



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 100 OF 2010

1. PETER CHENGE

2. STANLEY NGOROM

3. MARTIN CHENGE

4. JANE CHEMOS

5. MATHEW ANDIEMA & 12 OTHERS.....PLAINTIFFS

VERSUS

KAYOS MARKETING CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT

KEPHA MUDANYI (T/A Nyadimo Associates).....2ND DEFENDANT

JUDGMENT

1. In the plaint dated **8/11/201** and filed in this suit on the same date the plaintiffs pray for the following orders against the defendant:-

- (a) **A declaration that the unilateral survey done by the 2nd defendant in April - May, 2010 is null and void.**
- (b) **An injunction against the defendants, its agents and or authorized persons from evicting the plaintiffs from their respective land.**
- (c) **Costs of the suit.**

2. The plaintiffs pleaded in the body of the plaint that they are the members of the defendant company; that the 1st defendant's main objective was to purchase land on behalf of the plaintiffs and others and settle them according; that the defendant purchased land known as Kayos Farms and settled the plaintiffs for over a decade; that the plaintiffs settled and massively developed their respective land; that the land was partly arable and partly rocky that the plaintiffs agreed that each member shall get part of arable land and part of the rocky land equitably; that in **April and May, 2010** without any knowledge and resolution of the members the officials of the 1st defendant company instructed the 2nd defendant who unilaterally conducted a survey exercise on the land and thereby changed the status quo that existed for over a decade; that as a result of the survey some of the plaintiffs have lost their arable land and some have been allocated rocky land; that the plaintiffs' case is that each member is equitably entitled to arable land and rocky land and that the defendants have threatened to evict the plaintiffs from their arable land and settle them on rocky land.

The Defendants' Defence

3. The defendants filed joint defence on **9/2/2011**. The defendant agreed with the plaintiffs that the land bought by the company was to be subdivided amongst the members so that rocky lands and arable lands were equitably distributed amongst all members; that members were settled temporarily on the land to await survey; that the services of the surveyor were engaged with the knowledge of the plaintiff; that the surveyor's strict instructions were to maintain the original boundaries occasioned by the temporary settlement of the members and equitably share out the arable and rocky lands in so far as it was practicably possible; that the suit is based on mere fear and apprehension and is premature as all would be done to ensure the equitable distribution sought and that in normal survey the physical adjustment and movements of the members on actual survey is not unique but an acceptable and inevitable phenomenon in survey practices.

The Plaintiffs' Case

4. Peter Chenge, the 1st plaintiff gave evidence in support of the plaintiffs' claim. He substantially reiterated the matters raised in the plaint. He produced receipt dated 7/12/2003 whereby he paid Kshs.9500/= as **P. Exhibit 1**; he admitted that the parcels each person temporarily occupied was shown to the members by the officials and that there must be adjustment on the ground once survey was done; that the surveyor was given instructions to leave the members on the areas that they had been cultivating as far as that was practicable; that he was entitled to **3 acres**; that between **April and May 2010** a surveyor came to the farm and surveyed the land in a fraudulent manner that was not in consonance with the desires of the members; that the officials were given huge chunks of land; that some members were given only rocky land; that **PW1** was given a small stretch running into a rocky area; that his semi-permanent house was left out of the portion that he was given; that he has stayed on the area for about **23 years**; that upon complaint the chief advised that the plaintiffs go to court; that complaints to the officials were not addressed; that the court should nullify the survey work and allow the members to remain where they used to be;

5. **PW2**, referred to himself as **John Saekwo Ngeywa** but his evidence was subsequently expunged from the record on account of impersonation.

6. **PW3, Jane Naibei**, stated that she is entitled to **1.7 acres** but she was cultivating on **1 acre** of land; that she was not happy with the survey exercise as she was not given the land she used to cultivate before the survey but was given a swampy area; that similarly complaints to the chairman and the area chief did not bear fruit; that the survey should be nullified. However on cross examination she stated that she was not moved from the portion on which her house stood.

7. **PW4, Ben Kipsior Kibor**, stated that he had been at Endebess for **20 years**; that that he has two and a half acres; that the surveyors pushed him to a place where another member had been; that his land fell on a waterlogged place, that a quarter of his land is not arable; that survey should be nullified. He however stated on cross examination that the survey exercise was not yet complete and that the plots they had been shown before the survey were only for temporary settlement. On re-examination he stated that he had been pushed from the area he had occupied by about **20 metres**.

8. **PW5, Mathews Andieme**, also stated that he had been at the farm for **20 years**; that he was allocated two and a half acres; that the survey exercise favoured the chairman and persons close to him; that the chairman has taken part of what used to be his land; that he used to occupy an area which was arable; that during the survey he was moved to a completely different area and given a rocky area of about **2 acres**, leaving him only a half-acre of arable **The Defendants' Case**

9. The defendants through their Chairman **Stephen Boiyo Chemogotio**, testified on **2/10/2018**. He adopted his witness statement dated **8/2/2011**; he stated that the suit land measuring **324 acres** was purchased from one **Bernard Habo Luombo**; that consent was obtained to subdivide the land into **107 portions**; that members agreed to call in a surveyor who came in and did his work; that none of the members were moved from their land; that the surveyor adjusted all portions occupied by the members to reflect their payments which does not amount to eviction; that each person was to get both arable and rocky land; and that the suit should be dismissed as in his opinion it has no merit.

The parties' submissions

10. The defendants filed their submissions on the **12th October 2018**. I have perused through the record and found no submissions filed on behalf of the plaintiffs.

DETERMINATION

Issues arising

11. The issues that arise in this suit are as follows:

(a) *Should the survey exercise be nullified?*

(b) *Who should bear the costs of the suit?*

(a) *Should the survey exercise be nullified?*

12. Parties must prove their case by way of evidence that favours what they allege in their pleadings.

13. The greatest hurdle the **17** plaintiffs faced in this hearing was proof that the survey exercise disadvantaged them, and in a manner that was not experienced by the other **90** members. I find that this is a great predicament on the part of the plaintiffs in that the amount of evidence they required to prove their claim would be a parallel survey report on the entire land showing that the surveyors had treated them in an inequitable manner. The plaintiffs never brought any alternative report that could demonstrate that there was inequity in the distribution of land.

14. It is also generally agreed by the witnesses for the plaintiffs that members had been temporarily settled on portions of the suit land awaiting survey and that it was expected that upon final survey some changes would affect members. The witnesses who testified stated that they had been affected by the survey, but they never demonstrated that they had been affected in a manner that was not foreseen. Reports on the discrepancies in the arable or rocky proportions allocated to different members were not availed.

15. It is also agreed amongst the witnesses that the survey exercise was incomplete by the time they instituted this suit. The incompleteness of the exercise in itself rendered it possible that even the commissioning of a parallel survey report was not possible, for it could only be raised appropriately in relation to an already completed survey exercise.

16. On the other hand the evidence of **DW1 Stephen Boiyo Chemogotio**, the society's chairman, showed that the differences in size of the plots various members got was dependent on the amount of money they paid to the society earlier on which dictated the plot size.

17. It is the conclusion of this court that the plaintiffs have not adduced sufficient evidence to support their claim. In saying this I am aware of the herculean task that the plaintiffs would face if they were to set out to obtain sufficient evidence to prove their claim. However, ours is an adversarial system and orders sought can not be granted where there is insufficient evidence to support them. I therefore find that the plaintiffs have not proved that the survey exercise should be nullified and that this suit should for that reason be dismissed.

(b) Who should bear the costs of the suit?

18. The court has discretion in orders concerning costs. This suit was commenced by the plaintiffs in a quest to assert their rights whose violation they have not proved were violated by the defendants. This court can not know if any violations were committed. In ordinary times the costs follow the event. I am inclined to order that each party bears their own costs of the suit.

19. For clarity the final orders in this matter are as follows:

(a) The plaintiff's suit is dismissed for want of sufficient evidence.

(b) Each party shall bear their own costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 30th day of **October, 2018**.

MWANGI NJOROGE

JUDGE

30/10/2018

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the parties

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

30/10/2018