



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 191 OF 2013

SAMSON NKOYE MWINJA.....1ST PLAINTIFF

JOVANA NCHUGUNI NKOYE.....2ND PLAINTIFF

VS

JOSEPH IGUNA KAMWARA.....1ST DEFENDANT

JAPHETH MUBIRO.....2ND DEFENDANT

RWANDA MARIGU.....3RD DEFENDANT

JUDGMENT

1. The Plaintiffs herein jointly filed a plaint dated 22/07/ 2013 seeking the following reliefs;

a. A permanent injunction restraining the Defendants , their family members, representatives, assigns, employees, servants, agents and anyone for or through them from entering into, trespassing onto, delineating and /or taking possession of any portion / part of and or whatsoever interfering with the Plaintiff's peaceful quiet exclusive , uninterrupted and undisturbed actual possession , cultivation, user and enjoyment of all that un-demarcated, unrecorded and unregistered land measuring about 40 acres situate in Mpuku village , Kanjoro Location, within Tharaka Nithi County.

b. Payment of Kshs. 19,498/- the value of the damaged crops , against the 1st Defendant with interest thereon at the rate of 30% from November ,2012 till payment in full; and

c. Costs of this and interest thereon against the Defendants jointly and severally.

2. The Plaintiffs jointly claim an ownership interest over all that parcel of land they have described as un-demarcated, unrecorded and unregistered land measuring about 40 acres situate in Mpuku village, Kanjoro Location, within Tharaka Nithi County which they claim to have acquired in the year 1977.

3. The Plaintiffs aver that sometimes in the year 2006 the Defendants herein who are relatives to each other showed intentions of grabbing the suit land from the Plaintiff's prompting the Plaintiffs to report the matter to the area manager who ruled in the favour of the Plaintiffs.

4. That later in the year 2012 the Defendants confronted the Plaintiffs with intention of forcibly evicting them from the suit land thereby damaging the Plaintiffs crops valued at **Kshs. 19,498/-**. The Defendants made another attempt to evict the Plaintiffs on 31.07.2013.

5. The Plaintiffs contend that the Defendants have compromised the area chief as their family is wealthy and influential in the area. The Plaintiffs maintain that the Defendants are determined to grab the suit land from the Plaintiffs with no justifiable reason. That if the actions of the Defendants are not tamed they will amount to violation of the Plaintiff's Constitutional right to acquire, own property and enjoy the same.

6. The claim is opposed through a joint statement of defence by the Defendants dated the 12.09.2013 in which they deny knowledge of any land that is owned by the Plaintiffs within Mpuku Village of Kanjoro Location within Tharaka Nithi County and aver that they too own and occupy Forty (40) acres of land in the same area by virtue of ancestral tenure. They also deny being party to the proceedings before the chief as alleged by the Plaintiffs. They claim that the Plaintiffs' claim is vague, fatally defective, bad in law and an abuse of Court process and that the prayers sought are contradictory and untenable.

7. The matter proceeded by way of viva voce evidence with the Plaintiff calling 4 witnesses and the Defendant 1 witness.

8. PW1- the 1st Plaintiff testified that the suit land belongs to him and he had a judgment in his favour declaring him the owner of the suit land. He confirmed that the land in the area is not yet demarcated therefore he had no map. That the assessment for the damaged crops was done by the agricultural officer.

9. PW2 - testified that the 1st Plaintiff and herself are husband and wife having been married in the year 1973. That they acquired the suit land in the year 1977 when she was newly married and have been in possession and occupation since. She confirmed that the suit land is approximately 40 acres and conceded that they do not have any papers in proof of ownership of the land. That the value of the damaged crops by the Defendants herein was assessed at 19,498/- by the agricultural officer and the report bears their official stamp.

10. PW3 - testified that he lives in the neighboring village and the Plaintiffs were well known to him. He was aware that the Plaintiffs and their children have been tiling the suit land for several years. He was aware the Plaintiffs' crops were damaged and they had made a report to the police but no police officers came to the ground. That though the land is not demarcated he claimed to know the boundaries of the Plaintiffs' land. That he was also aware of the suit before the area manager which was decided in the favour of the Plaintiffs.

11. PW4 – Claimed to be a resident of Mpuko village and well known to both the Plaintiffs and the Defendants for over 30 years as he is their neighbor. He conceded that the all the land in the area is un-demarcated but that each one of them knows their own boundaries. He claimed to know that the suit land belongs to the Plaintiffs and it measures about 40 acres.

12. The Defendants opted to call the 1st Defendant testify in solo. He claims to have lived at Kanjoro since he was born. He stated that the suit property has no title as all the land in the area has not been demarcated yet, though each member of the village knows their own parcels of land which are boarded by live fences made of grown shrubs. He claims that the 1st Plaintiff has his own land while he and his co-Defendants also have their own land measuring about 40 acres in the same area by way of ancestral tenure. He claims that the Plaintiffs have always wanted to grab their land culminating into disputes before the local authorities of the area and has inserted in his statement three decisions of disputes settlement tribunals in respect to some lands in the same village. He denies that a decision was reached by the area manager not in his favour in respect to the suit land.

13. The Plaintiffs submitted that though land in the area is un-adjudicated and un-demarcated the Plaintiff's witnesses had conducted credible evidence to show that the members of the Mpuko village have subdivided the land amongst themselves and each one of them was well aware of the boundaries of their land. The four witnesses attested that the suit land belongs to the Plaintiffs and urged the Court to believe their testimonies. They faulted the 2nd and 3rd Defendants for failing to testify in support of their claim and urged the Court to dismiss the joint statement of defence of all the Defendants. They also faulted the Defendants for failing to raise a counterclaim to the Plaintiff's claim in support of their claim to own some 40 acres in the same area.

14. The Defendants in their submissions faulted the Plaintiffs for failing to clearly demonstrate to the Court the particular piece of land that they own in the said village. They have dismissed the Plaintiffs claim for being vague and conclude that the Plaintiffs have failed to prove their case on a balance of probabilities. They claim to have raised a counter claim vide paragraph 6 of their defence. They are of the opinion that the failure of the 2nd and 3rd Defendants to testify does not affect the Plaintiffs' case as the burden of proof squarely lies on the Plaintiffs.

Issues arising for determination

15. As to whether the Court has jurisdiction to determine rights over land that is not adjudicated, demarcated and unregistered, the Plaintiffs have approached the Court seeking restraining orders against the Defendants herein from entering into or dealing with the suit land which they have described as un-demarcated, unrecorded and unregistered land measuring about 40 acres situate in Mpuko village, Kanjoro Location, within Tharaka Nithi County. The Plaintiffs adduced evidence to the effect that although the land in the area is un-demarcated each member of the village knows the boundaries of their portions which are apparently locally demarcated using the naturally growing shrubs and bushes. There was no expert report produced by the Plaintiffs to confirm those averments. It was also not clearly established how the Plaintiffs arrived at the acreage of the suit land. The Plaintiffs claim that the suit land has been subject to arbitration by the local elders of the area and they annexed copies of the proceedings and findings before the land disputes elders committee. The Defendants on their part aver in some sort of counterclaim that they too own some 40 acres of land in the same area but do not in their statement of defence state whether that parcel of land is the same as that the Plaintiffs. Later in their submissions they say that their counterclaim is based on the same parcel of land.

16. Jurisdiction of the Courts to determine any party rights is derived from either the Constitution and or statutes. Article 61(2) of the Constitution classifies land as public, community or private land. The Plaintiffs' suit discloses a private ownership claim to the suit land by the Plaintiffs. The Plaintiffs who are a couple claim to have been in possession and use of the suit land together with their children for a couple of years. Their claim does not relate to public or community land

17. Article 64 of the constitution defines what constitutes private land as follows;

- a. Registered land held by any person under a free hold tenure
- b. Land held by any person under leasehold tenure
- c. Any other land declared private land under an act of parliament.

18. The description given by the Plaintiffs of the suit land does not place the suit land in any of the above categories. They have told the Court that the suit land is un – registered, they have not said it is held under leasehold or that the suit land has been declared private land by parliament.

19. The failure on the part of the Plaintiffs to establish in which category of land the suit land falls into as provided in the Constitution means that the orders sought may be not tenable.

20. It would appear that the suit land falls in category of land in special areas in that regard the Land adjudication Act, cap 283 provides for the ascertainment of rights and interests in and for the consolidation of land in special areas and for registration of title and of transactions affecting such land. The Plaintiffs have not established that the suit land has been subjected to the processes contemplated by the Land Adjudication Act/Land Consolidation Act as may be applicable.

21. The Plaintiffs have also not claimed that a process of adjudication or consolidation is ongoing over the suit land and if it has infringed on their rights. This Court therefore lacks powers to assert nonexistent rights.

22. In the celebrated case of *Owners of the Motor Vehicle M.V. Lillians versus Caltex Oil (Kenya) Limited (1989) KLR1. Nyarangi JA* (as he then was) had this to say: -

“...The moment a Court determines that it has no jurisdiction it has to down its tools and proceed no further”

23. Having found that this Court lacks jurisdiction to determine rights concerning land that is not held under a known legal system, the Court therefore lacks jurisdiction to go into the merits of the case. The Plaintiffs have clearly come to the wrong forum; they may seek assistance from other forums that are mandated to handle such matters in law.

24. In the circumstances I find the Plaintiffs' land is incapable of any description known in law. It neither falls under the categories prescribed in law in Kenya. It is not under adjudication and perhaps the rights of the parties are best settled at the adjudication stage whenever the area is established as an adjudication section, if it has not been established by now.

25. In view of the above reasons this case collapses and I order that the suit being incompetent be struck out with costs to the Defendants.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MERU THIS 28TH DAY OF JUNE, 2018.

J G KEMEI

JUDGE

In the presence of:

C/A Mutua

Ms. Kaume holding brief for holding Carl Peters Mbaabu for 1st and 2nd Plaintiffs

Gikonyo for 1st to 3rd Defendants