



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

LAND CASE NO. 64 OF 2012

ELIJAH MWACHIRONDA CHENGO.....PLAINTIFF

-VERSUS-

ATHUMAN HASSAN MWANGUVU & 7 OTHERS.....DEFEDANTS

JUDGEMENT

1. By a plaint dated 12th April 2012, the plaintiff sued the eight (8) defendants seeking for :-
 - a) A mandatory injunction against the defendants restraining the defendants jointly and/or severally from anyway interfering with the parcel of land comprising 198.88 acres or thereabouts and forming part of plot No. KWALE/MWERENI/14 also known as MWERENI GROUP RANCH.
 - b) Vacant possession of the parcel of land measuring 198.88 acres forming part of Plot No. KWALE/MWERENI/14 known as MWERENI GROUP RANCH, by the defendants.
 - c) Costs of the suit.
2. The defendants were served with summons to enter appearance on 14th April 2012 as per the affidavit of service on record filed on 28th April 2012. They were again served with Court process on 3rd May 2012 as evidenced by the affidavit of service filed on 6th June 2012. They all failed to enter appearance within the prescribed time.
3. After disposal of the interlocutory applications, the suit was set down for hearing. The plaintiff testified as PW 1 together with his witness. PW 1 said that he is a resident of Mwereni location. He is a farmer and church elder. He knew all the defendants who are his neighbours. PW 1 continued that there is a road between the defendants' land and his family's land. PW 1 stated that the entire land measures 43466 ha and is registered as Kwale/Mwereni/14. It is the plaintiff's evidence that each family of the group ranch owns a portion from this land with the plaintiff's family portion measuring 198.88 acres. He also produced a sketch map for the portion he is claiming as Pex 2.
4. PW 1 continued that the defendants invaded half of their land forcefully and began ploughing it. The plaintiff stated further that on the invaded land, they had planted fruit trees such as mangoes, cashew nuts and coconuts. PW 1 stated that the defendants cut some of these trees and burnt them. PW 1 took his complaint to the Agricultural officer who visited the land and took

photographs which were produced as Pex 4. He asked the Court to enable him recover his land. He also prayed for compensation for damaged fruit trees and costs of the suit.

5. SAID CHILUNGA NDORO CHAKA testified as PW 2. He told the Court that he is the current chairman of Mwereni group ranch. The witness testified that the role of the committee is to take care of the ranch property by collecting cess and also maintain peace. PW 2 knows the plaintiff owns 198.8 acres of the ranch land. The ranch has a title deed which is in his custody. PW 2 stated further that he knew about the dispute and according to the minutes he found in the office, the disputed land belong to the plaintiff. Since the defendants did not enter appearance, both the plaintiff's and defendants' case was closed at the end of the testimony of PW2.
6. The plaintiff's advocate did not offer submissions at the close of the case. The Court will therefore make its determination based on the pleadings filed and the evidence adduced. The title deed produced as Pex 1 shows the whole land is registered and owned by Mwereni Group Ranch. The plaintiff also produced a letter signed by the group ranch chairman dated 29th March 2006 confirming the plaintiff as a member of the ranch. PW 1 also filed in his list and produced as Pex 2 the site location sketch map showing the boundaries of the portion in dispute measuring 198.8 acres. The photographs produced as Pex 4 do show some evidence of destruction on the land. Lastly, the plaintiff produced as Pex 5 being a statement narrating events of a meeting held on 4.5.1999. It seems the defendants did not attend that meeting although the resolution of that meeting was also not clear.
7. In the affidavit of the plaintiff filed on 12th April 2012 at paragraph 12, it is deposed that the invasion of the land took place on 25th February 2012 and the defendants continue to deprive the plaintiff and his family the use of the 198.8 acres of the Mwereni group ranch. In the ruling of Tuiyot J. on the interlocutory application filed by the plaintiff at paragraph 13, the judge quoted the provision of the 2nd schedule of the Land (Group Representatives) Act which provides that :-

“Every member shall be deemed to share in the ownership of the group land in undivided shares”

The Judge found the plaintiff/applicant had not addressed this matter in persuading the Court that their claim for a portion of the ranch is not in conflict with the provision of this law.

8. The constitution of the group ranch was also filed by the plaintiff in his list of documents. At clause 4 thereof, it states thus :-

4 (i) No person who is a member of the group shall have an individual plot number which such a person shall claim to be his/hers.

4 (ii) Group representatives shall allow only small pieces of land which will be used to cultivate for subsistence crops e.g maize, beans etc.

The constitution of Mwereni group ranch therefore does not allow any of its members to lay a stake on individual plots. The plaintiff however is laying a stake on a portion measuring 198.8 acres. He did not lay any basis in his evidence to show that he is indeed entitled to a portion of the group ranch land measuring 198.8 acres to the exclusion of the defendants given that the Group's Constitution allows every member of the group an undivided share to the group land. Further the Court was not told who drew the sketch map that created the boundaries for the plaintiff's portion. The sketch map relied upon by the plaintiff is inadmissible in evidence as the author is unknown.

9. In the plaint, the plaintiff did not disclose when the invasion took place. In the affidavit supporting the injunction application, he said February 2012. This may not be so as the statement giving background of the elders meeting shows the dispute dates back as late as May 1999. In his evidence in chief, the plaintiff also failed to tell this Court when the invasion took place. The

plaintiff did not tell this Court whether the defendants belong to one family or they are sued individually. He only gave a sweeping statement that the defendants have invaded the land and cut down the fruit trees and began ploughing. I find this plaintiff to have proved his claim to the extent that he is a member of the ranch therefore he is indeed entitled to a portion the group ranch land comprised inland parcel no Kwale/Mwereni/14. However I find no proof of the size claimed being 198.8 acres thereof as there are no minutes of the group ranch representatives' minutes and/or resolution to show that he was entitled to that portion. There was nothing given by PW 2 to show the shares/portions of each/ group family member of the ranch. PW 2 did not also produce copies of the documents he found in the office which he said confirmed the land belong to the plaintiff's family.

10. On the second limb of the claim on damages, there was no production of the report made by the agricultural officer which assessed the damage and compensation payable. The plaintiff is asking this Court to assess damage based on photographic evidence that does not show the extent of damage if at all. Secondly, the photographs do not show who caused the damages or who cut down the fruit trees amongst the eight defendants. I find this prayer is not proved and dismiss it.

11. In conclusion, I allow the plaintiff's case to the extent that he is entitled to a portion of the suit land and the defendants are barred from interfering with his use and occupation thereof. I do not grant him orders declaring him that he owns 198.8ha and leave it to the executive committee of the ranch to establish the boundaries of the plaintiff's land from which the defendants are permanently stopped from trespassing on. On the prayer for costs, the suit was not defended, I order each party to bear their costs.

Judgement dated & delivered in Mombasa this 8th day of December ,2015

A. OMOLLO

JUDGE