be ascertained through the process of adjudication which does not fall under the ambit of court process. The other possibility is that of allocation. For this to happen one is issued with an allotment document which contains terms and conditions thereof. The land may be un-surveyed but would have to be ultimately surveyed and demarcated. I have not seen any such allotment document given to the plaintiffs. As for the setting apart process, the same is detailed under section 13 of the **Trust Land Act** (repealed) which details are not manifested in this case. I am not able to find any other ways that plaintiffs could claim the land for members of Turkana Community.

21. What is clearly apparent is that the Members of the Turkana community appear to be the ones claiming the land. The plaintiffs are such Members save that they want the land as private land where as defendants are claiming that the same is community land.

22. I have no doubts that the land is not registered. However, I will hesitate to make any pronouncement on which category the land falls under, but certainly the land doesn’t belong to plaintiffs alone.

23. For now, I find that plaintiffs have on a balance of probabilities not proved their case. The case is dismissed with costs to defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF APRIL, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ashaba holding brief for Kiogora for defendant

All 3 plaintiffs

4th and 7th defendants

HON. LUCY. N. MBUGUA

ELC JUDGE