



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 224 OF 2015

(FORMERLY KERUGOYA 922 OF 2013)

NTHUMBI MUCHUNGU & 12 OTHERS PLAINTIFF

VERSUS

HERBERT NTHIIRI & 16 OTHERS DEFENDANTS

JUDGEMENT

1. There are several suits herein whose reference numbers have been changing over the years. The suits appear to have been consolidated for hearing and determination as one suit. The suits appear to be *Embu HCCC No. 87 of 1997*, *Embu HCCC No 196 of 1997* and *Embu HCCC No. 867 of 1997*.

2. In *Embu HCCC No 196 of 1997*, the Plaintiff James Ben Mugo, who claimed to be a member of Gekara clan sued the Defendants over what he pleaded was fraudulent appropriation of Gekara clan land comprised in *Title No. MBETI/GACHURIRI/172* (hereinafter referred to as the "suit property"). He, therefore, sought the following reliefs against the Defendants who were said to be members and trustees of Gekara clan in respect of the suit property;

- a) *A declaration and order that the registration of Gekara Group Ranch over Mbeti/Gachuriri/172 is fraudulent.*
- b) *An order that the Plaintiff is entitled to a share out of Mbeti/Gachuriri/172 and more particularly to Mbeti/Gachuriri/438 and 439 as are the other interested persons.*
- c) *An order that the 10 trustees of the group Ranch are trustees of Gekara clan and not Gekara Group Ranch over Mbeti/Gachuriri/172 and an order of the rectification of the register thereof.*
- d) *Costs of this suit with interest.*
- e) *Such further or better relief as the court may deem fit.*

3. In *Embu HCCC No. 87 of 1997*, there were 13 Plaintiffs (all members of Gekara clan) who sued 17 Defendants, the 1st five whom were said to be trustees of Gekara clan whereas the rest were Defendants who were trustees of the various sub-divisions of the suit property. Those trustees were said to be either relatives of the trustees of purchasers. The Plaintiffs also pleaded to be entitled to parts of the suit property by virtue of adverse possession under the ***Limitation of Actions Act (Cap 22)***.

4. The Plaintiffs, therefore, sought the following reliefs against the Defendants;

- a) *That a declaration that the Plaintiffs are entitled to the parcels each occupies.*
- b) *That each Defendant do transfer the titles registered in their respective names to the Plaintiffs occupying the respective parcels of the land.*
- c) *The 1st, 2nd, 3rd, 4th and 5th Defendants be ordered to pay damages to the Plaintiffs for breach of trust.*
- d) *The Defendant be ordered to pay costs of this suit jointly and severally.*
- e) *Any other or better relief as to the court seems expedient be granted.*

5. The Defendants denied all the allegations raised by the Plaintiffs and in particular, denied that they were leaders or representatives of Gekara clan. They also denied that the suit property was ever owned by Gekara clan and that the Plaintiffs had any beneficial, legal or equitable interest in the suit property or any subdivisions thereof.

6. The Defendants also pleaded that at all material times, the suit property was owned by Gekara Group Ranch (hereinafter known as "Gekara Group") which was a body registered under the Land (Group Representatives) Act 1968. It was pleaded in further defence that the instant claims by members of Gekara clan were *res judicata* in view of an earlier court ruling in *High Court Misc Civil Application No. 162 of 1979* in which the clan lost its fight for the suit property.

7. The Plaintiffs called 4 witnesses and closed their case. They gave oral evidence and referred to their witness statements in their testimony. The first witness was Nthumbi Muchungu (PW 1) who testified that the suit property originally belonged to Gekara clan and not Gekara Group Ranch as it was eventually registered. The history of the suit property was contained in his witness statements which showed that Gekara clan had teamed up with 4 other clans to contribute land to Ngeru 5 clans Ranching Scheme.

8. When the said Ranch was dissolved, each of the 5 clans apparently got their land back for distribution to its members. It was his case that Gekara clan got back the suit property which was somehow registered in the names of the 1st to 5th Defendants as trustees of "Gekara Group". It was his case that the Plaintiffs have all along been in occupation of various portions of the suit property which had been fraudulently sub-divided and transferred to the 6th – 17th Defendants.

9. The evidence of PW 2, PW 3 and PW 4 supported the evidence of PW 1 that the suit property was originally Gekara clan land and not the property of what the Defendants called Gekara Group. They stated that for a long time, the 1st Defendant, Herbert Nthiiri was the leader or chairman of Gekara clan and that he is the one who engineered the fraudulent acquisition and disposal of the suit property to relatives and outsiders.

10. The Plaintiff in Embu HCCC No. 196 of 1997 stated in his witness statement that the 1st Defendant had failed to forward the names of the trustees nominated by the clan but had instead forwarded his own name and that of his relatives as trustees. The names and relations disclosed in the statement were as follows;

- a) Herbert Nthiiri - Chairman
- b) Kigoro M'tetu - Stepbrother to Herbert Nthiiri
- c) Anderson Mwathi - Son to Herbert Nthiiri
- d) Gibson Kifuti - Son to Herbert Nthiiri
- e) Njiru Kanuthu - Stepbrother to Herbert Nthiiri
- f) Karani Njoka - Brother to Herbert Nthiiri

11. The Defendants called only one witness to testify on their behalf. The witness Anderson Mwathi (DW 1) who is one of the 17 Defendants in the suit. He testified orally and referred to his witness statement dated 22nd September 2017. He conceded that the original land in dispute belonged to the five (5) clans referred to by the Plaintiffs which operated as a group ranch or co-operative society. He, however, stated that the suit property belonged to Gekara Group and not Gekara clan since not all members of the clan were members of Gekara Group. He stated that all necessary approvals and consents were granted by the authorities to enable them subdivide and deal with the suit property.

12. The parties herein did not file an agreed statement of issues for determination. The Plaintiffs filed their own version of issues whereas the Defendants filed none. However, from the pleadings, documents and statements on record, the main issues for determination in this suit may be summarized as follows;

- a) Did Title No. Mbeti/Gachuriri/172 (the suit property) belong to Gekara clan or Gekara Group Ranch?
- b) Is the Plaintiffs' suit *res judicata*?
- c) Are the Plaintiffs entitled to the reliefs sought in the proceedings?
- d) Who shall bear the costs of the suit?

13. The court has considered the evidence on record on the 1st issue. The court is satisfied that at some point in the past some 5 clans namely, Kathi, Gekara, Rweru, Mugwe and Kamumu contributed part of their respective clan lands for the purpose of forming what was called Mihiriga Itano Co-operative Society (or NGARU) for ranching purposes. The court is also satisfied that upon dissolution of the said society, each clan got back their respective parcels of land and that Gekara clan got back the suit property.

14. It would appear that the other 4 clans were able to agree on the sharing and distribution of their portions of land but Gekara clan had a serious hitch. It would appear that their land was registered in the name of an entity known as Gekara Group Ranch which was the preserve of a few members. The evidence shows that this Group was composed mainly of relatives of the 1st Defendant and a few buyers who were sued herein as Defendants.

15. So, how did Gekara clan land move hands to a group under the **Land (Group Representatives) Act, 1968**? That is the real question in controversy here. Under the said Act, representatives of a group may apply for incorporation upon meeting certain requirements set out in the Act and the rules and regulations made thereunder. The preamble to the said Act states that it is,

“An Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act, and for purposes connected therewith and purposes incidental thereto.”

16. The provisions of **section 5** of the said Act provide for the mode of election of group representatives as follows;

“(1) Upon being notified under section 23 (5) (c) of the Land Adjudication Act, (Cap 284) that a group has been advised to apply for group representatives to be incorporated under the Act, the registrar shall convene a meeting of the members of the group, at a specified time and place, to:

a) Adopt a constitution;

b) Elect not more than 10 and not less than three persons to be group representatives of the group; and

c) Elect persons to be the officers of the group in accordance with the constitution.

(2) The registrar or a public officer appointed by him in writing for the purpose shall preside at the meeting to be held under section 5 of the Act.”

17. The 1st schedule to the Act provides for matters to be provided for in the Constitution of every group to include, *inter alia*,

a) The name of the group.

b) A description of the area, determined in accordance with the Land Adjudication Act, 1968 being the land in or over which the group has under recognized customary law, exercised rights recorded under the Act.

c) The persons who are the original members of the group

d) The persons to whom membership is open.

18. On the other hand, **section 2 of the Land Adjudication Act** defines a group as follows;

“Group means a tribe, clan, section, family or other group of persons whose land under recognized customary law belongs communally to the persons who are for the time being members of the group, together with any person of whose land the group is determined to be the owner under the proviso to section 23 (2) (a) of this Act.”

19. In my assessment of the evidence on record, there is no indication that Gekara Group or Gekara Group Ranch was a group which complied with the provisions of section 5 of the Act under which it was registered. There was no indication that the registrar or his representative ever presided over the election of its disputed representatives as required by law. There is also no indication that the said group met the description of characteristics of a group within the meaning of section 2 of the Land Adjudication Act either. The membership of the group consisted mainly of the close relatives of the clan chairman and some purchasers.

20. In my opinion, the registration of the Gekara Group Ranch was a scheme contrived by the 1st Defendant and his accomplices to grab Gekara clan land and to confine it into an exclusive club of a few. It was a dishonest and fraudulent acquisition of clan land using the mechanism of “group representatives” whom they quickly incorporated under the Land (Group Representatives) Act, 1968. The court, therefore, finds and holds that the suit property legitimately belonged to Gekara clan land and not Gekara Group Ranch.

21. The 2nd issue is whether the Plaintiffs’ suit is res judicata on account of the ruling delivered by the *High Court in NBI High Court Misc. Civil Application No. 162 of 1979, Philip Njeru Vs Mucembi Chiragu*. The court has considered that ruling against other material evidence on record. It is evident from the record that the Applicant in that case had challenged the decision of the Minister for Lands in an appeal under **section 29 of the Land Adjudication Act**. The appeal which the Minister had declined to allow related to 28 specific parcels of land which do not fall within the suit property herein. The attempt by the Applicant in that case to expand the scope of the orders sought to include a redistribution of the entire Gekara clan land was rejected by court as incompetent.

22. In my view, therefore, the matters in controversy herein were not canvassed, and could not be canvassed, in the earlier suit. The requirements of **section 7 of the Civil Procedure Act (Cap 21)** have not been satisfied in relation to the instant suit. The test for res judicata was described by the court in ***Kamunya & Others Vs the Pioneer Assurance Co Ltd [1971] EA 263*** as follows;

The test whether or not a suit is barred by res judicata seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time.”

23. In my opinion, the Plaintiffs are not trying to relitigate a matter which has previously been adjudicated upon by a court of competent jurisdiction and decided with finality. It could not also be said that they could have raised the claim relating to Title No. Mbeti/Gachuriri/172 (the suit property) in the earlier judicial proceedings. The High Court was categorical that the only matters to be ventilated related to the 28 parcels of land which the Minister for Lands had dealt with in his appeal.

24. The 2nd issue for determination is whether the Plaintiffs are entitled to the various reliefs sought in their pleadings. In my opinion, since the court has found that the suit property rightfully belongs to Gekara clan and not Gekara Group Ranch, the Plaintiffs are entitled to some form of relief. It is evident that the pleadings were not meticulously drawn. Some of the reliefs sought are not so straight forward.

25. It was submitted by the Defendants that some of the purchasers of sub-divisions of the suit property were not joined in these proceedings. However, their identities and the parcel numbers they purchased were not disclosed. The court will only issue orders against persons who have been joined as parties to the proceedings, that is, the 17 Defendants who were sued.

26. The court is inclined to issue a declaration that the registration of Gekara Group Ranch as proprietor of Mbeti/Gachuriri/172 was fraudulent. The court shall further issue a consequential order that all the subdivisions and transfers of portions of the suit property to the Defendants is null and void.

27. The rest of the prayers sought by the Plaintiffs are declined. Given that the court has found that the suit property rightfully belongs to Gekara clan, the court has no jurisdiction to distribute the said land amongst the Plaintiffs and other members of the clan. The Plaintiffs are at liberty to establish their entitlements through the mechanisms provided for under the Land Adjudication Act.

28. The 4th issue relates to costs of the suit. The general rule is that costs of an action follow the event as provided for under **section 27 of the Civil Procedure Act (Cap 21)** unless for good reason the court orders otherwise. In my view, the Plaintiffs as successful parties, are entitled to costs of the suit.

29. The summary of the court's findings and holdings on the issues for determination are as follows;

- a) The suit property, Mbeti/Gachuriri/172, rightfully belonged to Gekara clan and not Gekara Group Ranch.
- b) The Plaintiffs' suit against the Defendants is not res judicata.
- c) The Plaintiffs are entitled to some and not all the reliefs sought in their pleadings, full particulars of which are stated in the judgement.
- d) The Plaintiffs are entitled to costs of the suit as against the Defendants.

30. The upshot of the foregoing is that the court finds merit in the Plaintiffs' suit and hereby enters judgement in their favour against the Defendants as follows;

- a) A declaration is hereby issued that the registration of Gekara Group Ranch as proprietor of Title No. MBETI/GICHURIRI/172 was fraudulent and that all sub-divisions and transfers of the suit property to the Defendants was null and void.
- b) The Plaintiffs are hereby awarded costs of the suit.
- c) All the other reliefs sought are declined.

31. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 5TH day of APRIL, 2018

In the absence of the advocates for the Plaintiffs and the Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

05.04.18