



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 302 OF 2017**

**NYAYO TEA ZONE DEVELOPMENT CORPORATION.....PLAINTIFF/APPLICANT**

**VERSUS**

**JEREMIAH KIPTALAM NYABEN.....DEFENDANT/RESPONDENT**

**RULING**

The applicant has come to court praying for an order that the defendant/respondent or his agents be restrained from trespassing onto, accessing, using or in any other manner interfering with the plaintiff's/applicant's ownership, control and use of the suit land pending hearing and determination of the main suit, the defendant/respondent or his agents are restrained from trespassing onto, accessing, using or in any other manner interfering with the plaintiff's/applicant's ownership, control and use of the suit land and that the Nandi County Police Commandant to oversee compliance with the orders set out above; and Costs of this application be provided for. The application is based on grounds that pursuant to Legal Notice No. 8 of 2002, the plaintiff/applicant in consultation with the Chief Conservator of Forests was mandated to create tea and fuel growing zones in gazette forests and gazette trust land and after the creation of the tea and fuel wood growing zones, the land was vested and became the property of the plaintiff and as a result, all rights of exclusive use, control and possession were vested in the plaintiff/applicant.

The facts of the complaint are that on or about the year 2016, the defendant/respondent either acting on his own behalf or on behalf of a group of other non-identified persons illegally, unlawfully, forcefully and without any justifiable cause fenced off and occupied a large portion of the plaintiff's/applicant's land thereby restricting access to the tea bushes by the plaintiff/applicant which acts amount to trespass as a result of the said trespass by the defendant/respondent access by the plaintiff/applicant to the said land has been denied making plucking of mature tea therein impossible leading to substantial loss of income as the land in question has more than 78,324 tea bushes that fetches the plaintiff/applicant millions of shillings in public revenue; and

As a result of the trespass, the plaintiff/applicant continues to suffer irreparable damage due to the loss of mature tea which is highly delicate in addition to paying workers for work not done. The plaintiff/applicant executes its mandate as a benefit to the public hence the defendant's/respondent's offensive action is an affront to the public interest. In the supporting affidavit, the applicant states that the Plaintiff/Applicant is mandated to manage several forests all over the country where it has planted tea and fuel wood which serve as buffer zones to protect and conserve the forests and rehabilitate the ecologically fragile areas and that as part of the mandate the Plaintiff/Applicant has been managing and fostering the development of tea growing and forest conservation at Kobujoi Forest in South Nandi within Nandi County. That one of the gazetted forests is Nandi South which includes Kobujoi Forest which was gazetted as forest land vide a Gazette Notice No.76/1936 and has never been degazetted.

The plaintiff further states that pursuant to Legal Notice No.8 of 2002, the in consultation with the Chief Conservator of Forests he was mandated to create tea and fuel growing zones in gazetted forests and gazetted trust land forests and that after the creation of the tea and fuel wood growing zones, the land was vested and became the property of the Plaintiff/Applicant and as a result, all rights of ownership, use, control and exclusive possession were vested on the Plaintiff/ Applicant. In the year 2016, the Defendant/Respondent either acting on his own behalf or on behalf of a group of other non-identified persons illegally, unlawfully, forcefully and without any justifiable cause fenced off and occupied a large portion of the Plaintiff's/Applicant land thereby restricting access to the tea bushes by the

Plaintiff/Applicant which acts amount to trespass. That as a result of the said trespass by the Defendant/Respondent, access by the Plaintiff/Applicant to the said land has been denied making plucking of mature tea therein impossible leading to substantial loss of income as the land in question has more than 78,324 tea bushes that fetches the Plaintiff/Applicant millions of shillings in public revenue. That as a result of the trespass, the Plaintiff/Applicant continues to suffer irreparable damage due to the loss of mature tea which is highly perishable in addition to paying workers for work not done. The Plaintiff/ Applicant executes its mandate for the public good hence the Defendant's actions of trespass and interference is an affront to the public interest.

In the replying affidavit, the defendant states that he is totally a stranger to the issues raised in the Notice of Motion and that he has been sued wrongly and that he has not trespassed at all into the parcel of land of the plaintiff/applicant as alleged in the Notice of Motion and his supporting affidavit. That he has not occupied the plaintiffs land and having more than 78,324 mature tea bushes, but has intentionally and maliciously framed issues which are farfetched and cannot be established by actual evidence. Furthermore, he denies having forcefully, or illegally or unlawfully and or without justifiable cause, fenced off; or occupied a large portion of the plaintiff's/applicant's land and or restricted him any access to his tea bushes.

The defendant states further that on 16/11/2011, through a locational committee meeting at the Chiefs office, Chepkumia he entered into an agreement/negotiation for exchange of his parcel of land with Chepkumia Exchange Programme who gave him a portion of land No. 127 which he occupies as of now and That after the exchange negotiations, he surrendered his portion of land which he had bought to CHEPKUMIA EXCHANGE PROGRAMME for the government to build the school and an agreement was entered into. On 23/08/2016, the Chairman of Chepkumia Exchange Programme Scheme wrote a letter to the Manager, Nyayo Tea Zone plantation asking for boundary Re-Alinement for parcel plot No. 127 and the plaintiff plot No. 136. On 14/09/2016, the Zone Manager wrote a letter to the Ecosystem Conservator addressing the issue of boundary dispute between plots No. 127 and 136. That on 20/09/2016, the Ecosystem Conservator wrote the letter to the Zone Manager and confirmed that indeed parcel No. 127 which he occupies is within Chepkumia Exchange Programme and as such not of the plaintiff/applicant

On 7/10/2016, the County Surveyor wrote and confirmed that indeed the plot No. 127 and 136 are within Koiben Settlement given to Chepkumia Exchange Programme due for Excision Forest Reserve. That Chepkumia Exchange Programme is an initiative of the government and the plaintiff has no control over the government. The Chepkumia Exchange Programme was carried out by government and people were moved from their ancestral land to CHEPKUMIA and the government started a Wildlife Reserve at Chepkumia and thus gave people in turn as compensation whereby plot No. 127 is within that area and his entry cannot be held to be trespass. According to the plaintiff, the prayers of the plaintiff/applicant for an injunction are misplaced and cannot be sustained because he has not demonstrated that he has a strong evidence/grounds to succeed in the main suit. He prays that this application be dismissed with costs. He claims that the photograph presented is an exaggeration and does not show the true status of the land and also the gazette notice number 76/1936 is a colonial notice and has been overtaken by events now that the government of Kenya has already initiated steps to de-gazette the same and already moved people from their ancestral land and settled them there.

Mr. Githaiga submits that the application dated 6.9.2017 should be granted as the defendant has without any justifiable cause, trespassed onto their land in Kobujoi in Nandi South, which land is gazetted as forest land by legal Notice No. 76 of 1936. The suit property belongs to plaintiff/applicant as per legal Notice No. 30/2002, which gives their client ownership rights. The defendant trespassed in 2015 and has caused his client not to access the tea bushes on the land measuring 5.8 Ha. His client loses millions of shillings in public revenue. Public interest to be considered. According to Mr. Githaiga, the plaintiff has established a prima facie case with a likelihood of success. Moreover, that Balance of convenience lies with the grant of the orders sought. His client is a government corporation mandated to conserve the environment and generate revenue and is at the verge of collapse due to major losses.

Mr. Nyaben submits that he acquired the land under dispute in a government exchange programme

whereby he left his land for the government and was allocated the land in dispute. The plot is nearer the primary school whereas Nyayo Tea Zone is plucking tea on plot No. 136. He requests the court to visit the site. He has put up a small house for his workers. It is a cable house, one roomed for his worker.

I have considered the application and all relevant affidavits and submissions by parties and do find that the plaintiff has established on a prima facie basis that the land in dispute is part of a gazetted Forest land vide Gazette Notice No. 76/1936 and has never been degazetted and that he has been allowed by the Chief Conservator of forests to create tea and fuel growing areas in gazette forest and trust lands forest. The defendant on the other hand acted upon the agreement of exchange of land with the community. The defendant gave 1½ acres to put up a new school A.C.K. St. Andrews Chepkoiyo Primary School in Koiben village “C” Chepkumia sub-location, Chepkumia Location. It is trite law that gazetted forests cannot be alienated by any authority unless the law is properly applied. The suit land in dispute is alleged to be a gazetted forest. Under the management of Nyayo Tea Zone, it is not clear whether the exchanged parcel of land given to the defendant is part of the gazetted forest and therefore it appears that there is need to ascertain the actual land being used by the parties and the status of the said land.

This is a matter to be determined on balance of convenience and I do direct that the Chief Forest Conservator, the County Surveyor, Nandi to move to the disputed area and demarcate the gazetted forest land to establish whether the defendant has encroached on the gazetted forest within the next 30 days. The report to be filed within 30 days after the exercise of demarcation. In the meantime, each party is allowed to pick tea it has planted thus the plaintiff to be allowed to access its tea for purposes of picking. Mention on 6<sup>th</sup> March 2018 to confirm compliance. Orders accordingly.

**Dated and delivered at Eldoret this 7<sup>th</sup> day of December, 2017.**

**A. OMBWAYO**

**JUDGE**