



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 90 OF 2012

JULIUS K. BETT & 14 OTHERS.....PLAINTIFFS

VERSUS

JOSEPH KOROMICHA & 9 OTHERS.....DEFENDANTS

JUDGMENT

(plaintiffs suing the defendants that they have encroached on their land; defendants making counterclaim that they are lawful owners of the suit properties; only 2 plaintiffs giving evidence and no evidence of encroachment given; defendants not testifying to support their counterclaim; both plaintiffs' and defendants' suit dismissed).

1. This is now an old suit commenced by way of plaint in March 2004. There are 15 plaintiffs and they aver that they are the registered owners of the land parcels Olenguruone/Keringet Block 1/204, 221, 208, 223, 211, 254, 233, 257, 83, 72, 101, 184, 218, 220 and 205, respectively (hereinafter referred collectively as "the suit properties"). They have pleaded that on diverse dates, the defendants have encroached and continue to do so in their said land parcels. In the suit, they wish to be declared as the lawful owners of the suit properties, and for the defendants to be permanently restrained from the said properties.

2. The defendants filed a defence which they later amended on 2 November 2005 to include a counterclaim. They denied that the plaintiffs are the registered proprietors of the suit properties. They also denied that they have encroached into the suit properties or that they continue to do so. Without prejudice, they have averred that if the plaintiffs have titles, the same were obtained fraudulently. In the counterclaim, they have pleaded that they are the rightful owners of the suit properties and they have sought a declaration to that effect. They also wish to have the plaintiffs permanently restrained from the suit properties.

3. On 31 January 2018, a date that the matter was scheduled to proceed, Mr. Nyamwange, learned counsel for the plaintiffs informed the court that he has since learnt that the 3rd, 4th, 7th, 10th and 14th plaintiffs, and the 1st, 3rd, 4th, and 8th defendants, are deceased. I adjourned the matter for counsel to verify the position, and later on 19 March 2019, I was supplied with Certificates of Death for the 3rd plaintiff who died on 15 January 2011, the 7th plaintiff who died on 24 May 2016, the 10th plaintiff who died on 13 March 2003, and the 14th plaintiff, who died on 5 February 2016. I struck out the name of Taplule Chelangat Mutai, the named 10th plaintiff for it is apparent that she was dead when this suit was filed. I then marked the suits of the 3rd, 7th, and 14th plaintiffs, as abated since no substitution had been made within one year of their death, as provided for in Order 24 of the Civil Procedure Rules, 2010. On the part of the defendants, I got evidence that the 3rd, 4th and 8th defendants are deceased and more than one year had passed without them being substituted. I also marked their case as abated. I then directed the suit to proceed and further directed that each plaintiff will need to testify to prove his/her case.

4. Only two persons testified, that is the 1st and the 5th plaintiffs. The 1st plaintiff, Julius Kipkoske Bett, testified that he was given land by Kirobon Farmers and he is registered as owner of the land parcel Olenguruone/Keringet Block I (Kirobon)/204 measuring 1.210 Ha. He contended that the defendants are claiming his land and he singled out one arap Soi. He was cross-examined on whether he has documents to show that the land was allotted to him by Kirobon Farmers, but he had none. He however explained that he would not have gotten title if the same had not been allotted to him by the Society.

5. The 5th plaintiff on his part testified that he is the owner of the land parcel Olenguruone/Keringet Block 2/ 211. He claimed that Paul Ngeny is unfairly claiming his land and he wished to have a declaration that this is indeed his land. He was again cross-examined on whether he had documents from Kirobon Farmers which he did not carry.

6. The defence did not have any witness and Mr. Koome, learned counsel for the defendants, duly closed their case without calling any evidence.

7. I invited counsel to submit and they filed written submissions. I have taken note of these submissions in arriving at my decision. I take

note that in his submissions, counsel for the defendants tried to point me to a decision in Nakuru CM Civil Application No. 6 of 2002, to support the claim of the defendants. There was a preliminary objection that the defendant had filed which tried to allege that the plaintiffs' suit is res judicata the said case, and I directed that the issue whether this suit is res judicata, be determined within the proceedings. That means that evidence needed to be led about the existence of this case, and I am afraid that I cannot read too much into that decision as it was never produced as an exhibit, and it cannot be introduced as an exhibit during submissions.

8. It will be recalled that only the 1st and 5th defendants presented their cases. They did mention that the defendants are claiming that the land registered in the names of the 1st and 5th plaintiffs is not rightfully theirs. I do note that in the plaint, it was contended that on diverse dates the defendants have encroached and continue to encroach the suit properties. However, the 1st and 5th defendants did not give me any evidence of encroachment, only stating that one Arap Soi, and a Mr. Paul Ngeny, have been claiming their respective parcels of land. The only Mr. Soi named as defendant is the 8th defendant and he is already dead and the suit for and/or against him has already been marked as abated. I have seen Paul Ngeny as 5th defendant but as I have mentioned, no evidence of encroachment was given. The only evidence is that it was said that he claims the land. I was never referred to any document or anything which would make me believe that the said Paul Ngeny is claiming the 5th plaintiff's land. The other plaintiffs did not lead any evidence to prove their suits but again no evidence was led for the defendants.

9. I am not persuaded that the 1st and 5th plaintiffs have proved anything and I have to dismiss their case. The other plaintiffs still left in the suit also brought no evidence and I have no option but to also dismiss their case. Neither did any of the defendants present any evidence and their counterclaim is dismissed. I am afraid that this is not the sort of case, given the nature of the pleadings and the very thin evidence, that this court can make any substantive orders on.

10. In essence, neither the plaintiffs nor defendants have proved anything against the other in this suit. I in fact wonder why they brought this suit in the first place. The only issue is costs. Both sides have failed and my order is that each party do bear his and/or her own costs.

11. Orders accordingly.

Dated, signed and delivered in open court at Nakuru 18th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Karuga holding brief for Ms. Cheloti for the plaintiffs.

Ms. Amina holding brief for Mr. Kiplenge for the defendants.

Court Assistants: Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU