



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CIVIL SUIT NO. 47 OF 2013

CLAUDE SOGHIA NYAMBU.....PLAINTIFF

-VERSUS-

CLAIVERY MAGHANGA.....DEFENDANT

JUDGEMENT

1. The plaintiff sued the defendant vide a plaint dated 25th February 2013 seeking for prayers that :
 - a) **An order of eviction against the defendant, his servant, employees, agents, and/or such other person claiming under him from trespassing the parcel of land in Kokua Village, Mgange location Wundanyi.**
 - b) **A permanent order of injunction restraining, barring and/or stopping the defendant with his servant, employes, agents and/or any person claiming under him from trespassing, entering and/or in any way interfering with the parcel of land at Kokua village, Mgange location Wundanyi.**
 - c) **Such other or further orders the Honourable Court may deem fit and just to grant in the interest of justice.**
 - d) **Costs of the suit.**
2. The suit was defended. The defendant filed a defence dated 22nd June 2014 denying the plaintiff's claim. Both parties were able to file documents they relied on in support of their case.
3. The hearing commenced on 25th February 2015 with the plaintiff testifying as PW 1. He testified that he is a farmer living in Mbenge location. He said that the defendant has been coming to plough his land yet the case ended in 2008 and the defendant did not file appeal. PW 1 continued that he has no family relations with the defendant. He urged the Court to look at the documents he filed.
4. In cross – examination, PW 1 stated that the defendant did not appear before the tribunal inspite of being served. That the defendant was to appeal within 30 days from 6th June 2008 but he did not. That the complainant in the criminal case against the defendant was Gabriel Njunwa Simwichi.
5. PW 2 Gabriel Njunwa Simwichi testified that he lives in Mgange within Mbenge location. He knows both parties herein and knows the land belongs to the plaintiff. That the parents of the defendant did not

live on this land and the defendant is using the land by force. In cross – examination he confirmed he gave evidence before the tribunal. He stated that the defendant’s wife appeared before the tribunal. He also admitted being the complainant in the criminal case against the defendant. PW 2 states that the defendant began using the suit land in 2004. That the defendant destroyed his crops.

6. PW 3 is SAMWELA SHIRADI. He also lives in Mgange and prays for people. He testified that he knows the plaintiff because they come from the same place. He also knows the defendant. PW 3 testified that this land was given to the plaintiff by his grandfather. That the defendant & his family does not own land here. In cross – examination, he said the defendant started using the unploughed part of the land by force. That even the defendant’s mother asked him why he was insisting on using this land. According to PW 3, the land belongs to the plaintiff. That the plaintiff was given this land in 2002 when his father was still alive. The plaintiff closed his case with this evidence.

7. The defendant gave his testimony on 23.4.2015. He said he comes from Mlima in Gange location Taita – taveta district. That the suit land is situated in Kokua village Mgange location and it is measuring 5 acres. That this land was inherited from his grandfather. The defendant states that the plaintiff’s father came and asked his father to bless him to have a family house at Kokua. That the two plots are separated by a seasonal river. Later his grandfather migrated from this land and left it for farming.

8. DW 1 continued that he began using the land in 1998 until 2004 without any problem. In 2004, he said he found the plaintiff’s father planting sisal on the boundaries claiming a share having been the care taker. DW 1 said he reported the matter to the assistant chief but he was summoned before the Land Disputes Tribunal. The tribunal heard the case and later the award was read. He did not agree with the award and filed a notice of appeal.

9. According to DW 1, the appeal was not heard because one of the committee members liaised with the plaintiff and caused his arrest. He was charged in criminal case No 628 of 2009 but was acquitted. DW 1 further testified that in the plaintiff’s statement to the police, the plaintiff said his land is 2 acres and gave the names of his neighbours as Gabriel Simwichi, Philomena Mbingu, Michael Mwakazi and Mee Masenzi. According to DW 1, the plaintiff does not know the land he is claiming and he does not have any land. DW 1 avers it is the plaintiff who has encroached on his ancestral land. He urged the Court to dismiss his suit.

10. In cross – examination, he said what he has said is true. He said he filed an appeal. That the land dispute was between him and the plaintiff’s father. The defendant called his second witness who testified on 23rd November 2016. She is called Dina Kazungu from Kishushe sub-location. DW 2 said she knew the defendant in 1998 when the defendant bought land near hers at Kishushe. They would plough and plant together. DW 2 continued that the Defendant farmed his land in Muroko sub location between 1999 – 2004. At the end of 2004, the plaintiff had planted crops on the suit land. According to DW 2, the plaintiff is not neighbouring the suit land but is 200 metres away. That in 2009 the defendant was arrested.

11. In cross – examination by the plaintiff DW 2 said her plot does not neighbour the plaintiff’s. She said he knew the plaintiff when she was helping the defendant with harvest. DW 2 said they are not village mates with the defendant. She denied that she was lying to Court. The defendant also closed his case.

12. Both parties filed written submissions which I have read and need not reproduce herein. From the evidence of both parties herein, each of them is laying a claim to the suit land by virtue of having inherited the same from their grandfathers. The plaintiff and the defendant are not related. The question for this Court to determine is who between the two parties has laid a basis to be entitled to the land.

13. The plaintiff in his documents filed in Court includes proceedings from Taita Taveta land Tribunal Court between the plaintiff and the defendant over the same parcel of land. This was in Land Dispute Tribunal Case No 2 of 2008. The tribunal awarded the plaintiff the land and the award was adopted as an order of the Court on 6th June 2008 in Wundanyi Resident Magistrate’s Court No 2 of 2008. This award

has not been set aside.

14. The plaintiff has testified that he inherited this land from his grandfather. His evidence was corroborated by the evidence of PW 2 & PW 3 who said they know the land belongs to the plaintiff. PW 3 even said that the defendant's mother who is still alive was called to say why his son was using the land. That the defendant's mother said they do not own land in that place.

15. The defendant on his part claims the land belonged to his grandfather who later moved out of the suit land leaving it for farming. He did not state when his grandfather moved out neither did he call any of his relatives to corroborate this claim. The plaintiff's witnesses said both parents of the defendant were still alive yet none was called as a witness. Instead the defendant called a neighbour who only knew him in 1998 and who does not have the history of the suit land as a witness. The evidence of DW 2 does not add any value to his claim as she does state why she thinks the land is owned by the defendant.

16. Further the defendant said he did not agree with the award of the Tribunal and filed his appeal but that his appeal was not heard because of his arrest. From his documents, he was arrested on 24th October 2009 which was more than one year after the award was read and adopted. The application to file an appeal is dated 25.6.2008. The judgement in the criminal case was read on 3rd May 2011. This case was filed in 2013. All this time, the defendant did not take any steps to pursue his appeal and or bring a case against the plaintiff. Each time it was the plaintiff who would take steps to enforce his claim.

17. The defendant also produced the statement of the plaintiff made to the police as Dex 5. In this statement, the plaintiff also stated that he inherited the suit land from his grandfather Ferdinand Nyambu Soghia. The first time on 18.8.09 he found the defendant preparing the shamba of his (plaintiff) neighbour Philomena. The plaintiff went again on 1.9.2009, he found the defendant cultivating near their boundaries. That the defendant has been invading their land claiming the whole place is his. Further that whenever the defendant did this, he was always armed with a knife, bows and arrows. The plaintiff informed Gabriel & Philomena and they reported the matter to the police.

18. I do not see any contradiction of the plaintiff's statement to the police and now to Court. Lastly the plaintiff has not asked the Court to award him land measuring 5 acres to contradict that his shamba is 2 acres as he told the police. Neither did the defendant produce any evidence that the suit land is measuring 5 acres. Taking all the above analysis, I am satisfied that the plaintiff has proved his case to the required standards.

19. Consequently I enter judgement for the plaintiff as prayed in the plaint with costs. I hasten to add that the O.C.S of the nearest police station to assist the plaintiff in executing this decree if need be.

Dated and delivered in Mombasa this 28th day of February 2017.

A. OMOLLO

JUDGE