



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 974 OF 2012**

**JOSEPH KALENYAN CHEBOI & OTHERS.....PLAINTIFFS**

**VERSUS**

**WILLIAM SUTER..... 1ST DEFENDANT**

**SAMUEL BIWOTT..... 2ND DEFENDANT**

**JUDGMENT**

*(Clan dispute over ancestral lands; land not demarcated and not registered; community land; whether court can hear a dispute over such land; absence of statute over community land; principles to be applied; reference to traditional dispute resolution mechanisms; matter referred to Osis traditional elders; decision of elders not accepted by plaintiff; weight to be given to such determination; no reason to depart from their decision; judgment entered in line with determination of the elders )*

**A. INTRODUCTION AND PLEADINGS**

1. This suit was commenced by way of plaint filed on 10 October 2012. The plaintiffs have pleaded that they reside in Elgeyo Marakwet County and that by virtue of customary right, they are owners of the land described as Tot/Koibirir/Kisiwei measuring about 2 Hectares. It is pleaded that on 11 July 2012, the defendants encroached into the said land and attempted to put up structures. It is pleaded that the provincial administration attempted to intervene in vain. The plaintiffs now want the defendants permanently restrained from the said land.

2. The defendants entered appearance and filed defence. They denied that there exists any land known as Tot/Koibirir/Kisiwei. They pleaded that land in the Tot area has not yet been adjudicated, and that the same is ancestral land held communally, with each family knowing their respective boundaries. The defendants pleaded that their homes are situated within their ancestral land. They have denied encroaching into the plaintiff's land and have asked that the suit be dismissed.

3. After pleadings closed, the matter was listed for hearing on 25 November 2013. The first witness gave evidence in chief and in the course of his testimony, it emerged to me that the plaintiffs are from Kalenyang Clan and the defendants from Kamitei Clan. The issue seemed to be who among the two clans is entitled to occupation of the land in issue. It also emerged that the land is not demarcated and that people in that area live communally based on their ancestral rights. It also emerged that the matter had earlier been referred to a panel of traditional elders known as the "Osis" (or "Asis"). I learnt that the Osis is a group of elders from the community where the parties come from, and who hear disputes within the community, including disputes on claims by clans over who is entitled to work or occupy certain land. The Osis had heard the dispute and made some determination.

4. I had the mind of referring the matter back to the Osis. In doing so, I was alive to the provisions of Article 159 (2) (c), which provides that one of the principles to be followed by courts when exercising judicial authority, is to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms. It will be noted that traditional dispute resolution mechanisms pursuant to Article 159 (3) of the Constitution, are allowed, so long as they do not contravene the Bill of Rights, are not repugnant to justice and morality, or result in outcomes that are repugnant to justice and morality, or are inconsistent with the Constitution or other written law. I inquired from the parties whether any has objection to the matter being referred back to the Osis and none had any objection. I therefore referred the matter back to the Osis elders and gave directions that they make the following determinations :-

*(a) To determine and mark on the ground the exact boundaries between the Kalenyang and Kamitei families.*

*(b) To determine whether there has been any encroachment by either Kalenyang or Kamitei land by the people from the other's family and if so which person has encroached and has built or utilized land that he is not supposed to occupy.*

*(c) The Osis to sit with the parties and agree on when the exercise will be conducted.*

*(d) The meetings of the Osis to be organized through the Chief Koibirir Location, Marakwet East District.*

*(e) The Chief to file the findings and report of the Osis within 30 days.*

5. I gave a mention date and ordered status quo to be maintained. The Osis filed their report within the time frame given but the defendants disputed it. They also raised issue that the Chief was a relative of the plaintiffs and therefore impartial. Given this position, I asked the Chief, who was present, to step aside and asked the Osis to revisit the issue without the involvement of the Government Administration.

6. The Osis proceeded as directed and filed a second report. This time the plaintiffs disputed it and declined to be bound by it. Since it was a non-binding mediation process, I was unable to enter judgment according to the report. In essence, my efforts at having the matter resolved solely through the traditional dispute settlement mechanism came to naught and I proceeded to hear the dispute.

## **B. EVIDENCE OF THE PARTIES**

7. The plaintiffs called only one witness, Joseph Cheboi Kalenyang, the 1st plaintiff. He testified that he has lived on the disputed land since he was born. He stated that his father was also born on the land and that the same is of their clan. He had earlier obtained authority to sue on behalf of members of his clan. He testified that the land is unsurveyed and unregistered, but that they have been living peacefully on it, until the Kamitei Clan invaded it. He testified that previously the land was being ploughed but that now it is used as a residence. He testified that the Kamitei clan have built structures on it. He testified that he has brought this suit on behalf of the clan.

8. In cross-examination, PW-1 testified that the two clans are related and they are distant cousins. He also testified that there had been a barbed wire separating the land of the two families but that the same is no longer there. He testified that he himself does not live on the land but that his brothers do. He was challenged that he has not brought the suit on behalf of the clan but on his own behalf but he insisted that the suit is brought on behalf of the clan.

9. DW-1 was William Ruto Suter the 1st defendant. He testified that the 2nd defendant is his cousin whereas the plaintiffs are distant cousins. He stated that they (the defendants) were born on the land in dispute and so too their close relatives. He stated that they have developed houses on the land. Some photographs showing the user of the land were produced. He showed some houses and pointed out his own, and others, as belonging to his close relatives. He stated that the 2nd defendant has even developed

some rental units on the land. He pointed out a dispensary which he stated is on the Kalenyang side of the land and which is about 1.5 kilometers from the land in dispute. He testified that the dispute has been to the Osis Elders about 4 times. The first Osis resolved that the disputed land belongs to the Kamitei clan (defendants). The Kalenyang sought an appeal. In the appeal, the Osis decided that since the Kalenyang had donated some land for the dispensary, the Kamitei Clan should cede some of their land to the Kalenyang. Some members of the Kamitei clan were not happy and sought a further appeal. But the Kamitei lost the appeal, with the Osis upholding their 2nd decision. He testified that arising from that decision, the Kalenyang clan was given a portion of about 1.5 acres of Kamitei land on the western side. The Kamitei agreed to abide by this decision but the matter again went before the Osis, as there seems to have been an issue on where to place the boundary. The Osis made a decision on it. He stated that he is in agreement with the decision of the Osis that was filed under my directions. He relied on the sketch of the Osis demonstrating the boundaries.

10. With that evidence, the defendant closed his case.

11. I thought it wise to hear the opinion of the Osis, and although none of the parties called any member of the Osis as a witness, I used my discretion and summoned as a witness, the Chairman of the panel of the Osis which heard the dispute. The Chairman, Edward Kimole appeared and I allowed him to give evidence and explain their verdict. Edward Kimole is a retired Senior Chief. He stated that they have a group of elders called the Endo Village Elders. They are a panel of 11 elders. They are termed as the "Asis" which is a general description given to those who resolve disputes. There are several panels of the Osis. He testified that the Osis had heard the dispute between the Kamitei and Kalenyang clans on several occasions. The final sitting was that made under my direction, vide which, they determined the boundaries between the two clans. They decided that the boundary be a seasonal stream after considering all factors, with the eastern side being the Kamitei area, and the western side being the Kalenyang area.

12. I offered the witness for cross-examination by both Mr. Komen for the plaintiffs and Mr. Kipnyekwei for the defendant. The witness testified that he was not in the previous panels of elders that had earlier decided the dispute. He confirmed that the land is not surveyed.

### **C. SUBMISSIONS OF COUNSEL**

13. Mr. Kipnyekwei for the defendant first raised issue about the nature of the suit filed. He submitted that the order allowing the plaintiffs to file a representative suit did not give the plaintiffs leave to file suit on behalf of the Kalenyang clan and that the plaintiffs have no locus. He also submitted that no official document exists to prove that there exists land measuring 2 acres known as Tot/Koibirir/Kisiwei as described by the plaintiffs. He submitted that the suit land has not been clearly defined by the plaintiffs. He submitted that the court cannot issue injunctive orders on non-existent land and that the suit should be dismissed. In the alternative he asked that the findings of the Osis on the extent of the boundary be maintained.

14. Mr. Komen for the plaintiffs submitted that an order had been issued allowing the plaintiffs to file this suit as a representative suit. He submitted that a clan is not a person in law and has no capacity to sue which necessitated the plaintiff to seek leave to file a representative suit. He submitted that though the land is unregistered, it is held communally by the plaintiffs who are of Marakwet descent. He was of the view that the plaintiffs have demonstrated a case for the land.

### **D. DECISION**

15. Before I go to the pith of the matter, there is a preliminary issue which I want to quickly put away. Counsel for the defendant of course raised issue about whether or not the plaintiffs were representing the Kalenyang clan. Before the filing of this suit, the plaintiffs had sought and were granted leave to file a representative suit on behalf of themselves and 24 others who belong to the Kalenyang clan. I believe that the 24 persons claim an interest in the land under dispute. The suit may not necessarily be for the entire clan, but for the 24 people within the clan, who are interested in the land in issue. On my part I do not see any problem with the two plaintiffs agitating the issue on behalf of the other 24, since leave to do so was

granted.

16. Let me now get to the gist of the issues at hand.

17. The contention before this court relates to the right to use and occupy certain land. It is not in contention that the disputed land is neither surveyed nor registered. It falls in Koibirir Location in Kisiwei sub-location in Tot within Elgeyo Marakwet county. Probably that is why the plaintiffs described the land as Tot/Koibirir/Kisiwei. But that can only be for purposes of description and cannot be said to be the formal identity of the land. The land is held communally and no one has title to the same. From what I could gather, each clan or family occupies a specific area, which is identifiable and which they claim as their own. Other clans or families have no right to interfere with their possession. Each clan and/or family seem to know the confines of their areas, but just like boundary disputes can arise in demarcated land, so too, in these types of land.

18. The challenge of course is how to resolve conflicts related to these types of land. The lands appear to fall within the definition of "Community Land" as defined by Article 63 of the Constitution and in sub-article 2 (d) such land includes,

*"land that is :-*

*(i) lawfully held, managed or used by specific communities as community forests, grazing areas and shrines;*

*(ii) ancestral lands and land traditionally occupied by hunter-gatherer communities; or*

*(iii) lawfully held trust land by the county governments."*

The land in dispute can fall under the description of "ancestral lands and/or land held by a specific community". Under sub-article 5 of Article 63 of the Constitution, Parliament is mandated to enact legislation to give effect to Article 63. So far, no statute on Community land has been enacted. This certainly leaves a lacuna in the law, for there is actually no specific provision that one can point at, as providing the guiding principles on how the court should decide a matter such as this.

19. But I do not think the absence of a specific law would mean that the court cannot make a decision on the matter. The people of Kenya at Article 159 (1) of the Constitution, have vested judicial authority upon the courts and tribunals established by or under the Constitution. "Judicial Authority" in the ordinary meaning means the power to hear disputes and pass judgment on them. This court, being the Environment and Land Court, has mandate under provisions of Article 162(2)(b) of the Constitution to hear disputes relating to the environment and the use and occupation of, and title to, land. This jurisdiction is expounded by Section 13 of the Environment and Land Court Act Act No. 19 of 2011, which at Section 13 (2) (d), gives the court power to hear and determine disputes relating to public, private and community land, and in Section 13(2)(e) power to hear any other dispute relating to environment and land. I therefore do not agree with the submissions of Mr. Kipnyekwei, that this court cannot issue orders on land that is "non-existent" (in the form of land that is unregistered) .

20. As I stated above, there is no guiding law on how the court should approach a matter such as this. However, since the land is held by communities, principally under tenure derived from their ancestors, and which appears to fall under customary law, traditional dispute settlement mechanisms have great utility. That is why I thought of involving the Osis, a recognized traditional panel of elders, to assist in deciding this dispute. The court is of course not bound by their opinion, but the same must be given considerable weight.

21. The evidence of the plaintiffs is that the disputed land belongs to their clan and not to the clan of the defendants. They say that they were born on the disputed land and the said land belonged to their ancestors. This is the same evidence that has also been laid by the defendants.

22. From the evidence tabled, it would appear that the two clans, the Kalenyang and Kamitei clan are neighbours. At some point, land was donated by the Kalenyang clan to put up a dispensary. For this loss of land, the Kalenyang were compensated by some acreage from land that was originally of the Kamitei clan. The Kamitei clan was not happy with this and they lodged a complaint before the Osis. They lost the case with the elders upholding the decision to have the Kamitei clan cede part of their land to the Kalenyang. That is probably why the plaintiffs want certain land occupied by the Kamitei families.

23. It will be recalled that I referred the dispute to the Osis and the Osis made a determination of where the boundary between the two clans should be. The Osis in their wisdom, decided to have a seasonal stream be the boundary between the two clans. If I am to follow this decision, the Kalenyang will have received some land that was originally of the Kamitei on the eastern side of the boundary. The Kamitei's have no objection, and indeed, they have abandoned a *manyatta* that was on that side of the stream, and have moved to the western side of the seasonal stream in compliance with the decision of the Osis, though they do lose some land in the process.

24. I see no problem with the determination of the Osis elders. I think they thought through the matter before arriving at their decision. I will borrow from their wisdom. I have seen that the Kamitei family have now settled well on the western side of the seasonal stream. I see no reason why I should disturb their occupation and have the Kalenyang have this side as well.

25. My judgment therefore is that the Kalenyang ought to remain on the western side of the seasonal stream and the Kamitei to remain and occupy the eastern side of the seasonal stream. The boundary between the two shall be the seasonal stream. No person from the one clan should interfere with the occupation or use of the other's clan land unless with their permission.

26. The only issue left is cost. I think the plaintiffs were simply being difficult in not accepting the determination of the Osis. I award the costs of the suit to the defendants. The plaintiffs will also shoulder the witness expenses of Edward Kimole of Kshs. 7,000/=.

Judgment accordingly.

**DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF NOVEMBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

*Delivered in the presence of:*

*Mr. P.K. Komen present for the plaintiffs*

*Mr. J.K. Kipnyekwei present for defendants.*