



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO.62 OF 2017

FORMERLY NAKURU ELC NO. 416 OF 2013

ENKUTOTO ECO TOURISM TRUST.....PLAINTIFF

-VERSUS-

BEN TOPOIKA KIPENO.....DEFENDANT

JUDGEMENT

By a Plaint dated 4th June, 2013 the Plaintiff filed the instant suit seeking for the following orders: -

- (i) An order against the Defendant to immediately vacate the suit land
- (ii) An order that the Plaintiff is entitled to General Damages for the inconvenience occasioned by the Defendant
- (iii) Costs
- (iv) Such other relief that the court may grant in the circumstances.

It is the Plaintiff's case that at material times to the suit herein the Land Parcel No. TRANS MARA/KIMINTET 'D'/479 was allocated to the beneficiaries of the trust Plaintiff names:

- (a) Paul Koiyianto Kimaai
- (b) Sitato Olomampali Ikonet
- (c) Muntui Ole Sairowa(deceased)
- (d) Sadiya Ole Nanteya Laburra
- (e) Litipit Ole Koirien Neusiet
- (f) Charles Parketure Sharkeki

That pursuant to the aforesaid allocation, the beneficiaries on 18th January, 2001 appointed the following: -

- (a) Sitato Olomampuli Ikolet
- (b) Sidiya Olenteya Labura
- (c) Muntui Ole Kima
- (d) Charles Shakeki Parketure

(e) Seeko Ole Reyia Saikabu

Enkutoto Eco-Tourism Trust for the purpose of managing the trust property and to hold the suit parcel on behalf of the beneficiaries.

It is the Plaintiff's further contention that the Defendant was hired by the Plaintiff as an employee to market the activities of the trust at a monthly salary, however he avers that he acted in bad faith by engaging in acts that were inconsistent with his terms of employment which included building structures that were inconsistent with those on the trust land, diverting tourists to other establishment, sabotaging the trust activities and refusing to attend meetings they further contended that the Defendant refused to vacate the suit parcel which led to the trust terminating his employment contract and to issue Notice to him to vacate the suit parcel.

The Defendant in opposition to the suit had filed a statement of defence and a counter claim. In his defence the Defendant denied the Plaintiff's averment that the suit parcel was the property of the Plaintiff alone but stated that he together with other nine members pursuant to a letter dated 17th September, 1998 by the District Land Adjudication Officer Trans Mara and that the Plaintiff in a bid to dispose him of his share in the suit land prepared and registered a deed of declaration of trust without his knowledge and consent.

The Defendant averred that contrary to the Plaintiff's allegations he is a bonafide allottee and not a trespasser on the suit parcel of land in which he has been in occupation for a longtime and has his matrimonial home. The Defendant also denied that he was an employee of the Plaintiff but a bonafide beneficiary of trust in which he was even one of the signatories of a lease agreement between the owners of the suit land and East Africa Cultural Experiences limited which ran Olonana Camp with the suit land.

In his counter claim, the Defendant (Plaintiff) contended that he was one of the allottees and a beneficiary of the suit land but the Plaintiff (Defendant) constituted a trust to his exclusion without his name in which a lease was signed in respect of the suit land with East Africa Cultural Experiences Limited for a period of 33 years to construct a camp in the suit land which lease was registered without his knowledge.

The Defendant in his counter claim alleges fraud by the Plaintiff (Defendant) on the grounds that they registered the deed of trust without his knowledge, failing to give him a share of proceeds from the trust and claiming that he is an employee when he is a beneficiary of both the suit land and the trust.

The Defendant in his counterclaim thus prayed for

- (a) A declaration that the Plaintiff is a bona fide allottee of all that parcel of land known as Trans Mara/Kimintet 'D'/479
- (b) A declaration that the Plaintiff is a beneficiary and a member of Enkutoto Eco Tourism Trust, the Defendant herein and is entitled to all monetary emoluments accruing by virtue of being a member of the trust
- (c) That the Defendant, his servants, agents and or assigns be permanently restrained from interfering in any way whatsoever with the Plaintiff's peaceful occupation and possession of his portion within Trans Mara/Kimintet 'D'/479.
- (d) Any other relief that the court may deem fit to grant.

When the suit proceeded for hearing Charles Sharkeki testified for the Plaintiff trust. He stated that the suit land was part of a Group Ranch that was demarcated in 1991 and the land allocated to the six persons including himself and that they later started the Plaintiff trust in 2001. He produced before court a deed of trust and a certificate of incorporation of the trust dated 18/1/2001.

PW1 stated that the Defendant started complaining about his exclusion when he was just an employee of the Plaintiff charged with the responsibility of marketing the activities of the trust and the sourcing of clients. He further stated that the Defendant started to construct structures on the trust land despite protests from the members of the trust and despite calling him to several meetings to discuss the construction he refused to attend and that by a resolution of the members he was expelled and ceased being an employee of the trust and he produced Plaintiff Exhibit 3 which were the minutes of the aforesaid meeting and that despite being asked to vacate from the suit land he refused to vacate the said land.

On cross-examination PW1 stated that the suit land was first allocated in 1991 after the adjudication of the Group Ranch land and they later obtained title to the land against a letter form the land Adjudication officer and that the said letter was prepared in respect of Land Parcel Trans Mara/Kimintet 'D'/497 which contained the name of the owners.

He further stated that the Defendant currently lives on the suit land and that he was previously a member of the trust though he was expelled and duly notified and that he was also an employee of the trust and the same was later terminated on account of the Defendant's actions.

The Defendant testified on his behalf and stated that he lived on Land Parcel Trans Mara/Kimintet 'D'/479 from 1984 to date. He stated that he was one of the promoters of the trust which owns the suit land. He produced letters dated 17/8/98 and 13/11/95 which evidenced that.

The Defendant further contended that they sought for an investor to buy a high end camp on the suit land and they entered into a lease agreement with East Africa Cultural Experience Limited for a period of 33 years which is currently the Olonana Sanctuary Camp run by Abercombie and Kent.

He further averred that the officials of Trust have not been paying him what was due for being a member. He stated that he was one that procured the title to the land with the assistance of the late Justice Ole Keinwa and despite all that he never received any shares from the trust.

The Defendant contends that he was not aware of any meeting held on 18/1/01 to reconstitute the trust that excluded him from the trust.

On cross-examination the Defendant stated that the name Ben Topoika Neusiet is not his name as indicated in a letter dated 1/9/97. He confirmed that there was a lease that the Plaintiff entered into with both Cultural Experience Limited, Enkutoto Olololo Limited who are parties not to the suit. He also confirmed that the letter dated 9/11/18 from the late Justice Ole Keiwa was done on a plain paper and not on his official letterhead.

At the close of the case both parties filed written submissions. The Plaintiff in its submissions stated that the Defendant was a mere employee of the Plaintiff and was only allowed to live on the suit as an employee.

The Plaintiff in their submissions also took issues with the bundle of documents that were produced as Defence Exhibits 1 and 2 which it alleges that they describe two different persons. The Plaintiff contends that in the verifying affidavit dated 3/5/17 the Defendant is described as 'Ben Topoika Kipeno' which is different from that of the name on its exhibits. The Plaintiff also contended that annexures exhibit 3 have no relevance as it relates to a party that is not involved in the suit.

On whether the Defendant was a member of the trust the Plaintiff contends that he was an employee and was not entitled to any benefits. Further they averred that the Defendant has not stated what amount he is owned by the trust.

The Defendant on his part in his submissions stated that he was a member of the trust and a beneficiary of the parcel of land. He relied on a letter dated 17/8/1998 from the District Land Adjudication officer and that the registration of the trust was fraudulently leaving him out. He further contended that he is one of the rightful owners of Land Parcel Kimentet 'D' /479 and thus should not be denied to fully benefit from the activities that are carried on the suit parcel.

I have carefully considered the testimony of the witness in the matter and the submissions that were filed by the respective parties and the issues for determination before me are:-

- (i) Who is the owner of Land Parcel Trans Mara/Kimintet 'D'/479
- (ii) What are the appropriate orders in the circumstances of the case

From the evidence and the pleadings filed it is not in dispute that the suit land was allocated through the land adjudication process in 1995 by a letter dated 13/11/1995. The District Land Adjudication Officer confirmed the owner of the land as:

1. Paul Koyianto Kimaai
2. Charles Sharkeki Parketure
3. Sitato Ololmampuli Lonet
4. Sadiyia Nanteya Ololabura
5. Muntui Ole Sairowa Kiina
6. Letimit Ole Koirien Neusiet
7. Ben Topuika Neusiet

By another letter dated 17/8/1998 in which the Land Adjudication Officer certified the rightful owners of the land as:-

1. Paul Koiyianto Nimaai
2. Sitato Olomampuli Ikotet
3. Sadiya Olenateya Labuna
4. Muntui Ole Kima
5. Letiriti Koilel Neusiet
6. Charles Sharketi Parketure
7. David Ololpisiae Olemoita
8. Seeko Oleretia Saikabu
9. Lerendei Ole Sadera

10. Ben Tapoika Kipeno

Whereas the first letter outlined the owners of the land as seven (7) individuals the letter dated 17/8/19 indicated the owners as ten (10) members. It is battling as to how letters from the same office show such discrepancy. The Plaintiff contend that the Defendant was not a member of the initial allottees shown on the letter dated 13th November, 1995. The Defendant also based his interest on the title to the letter dated 17/8/98 whereas on the letter dated 13/11/98 the District Land Adjudication officer is explicit as to who the owner of Land parcel Trans Mara/Kimentet 'D'/479 is, he states that the land is owned by the 7 individuals appearing on the said letter. However, on the letter dated 17/5/1998 he stated that the suit land was rightfully owned by Enkutoto Eco Tourism Trust and went ahead to enumerate the members of the group.

From the above, it is evident that the owner of Land Parcel Trans Mara/Kimentet 'D'/479 where by the original 7 members and not the later who constituted themselves into the trust. It is the Plaintiff's contentions that the name Ben Topoika Neusiet is not that of the Defendant.

From the testimony of the witnesses I find the Plaintiff have discharged the bundle of proof on a balance of probabilities that indeed the Defendant was not among the initial allottee of the suit land and that the Defendant was not among the initial allottee of the suit land.

On whether the Defendant was a member of the trust it is the Plaintiff's contention that the Defendant was an employee of the trust and not a member. The evidence of a member of trust or any other organization can be derived from the documents that constitutes the organ or from a register if one exists. In the instant case the reference document of who a member is the deed of declaration trust. In the instant case had two deeds of declaration of trust that is the one dated 18/1/01 in which the defendant is not a member of trust and with the absence of any other evidence I find that the defendant by the dint of the registration of the deed of declaration trust dated 18/1/01 he ceased being an employee.

As to whether the Plaintiffs have suffered damages there is no proof that indeed they will suffer any damages and since the allegations of the counter claim have not been proved I consequently dismiss it.

In view of the above I hold that the Plaintiff has proved its case on a balance of probabilities and I thus enter judgement for the Plaintiff against the defendant in the following terms: -

- (i) That the Defendant do vacate the trust land within 90 days of the Judgement herein and in default the Plaintiff be at liberty to apply.
- (ii) That I award cost of the suit to the plaintiff.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **23rd** day of **July, 2019**

Mohammed Kullow

Judge

23/7/19

In the presence of:-

Mr Kiptoo for the Defendant

Mr Kambo holding brief for Munyororo for the Plaintiff

CA:Chuma