



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL SUIT NO. 97 OF 2005

JULIUS WEPUKHULU SARATUKI.....PLAINTIFF

VERSUS.

KAMUSINDE FARMERS CO-OPERATIVE SOCIETY.....DEFENDANT

JUDGMENT

[1] The plaintiff Julius Wepukhulu Saratuki sued Kamusinde Farmers Co-operative Society Limited the defendant herein and alleged that sometimes in the year 2002 he granted the defendant of his own free will a license to use part of his land for purposes of growing coffee seedlings for its members. He avers that it was mutually agreed that the defendants would upon revocation of the license permit the plaintiff free use of his land. The plaintiff states that in breach of that understanding the defendant has without any colour of right purported to assert full ownership rights over the said portion and have adamantly prevented the plaintiff from stopping or carrying out any work on the said portion and have barred the surveyors from carrying out the survey.

[2] The plaintiff claim that the defendants have no colour of right or claim on any part of the land No. Kimilili/Kamukuywa/409. The plaintiff claim for a permanent injunction restraining the defendants whether by themselves, their servants from interfering with the plaintiffs use and/or enjoyment of land parcel No. Kimilili/Kamukuywa/409. He also asked for a declaration that he is entitled to use and enjoyment of the suit land Kimilili/Kamukuywa/409.

[3] The defendant filed a defence dated 31/1/2006 and denied the allegation of the plaintiffs and stated that it has never grown, during the years named, grown any coffee seedlings or at all. It further says that the defendant not having used or occupied any part of the plaintiffs parcel of land denied there was a mutual agreement and that hence, the issue of revocation of license does not arise. Finally the defendant denied the jurisdiction of the court. It averred that the matter was purely a boundary dispute to be determined by the Land Registrar and or the Land Dispute Tribunal. The issue of jurisdiction was never taken up during the hearing.

[4] The parties set out 16 agreed issues and filed them in Court on 6/4/2016.

[5] The court ordered the Land Registrar Bungoma County and the District Land Surveyor to visit Land parcels Kimilili/Sikhendu 714 and Kimilili/Kamukuywa/409 and give a report to determine the acreage of each parcel and actual position on the ground as aligned to those Registry Index maps and file a report. The report was filed on 28/6/2016. Their observation was that it was for the two parties to justify their claim of the disputed area of 1.04 ha marked on the report filed in court and marked red. This 1.04 ha

was a portion of land beyond river Sosio and in land parcel Kimilili/Kamukuywa/409. The river Sosio separated Land parcels Kimilili/Kamukuywa/409 and Kimilili Sikhendu/714.

[6] During the hearing of this case Julius Wepukhulu Saratuki gave evidence and relied on his statement dated 22/10/2010 he produced it as his evidence. He gave evidence of how 2 acres are used by the defendants. He said that he has used these two acres as a place for his cows. He said that the defendants chairman had asked him for permission to use the same and plant coffee seedlings for their members. He said that he does not want the defendants to cross the river Sosio and get into his land. On cross examination he said that his land is 32 acres. He stated that river Sosio was the boundary between the two lands Kimilili/Kamukuywa/409 and Kimilili/Sikhendu/714.

[7] Francis Wanyonyi Wanakai gave evidence and said that he was a Secretary Manager of Kamusinde Farmers Co-operative Society since 1983. He said that Kimilili/Sikhendu/714 was one of their assets and that it is traversed by river Sosio. He relied on his statement dated 28/8/2015. He said that he had attached documents he wished the court to rely on. He said that they have used the land to graze their animals and even do horticulture. He testified that the land is still in the name of the Bungoma County Council.

The defendants called Kefa Kituyi, Japheth Sitati who relied on their statements. Kefa Kituyi said that his father gave his land to Kamusinde Farmers Co-operative Limited and it went up to the river. Joseph Mukubuyi Lusweti relied on his statement and asked the court to rely on it in support of the defendants.

[8] Finally called was the surveyor and Land Registrar who had filed their report earlier referred to. Mr. Amos Wekesa Simiyu gave evidence and said that Kimilili/Kamukuywa/409 is registered in the name of Julius Wepukhulu Saratuki and Kimilili/Sikhendu/714 is registered in the names of County Council of Bungoma reserved for Kamusinde Farmers Co-operative Society. He confirmed that the two parcels are in different registration Sections. That 409 is in Kamukuywa adjudication section and that 714 is in Sikhendu adjudication Section.

[9] He explained that piece of land in dispute is 2.41 acres. He said that there was a brace in favour of Parcel 714. He explained that the brace is put where a piece of land continues through a road, river or powerline. He said he did not know who placed a brace on the piece of land 714. He said that the brace must have been the work of the adjudication committee and the survey department. He said that he was not sure whether the brace is justified. On cross examination by the court, he said that you cannot put a brace after registration under any circumstances. He said that a brace can also be put illegally.

[10] John Momanyi Ocharo, the Bungoma District Land Registrar and the author of the report stated that parcel Kimilili/Kamukuywa/409 was registered on 17/7/65 and that Kimilili/Sikhendu/714 was registered on 26/6/66. That the two parcels of land belong to two different registration sections. He said that the land registry opened and registered the records for Kimilili/Kamukuywa and then a year later they opened and registered the record for Kimilili Sikhendu. He said that the two registration sections cannot overlap if things are done properly. He said that, other than Kimilili/Sikhendu/714 no other parcel crosses River Sosio to Kamukuywa registration Section. He testified that the land being claimed by the defendant is still Government land reserved for Kamusinde Factory. He stated that the defendants should have obtained their title. He explained that once a piece of land is reserved for someone, like in this case, you apply to the Local Authority or Town Council and get a temporary letter to occupy and develop the land and then you apply to the Commissioner for lands for a lease, pay stand premium and become an owner. In the alternative you can get a direct allocation from the President. In his evidence he said that nothing had ever been done by the defendant to acquire title of Kimilili/Sikhendu/714. The title is still owned by the County Council of Bungoma.

[11] On the brace, the witness testified and said that him and the surveyor were not able to trace when the same was done and who placed it there. That they looked for the aerial map which is authoritative and they did not see this brace on the aerial map. He said that the river Sosio marks the boundary of the two registration sections. He averred that if the brace was real, it would have been visible from the aerial map. He said that the brace is totally misplaced.

[12] From the documents produced for Kimilili/Kamukuywa/409 the land is indicated as 33 acres. It is on registry map sheet 12 and is in the name of Julius Wepukhulu Saratuki. The first registration was on 17/7/65 in the name of Saratuki Wambululu. Kimilili/Sikhendu/714 was registered on 29/6/66 registered in the name of County Council of Bungoma. It was reserved for Kamusinde Factory. This land upto today is still Government land. The defendant herein does not own this land. They have not made any attempt to have the same in their name since 29th June, 1966. From the evidence adduced herein, it is clear that land parcels Kimilili/Kamukuywa/409 and Kimilili/Sikhendu/714 are in totally different registrations sections. Kimilili/Kamukuywa registration Section was registered a year earlier than Kimilili/Sikhendu. It was not possible to put a brace from an earlier registration section to a latter registration Section. I agree with the land registrar that the brace is totally misplaced. In any case, no other piece of land from Kimilili/Sikhendu registration Section has crossed river Sosio into Kimilili/Kamukuywa registration Section. Kimilili/Sikhendu/714 was reserved for Kamusinde Factory. The defendant if it is the "Kamusinde Factory" have never made that reservation count. The land still belongs to the Government. No land was reserved for Kamusinde Farmers Co-operative Society which is a body corporate with power to sue or be sued. So, if there was any agreement between the plaintiff and the defendant to use part of his land Kimilili/Kamukuywa/409 then the defendant cannot raise any ownership or entitlement to Kimilili/Sikhendu/714 because it does not belong to it. In any case, in its defence, the defendant generally denied everything in the plaint including occupation and user of part of Kimilili/Kamukuywa/409.

[13] The plaintiff is the owner of Kimilili/Kamukuywa/409 a land of approximately 32 acres, spanning up to Sosio river. The plaintiff is entitled to full use of the same as by law mandated. Land parcel Kimilili/Sikhendu/714 does not cross river Sosio. The defendant must move out and vacate any area it is occupying belonging to Kimilili/Kamukuywa/409. The plaintiff shall have the costs of this suit.

Judgment read In open Court in the Presence of Counsels.

Dated at Bungoma this 28th day of February, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Court Assistant: Anthony

Mr. Ocharo: For Mr. Ikapel for the Plaintiff

Madam Mumalasi: For Mr. Murunga for the defendant



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