



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, WAKI & AGANYANYA J.J.A)
CIVIL APPEAL NO. 330 OF 2009**

CCC

BETWEEN

1. JOSEPH KASHAU OLOLKUO
2. MAMAET OLE NAKURROH
3. ODUPOY OLE LELUYA PARSTAU
4. JOHN OLE HOSENI
5. SAITOTI OLE KILOKU
6. SANDULA LESHISHI
7. SORIMPANI OLE NAIRENYU

**(All suing on their own on behalf And all the member of the Maasai
Community residing in L.R. Nos. Narok Maiella Estate 2662, 1380 and 8398/2).....
APPELLANTS**

AND

**NGATI FARMERS CO-OPERATIVE SOCIETY
LTD.....RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Kenya at Nakuru (Koome, J.) dated
17th November, 2006**

**in
H.C.C.C. NO. 267 OF 2005 (O.S.)**

JUDGMENT OF THE COURT

This is the second appeal concerning a dispute over three properties situated in the Maiella area of Narok District. The properties are L.R. No. Narok/Maiella Estate/2662, Narok/Maiella Estate/1380 and Narok/Maiella Estate/8398/2.

The first appeal was from the decision of the High Court (Rimita J.) given on 12th May, 2000 in Nakuru High Court **Civil Case No.89 of 1996**. The plaintiff in that suit was **Ngati Farmers Co-operative Society Ltd**, the respondent in this appeal, with councilor **John Ledidi, Kelesi Ole Pushati, Kariwo Ole Nakoru, Ndoyoo Ole Kamassia, Ipite Ole Kiloku, Lemei Ole Siriai, Chief Hassan, John K. Siriai, Cheringot Ole Siriai, Lemon Ole Punyua, Kosev Ole Maloit, Namesi Ole Mosheshi, Ole Nkuku, Madero and Moshoga Ole Kashikwa**, as the defendants. The suit was commenced by plaint and in it the plaintiff prayed for an injunction, restraining the defendants, either by themselves, their servants, agents, employees and anybody purporting to act on their behalf from alienating, occupying, interfering with the survey work which by then was ongoing on the aforesaid three parcels of land. In addition the plaintiff

prayed for a declaration that the defendants were trespassers on the property, general damages for trespass, an eviction order against all the defendants and costs.

The named defendants through their counsel, Mr. Konosi, filed a written statement of defence denying the claim and themselves counterclaimed by seeking a declaration that they had become entitled to ownership of the property by adverse possession, and an injunction to issue restraining the plaintiff from evicting them from the three parcels of land.

Rimita J. heard the case fully, and in his judgment, as material, he rendered himself thus:

“The defendants assertion that they occupied the portions of the plaintiff’s land since they were born (over 20 years) must be true. I find that the defendants did not enter the disputed portions of the plaintiff’s land with consent of the plaintiff. In any case if the consent was for grazing rights then it was violated and the defendants by making settlements, cultivating the land and growing crops, building schools etc, became trespassers.

I think their possession of the said distinct portions of land was adverse.

The plaintiff’s claim is therefore time barred and cannot succeed. There is a counterclaim. The application must have been by way of Originating Summons but since their claim is in answer to the plaintiff’s claim, I think it should succeed.”

Earlier in his judgment the learned Judge remarked that he visited the disputed portions of the land and observed that the portions which were occupied by the defendants were clearly delineated, there was an old school and several other developments thereon, and that the portions occupied by the Maasai were under cultivation and some parts were used for grazing purposes.

Rimita J.’s aforesaid decision, as indicated earlier, gave rise to the first appeal to this Court to wit **Civil Appeal 64 of 2004**. That appeal was dismissed. It meant that the defendants/respondents became entitled to the land they were then occupying. The significance of that decision is that the land which was occupied by people other than the registered owners was thus identified.

The appeal before us arose from the decision of the High Court in Nakuru High Court **Civil Case No. 267 of 2005 (OS)**. The suit was commenced in November 2005, by Originating Summons pursuant to the provisions of **O.XXXVI rule 3D** of the Civil Procedure Rules. There were 7 plaintiffs who indicated in the heading of the case as ***“suing on their own behalf and all members of the Maasai Community residing on LR No. NAROK/MAIELLA ESTATE/2662, 1380 and 8398/2.”*** As is clear the dispute is over the same property as the subject matter of Nakuru High Court **Civil Case No. 89 of 1996**. There is a special procedure for instituting a representative action. As at the material date of that suit the relevant provision which governed such proceedings was **O.1 rule 8** of the Civil Procedure Rules, and more specifically **rules 8(2) and (3)**, which provided thus:

“8 (1) where numerous persons have the same interest in any proceedings the proceedings may be commenced by or against, one or more of them:

(2)The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit.”

The respondents in this appeal attached to the Originating Summons a list of the people on whose behalf they were suing and all those people appended their respective signatures against their names. That was not however sufficient compliance with the aforesaid provision. We have checked the trial court’s record of proceedings and we are unable to find any note regarding compliance with the above provision. We

think that on that ground alone though not raised in the memorandum appeal, the suit should have been dismissed as incompetent. But there are other grounds upon which a dismissal of the suit would have been based. But first the brief facts:

The suit land was originally owned by one **Raska** who sold it to the respondent Co-operative Society in or about 1964. Payment for the land was by instalments which were completed in or about 1974. It was common ground that the respondent is and has since then been the registered owner. But by the decision of the High Court in its **Civil Case No. 89 of 1996**, about 4201 acres thereof were awarded to the Maasai. According to the respondent the claimants were over 3000 in number even though the list submitted to the court has only about 347 people. It is however probable that those listed are merely heads of families. Be that as it may, the appellants have not identified the specific parts of the suit property which they are claiming. It is clear from the evidence that they do not occupy the whole of the land in dispute, but only a portion of it, which Rimita J. identified and awarded to the plaintiffs in **Civil Case No. Nakuru High Court Civil Case No. 89 of 1996**. By inference it is apparent that the appellants are claiming whatever portion is outside the subject matter of the earlier suit. However, as the claim is not clear on that, it has to be assumed that their claim is for the whole property.

There are some salient aspects of the earlier suit which should be brought out in this judgment. Initially the issues in that suit were referred to arbitration, and an award was filed. The details of the award are important. We will reproduce it in full:

“The Panel of Elders were divided in its decision each one eventually decided in favour of the party which invited them to participate in the meeting. The decision of this case therefore rested on the verdict of the Chairman. My findings therefore are that Ngati Farmers Co-operative Society is the legal owner of the land under dispute. However, because of the historical nature of the dispute the critical security implications I recommend that:

(a) That boundary which has been established and which has served both parties well should be legalized.

(b) Cllr. Lelingi and his group of Maasai should be made to compensate Ngati Farmers for the portion of land they are occupying at a price to be negotiated by the parties concerned.”

In the end the trial Judge agreed to award the defendants in that case the land but he did not require them to pay for it. Although the award was later, on 11th November, 1996, set aside by consent, what is significant is that the land the Maasai were occupying whatever their number, was identifiable and as stated earlier it was awarded to them by Rimita J.

In **Civil suit No. 267 of 2005(OS)**, the claimants are seeking an order that they have become entitled not to a portion but the whole of parcel **Nos. Narok/Maiella Estate, 1380, 2662 and 8398/2** by adverse possession. Considering the timing of the suit it would appear to us that the success of the earlier suit provided the impetus and resolve to claim the remainder of the land owned by the appellants.

The basis of the appellants’ claim was that the land is ancestral to them, they have no alternative land to settle on, their number inclusive of children is over 5000, and they have lived on the land all their lives.

The respondent as expected denied all that in a replying affidavit sworn by one Patrick Karanja Mwahuki, the Chairman of the respondent, who, among other things, states that the society allowed Maasais grazing rights, but instead they moved in and settled. He deposed that the appellants are trespassers and should therefore be ejected. He contended that the appellants moved onto the suit land only recently. Some members of the respondent society live on parts of the land, and the society is in the process of subdividing the land for the occupation of its members.

Koome J., heard the suit. She did not think that the procedure adopted by the appellants in bringing the suit had any irregularity. In her judgment she found as fact that the earlier suit was brought for the benefit of the Maasai Community who were residing on the suit property and concluded thus:

“ I find that the issues in controversy in this suit were substantially the same issues that were litigated

upon in Nakuru HCCC. No. 89 of 1996. The plaintiffs are litigating for the same claimants and over the same subject matter.”

That finding is one of those which are the subject matter of this appeal, but we shall return to the issue later on in this judgment.

On the issue of adverse possession the learned Judge found against the appellants in the following terms:

“From the evidence before the court, the Plaintiff has not established that they have been in continuous, uninterrupted possession of the suit land. Their evidence as I stated above, is in general terms, it defeats common sense how one plaintiff can variedly pursue an amorphous claim generally for a community and for unspecified rights.”

She then dismissed the claim and thus provoked this appeal.

There are six grounds of appeal, but they may be condensed into three:

- (1) The learned Judge erred in law in finding that the suit was **res judicata**.
- (2) The learned Judge erred in fact in finding that the claim over the suit property by adverse possession was not proved.
- (3) The learned Judge erred in fact and in law in her conclusion that Nakuru High Court **Civil Case No. 89 of 1996**, was a representative action.

We propose to deal with all these grounds together. It is common ground that the three parcels of land in this suit were the same ones as in the earlier suit. Mr. Konosi, in urging the appellant’s appeal tried to introduce a subtle argument regarding which property, in his view, was the subject matter of the earlier suit. It was his submission that the claimants in that suit were claiming only a specific acreage of each parcel of land and that the claimants were only 17 and their claim was specifically for their own benefit. That, however, is not borne out by the evidence. Proceedings before the arbitration panel show otherwise. In its ruling the panel chairman rendered himself as follows regarding the testimony which was given by Councillor John Lelingi, Nelson Ole Sangunyi, Lengisa Ole Maloi and Mbushati Ole Sironga:

“In their evidence they indicated that their claim of this land is historical. Right from the beginning they had boundary dispute with the Maela Limited. Eventually both parties agreed to a common boundary but what upset the Maasai was the fact that Maela Limited started to enter into a sale agreement with Ngati Farmers and leaving them out. The society found the Maasai on this land. As soon as the Farmers Society took possession of this land then the dispute started with a lot of confrontation. Eventually the Provincial Administration and Panel of Elders (drawn from both parties) established and fixed a common boundary. The effect of this was that Ngati Farmers Co-operative Society would share LR No. 2662 and the whole of 9398/2 be occupied by the Maasai. As of now both parties are occupying the land which was established by this reconciliation Committee of Elders. It is the contention of Councillor Lelingi and his group that the boundary which was established and has served the two communities satisfactory should be respected and be maintained”.

If that summarises the position as it was on the ground, it follows that the defendants in the earlier suit were not agitating a claim personal to each of them but a communal claim. Rimita J. visited the land and we think that what he observed is what is stated in the above excerpt.

The appellants in the appeal before us are not pursuing a different cause of action. They are claiming the same property and that does render their claim herein **res judicata**; and considering the manner in which they worded their counterclaim and pursued their case before Rimita J. they were **prima facie**, pursuing community rights. John Lesono Ledidi and Karino Ole Nakoru, testified on behalf of the defendants before Rimita J. The former testified that about 3000 people were on the disputed property and they occupied over 300 Manyattas. The latter added that boundaries were fixed and they built schools on their side which were exclusively for the Maasai children. In effect their testimony confirms what was stated

before the arbitration panel. That being the case, Mr. Konosi's submission that the decision of the High Court in its **Civil Case No.89 of 1996** affected only the 16 or 17 defendants in that suit is untenable. The dispute concerned the entire land and the High Court did adjudicate on it. It is instructive that prayer (2) of the defendants' counterclaim was categorical that the defendants were claiming not a portion but the whole of the three parcels of land. The prayer reads thus:

“A declaration that the defendants have acquired title to all those parcels of land known as Narok Maiella Estate/No.2662, 1380 and 8398/2 by adverse possession and/or prescription.”

That suit and more specially, the counterclaim, was not titled as being a representative action. However, the manner in which the defendants therein prosecuted it was for all intents and purposes a representative action. There is very little, if any difference, between that suit and the one from which this appeal originated. In the instant one the named plaintiffs have provided a list of people who they represent. However in the evidence given, it is clear that they represent a large constituency of people numbering over 5000 whose names do not appear on the lists given. Like in the earlier case, no notice was published to notify those purportedly represented of the existence of the suit so that any one or more of them who may have wished to apply to be joined could do so.

In **Kearsly (Kenya) Ltd v. Anyumba and Others** [1974] EA 112, it was held that it was essential to issue a notice to those represented to make them aware of the existence of the suit so that they are given an opportunity to decide whether or not to apply to the court to be added as parties. Such a notice is not a summons to enter appearance. That was the holding in that case. It may, however, in our view, serve to bar a party for whose benefit such a suit is brought from bringing a fresh suit on the same terms.

We have no basis for interfering with Koome J.'s decision. Accordingly, we agree with Mr. Kahiga for the respondent that the appeal has no merit both on the basis that the appellants' suit is **res judicata**, and also because on the evidence before the High Court, the appellants did not prove adverse possession. The appeal is accordingly dismissed with costs to the respondent, Ngati Co-Operative Society Ltd.

Dated and delivered at Nakuru this 11th day of NOVEMBER, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

.....
JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR