



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 388 OF 2013

RICHARD RUTTO CHELANG'A.....1ST PLAINTIFF

PAUL MURKOMEN SUTER.....2ND PLAINTIFF

VERSUS

DAVID CHELANG'A YEGO.....1ST DEFENDANT

ISAAC KIPCHUMBA YEGO.....2ND DEFENDANT

ABRAHAM LOTIPAI.....3RD DEFENDANT

JUDGMENT

By a plaint dated 12th July 2013 and amended on 12th February 2018 the plaintiffs herein sued the defendants jointly and severally seeking for the following orders;

- a) An order evicting the defendants from the suit property, namely Latir Farm measuring 2 acres or thereabout.
- b) An order for payment of general damages
- c) An order for costs and interests of the suit.
- d) Any other orders the court deems fit to issue.

The defendants entered appearance and filed their statement of defence on 20th August 2013 and the matter proceeded to full hearing.

PLAINTIFF'S CASE

PW 1 gave evidence and stated that the defendants have trespassed on their suit land. It was his evidence that this matter was handled by elders and the area Chief who wrote a report that the defendants move out of the parcel of land but the defendants have refused to adhere to the terms of the report.

PW1 produced the minutes and the reports from the Chief as exhibits before the court. It was also PW1's evidence that there was a fight that broke out between the Pokots and the Marakwets which led to the Marakwets fleeing to the mountains for safety. He further stated that after the fight the defendants occupied the suit land belonging to the plaintiffs and refused to move despite several meetings and *barazas*.

PW1 stated that this matter was referred to the Asus Elders and the Chief, Talai location to try and mediate the dispute. The parties testified and produced evidence showing that the parties participated in various meetings that were organized by appointed arbitrators/mediators by this court. PW1 further stated that the defendants are yet to comply with the resolutions passed by the elders and the chief that the defendants do vacate the suit land.

It was PW1's evidence that the 1st meeting was convened on 22nd April 2013 before the plaintiffs instituted the suit but it bore no fruit which minutes were produced as Pex2. That after filing this suit the same was referred to mediation on 5th June 2014 and that a 2nd meeting was convened on 23rd June 2014 by the Chief Talai location where a panel of elders were invited to continue from the previous meeting. He

stated that the defendants had been directed by their parents to move out of the land but they refused. The meeting was concluded and vide a letter dated 24th June 2014 the minutes thereof were forwarded to court in compliance with the order of 5th June 2014.

PW1 further gave evidence that on 14th October 2014 the matter came up for mention before the Judge to confirm if the report by the elders had been filed and the same was in the affirmative but the Judge referred the matter to the elders for another session where both parties were to be present, call witnesses and record all proceedings. That the elders were to evaluate the testimonies and make a decision and the chief was mandated to record the testimonies and the elders' verdict.

PW1 urged the court to enter judgment as prayed in the plaint and order for the eviction of the defendants.

On cross examination by the defendants, PW1 admitted that the defendants are in occupation and cultivating the suit land. He also confirmed that the land belongs to the community but individuals have their own portions.

DEFENDANT'S CASE

DW1 gave evidence and stated that the suit land is community land which was given to them by their parents. He further stated that they are in occupation of the suit land. It was further their evidence that the land cannot be classified as private land as no titles or adjudication has been done.

The defendants also stated that the claim is between the members of two clans and therefore the land is held under customary rights. Or, that the same falls under the category of lands under special areas in regards to the Land Adjudication Act, cap 283 (repealed). The defendants also stated that the plaintiffs have not established that the suit land has been subjected to the processes that were contemplated by the Land Adjudication Act and further that they have not claimed that the process of adjudication or consolidation is ongoing or whether it has infringed on their rights.

The defendants also submitted that the Land Adjudication Act had clear provisions as to ascertainment of interests in land and that there is established a committee whose functions include adjudicating and deciding upon conflicts in accordance with the recognized customary law. An arbitration board was also established to determine matters referred to it accordingly.

The defendants contended that the plaintiffs ought to have sought redress from the relevant institutions before filing this case. Further that the Community Land Act (2016) which is now applicable to disputes relating to the suit land provides that one must exhaust all other alternative dispute resolution mechanisms before instituting a suit. Any ADR should satisfy the principles of a fair hearing and the one held by the elders falls short of those principles. It also provides for the procedures of ascertainment of interests in communal lands.

The defendants cited the case of *M'Ithana M'Ithiriga v Murithi M'Amburubua*, Meru ELC No. 198 of 2016 where it was held that the court had no jurisdiction to usurp powers created by the Land Adjudication Act and the Community Land Act which are creatures of the legislature. The defendants further cited the case of **Kaume Chabani v Mwathi Mutheu** where the court found that it had no jurisdiction to handle matters concerning unadjudicated land unless when dealing with questions governing the integrity of the adjudication process. The defendants therefore urged the court to dismiss the plaintiffs' suit with costs.

PLAINTIFFS' SUBMISSIONS

Counsel for the plaintiffs gave a brief background to the case and submitted that vide a letter dated 28th November 2014 addressed to the Deputy Registrar ELC Eldoret it confirmed that a meeting had been held whereby the defendants appended their signatures. Counsel submitted that the defendants have not challenged the orders issued by the court referring the matter for arbitration and neither have they filed a suit challenging the decision of the chiefs and elders.

Counsel further submitted that the evidence shows that the defendants participated in the process and are therefore estopped from denouncing the outcome. Further that the defendants have not produced any evidence to show that they are the legitimate owners of the suit land.

Counsel relied on Section 107 of the Evidence Act with regards to the burden of proof and cited the case of **Nthumbi Muchungu & 12 others v Herbert Nthiiri & 16 others** where the court was on the declaration of ownership of land by the court.

Counsel further submitted that the land in question is ancestral land and has been passed on from generation to generation and no none of the parties are claiming it on a basis of a valid title. Counsel therefore urged the court to consider the evidence and the resolution of the elders and make a determination in favour of the plaintiffs.

ANALYSIS AND DETERMINATION

This is a matter that involves unregistered and unadjudicated land which the plaintiffs refer to as ancestral land. Before this matter was filed in court the parties had tried mediation before the elders but the same failed to bear fruits.

The court latter referred this case for arbitration by Elders but when the report was filed in court the court redirected the parties to go back to the elders and ensure that all the parties are given an opportunity to present their cases and a verdict recorded by the chief and filed in court. There has been back and forth between the elders and the court with no solution to the dispute.

The issues for determination in this matter are as to whether the claim is proper before the court and whether the plaintiffs are entitled to the

reliefs sought.

On the first issue as to whether the plaintiffs' claim is proper before the court, The Constitution recognizes three categories of land, that is public private and community land. Article 61 of the Constitution provides as follows:

(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.

Article 63 of the Constitution, community land is defined as;

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

The Community Land Act was enacted to give effect to the provisions of Article 63 of the Constitution. It therefore operationalizes the provisions of Article 63 of the Constitution. The Act defines community as a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes—

a) Common ancestry;

b) Similar culture or unique mode of livelihood;

c) Socio-economic or other similar common interest;

d) Geographical space;

e) Ecological space;

f) Ethnicity.

Section 12 of The Community Land Act provides for classes of community land holding that community land maybe held

a) as communal land

b) as family or clan land

c) as reserve land ; or

d) in any other category of land recognized under the Act or other written law

From the above classification it is evident that the land is community land which is occupied by clan members. The arbitration minutes by the elders also referred to Kaplakeka clan. The minutes indicate that the defendants were uncooperative and that they did not pay the fees requested by the elders. From the report the elders castigated the defendants in a manner that showed that there was no impartiality in the adjudication of the dispute.

The suit land has not adhered to the provisions of Community Land Act on ascertainment and recognition of community land. The Plaintiffs were not clear whether they were suing as individuals or as members of a clan who are entitled to the land. The plaint describes them as owners of 2 acres of Litir Farm being members of Kaplakeka clan. They also averred in the plaint that the defendants who are members of Kasimai clan have trespassed on the suit land.

Are the plaintiffs suing as members of Kaplakeka clan or as individuals against the defendants as members of Kasimai clans? If they are doing so then they need to file a representative suit. Further there are laid down procedures of recognition and ascertainment of rights in community land which have not been satisfied.

Section 5 of the Community Land Act provides for the protection of community land rights and states that:

Customary land rights shall be recognized, adjudicated and documented for purposes of registration in accordance with this Act and any other written law.

It also recognizes customary land rights, including those held in common which shall have equal force and effect in law with freehold or leasehold rights acquired through allocation registration or transfer.

I find that the plaintiffs' claim is warped and the procedures of ascertainment and recognition of their rights as per the Community Land Act have not been exhausted. The plaintiffs are also not sure whether they are claiming the parcel of land by virtue of being members of a clan or as individuals. The plaintiffs' claim therefore fails as the court can adjudicate on the matter and affect members of the clan who are not included in this suit. That would condemn parties unheard.

Having found that the plaintiffs' suit is flawed it follows that they are not entitled to the orders sought for eviction of the defendants. The plaintiffs have failed to prove that they have proprietary rights to the suit land. They have not provided any documents to prove that the suit land was registered to them or to their community in accordance with Community Land Act. The land is unregistered and no process of adjudication is ongoing. As was stated in **Samson Nkoye Mwinja & another v Joseph Iguna Kamwara & 2 others [2018] eKLR** the court lacks power to assert non-existent rights.

I have considered the pleadings, the evidence and documents produced together with judicial authorities and come to the conclusion that the plaintiffs' have failed to prove their case on a balance of probabilities and therefore is dismissed with costs to the defendants.

Dated and delivered at Eldoret on this 17th day of October, 2019.

M.A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Miss. Bonareri holding brief for Mr. Isiji for Plaintiffs and the Defendants in person.

Mr. Mwelem – court Assistant