



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAJIADO

ELC SUIT NO. 627 OF 2017

(Formerly Nairobi ELC NO. 885/2016)

REUBEN NJARO BALOSI.....PLAINTIFF

-VERSUS-

SERA MWERU KANGARI.....1ST DEFENDANT

LAND REGISTRAR, KAJIADO COUNTY.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

Reuben Njaro Balosi the plaintiff claims the following reliefs from the Defendants Sera Mweru Kangari, Land Registrar, Kajiado and the Honourable the Attorney General.

- (a) An order compelling the Land Registrar Kajiado County to expunge entries numbers 4, 5, 6, 7 and 8 entered against L.R. KIMANA/TIKONDO/181
- (b) A declaratory order that the plaintiff is the rightful owner of all that parcel of land known as KIMANA/TIKONDO/181
- (c) Costs of the suit together with interest thereon at such rate and for such period of time the Court may deem fit to grant.
- (d) Any other relief.

The plaintiff's case is as follows. In the year 1972, Land Adjudication took place at Kimana Group Ranch in Loitoktok area. The Plaintiff's father Samuel Balosi Kulale who was to be allocated L.R. KIMANA/TIKONDO/181 asked the Group Ranch Officials to have his land allocated to his son, the Plaintiff, instead of him.

Kimana Group Ranch duly obliged the Plaintiff's father and registered the suit land in the name of his son, the Plaintiff. The Plaintiff who was a busy man working away in Tanzania did not seek to process the title deed to the suit land.

In the year 2016, he decided to conduct an impromptu search at the Kajiado Land Registry and was shocked to find that the copy of the Register (Green Card) had entries number 4, 5, 6, 7 and 8 which he was not aware of. The said entries effectively transferred the Plaintiff's land first to one Mumira Kamau of P.O. Box 24772 Nairobi.

The said Mumira Kamau was issued with a Land Certificate on 7/8/1973. On 26/9/1974, the land was charged. On 30/1/1981 Joseph Kangari Muhu and Sera Mweru Kangari were registered as proprietors and issued with a Land Certificate on the same date.

The Plaintiff prays that the land reverts to him because he did not sell it to Mumira Kamau or anybody else and he has always assumed that it was in his name.

In support of his case, the Plaintiff filed the following;

- (a) Witness statement by himself dated 22/7/2016
- (b) Witness statement by Joseph Kampatae Nkoreo, Henry Kishoyian Seyiat and Oloibor Ole Olopurura dated 22/7/2016.

(c) Copy of the register for suit land showing the entries complained of.

(d) Copy of register for members of Kimana /Tikondo Group Ranch showing the Plaintiff as member number 181 and owning 16.0 Hectares.

At the trial, the Plaintiff testified and produced the area list of Kimana Tikondo. Two of his witnesses namely Joseph Kampatae Nkoreo and Oloibor Ole Olopurwa testified and corroborated the Plaintiff's evidence. They said that he is the owner of the land and he has never sold it to anybody.

I do not see any defence on record filed by the first defendant. The only defence that is on record is by the third and fourth Defendants. It is dated 28/7/2017. It is to the effect that the suit land was properly registered in the name of the first Defendant and that the correct procedure was followed and all the necessary documents are available at the third Defendant's registry. The defense calls for the dismissal of the Plaintiff's case.

On 3/10/2019 the District Land Registrar Kajiado filed the following documents to prove that all the entries in the register of the suit land are official;

- (i) Certified copies of the registers (Green Card)
- (ii) Transfer form dated 27/10/1972 from Reuben Ncharo Samuel to Mumira Kamau
- (iii) Application for consent forms from the Land Control Board
- (iv) Letter of consent dated 20/12/1978 between Mumira Kamau and the first defendant and her husband.
- (v) Transfer form dated 29/1/1981 between the same parties in (iv) above
- (vi) Stamp duty assessment dated 27/1/1981
- (vii) Copy of search form for the suit land dated 23/4/1976 showing Mumira Kamau as the registered proprietor of the suit land.
- (viii) Consent dated 23/6/1973 from Reuben Ncharo Samuel to Mumira Kamau
- (ix) Application for consent dated 23/6/1973
- (x) Adjudication record dated 11/2/1972 indicating Reuben Ncharo Samuel as the owner of the suit land
- (xi) Charge form dated 12/9/1972 to Kenya Commercial Bank
- (xii) Discharge form dated 30/1/1981
- (xiii) Consent to charge dated 4/7/1974

The second Defendant testified on 3/10/2019 and produced the above documents as exhibits.

The first Defendant did not testify as she was said to be senile.

Counsel for the first Defendant filed written submissions on 17/1/2022 while the Plaintiff's Counsel filed his on 17/2/2022. Both Counsels have identified the issues of determination.

I have carefully considered the evidence adduced in this case by both parties. I have also considered the submissions by both Counsel as well as the issues and the case law cited therein.

I find that the following issues are certain and not contested.

Firstly, it is not in dispute that the Plaintiff was registered as member number 181 of the Kimana/Tikondo Group Ranch. This is obvious from the copy of the Register (Green Card) a copy of which was produced by the Plaintiff and the second Defendant.

The second issue that is also certain and beyond dispute is that the first Defendant and her husband are currently the registered proprietors of the suit land. The same copy of the register (Green Card) is sufficient proof of this.

I find that the following issues will determine the suit

- (1) Is the suit time barred?

(2) Is there any evidence of fraud or mistake to warrant the expunging of entry numbers 4, 5, 6, 7 and 8 in relation to the suit land?

On the first issue, I find that the suit is not time barred for the following reasons.

Under **Section 26 of the Limitation of Actions Act**, an action to recover land is not caught up by limitation if it is based on the fraud of the Defendant or his agent or if the Plaintiff alleges that the relief he seeks was as a consequence of a mistake.

Even though the Plaintiff has not come out categorically to say that his claim is based on either of the two exceptions above, one can imply it from the pleadings. If the suit is based on the two grounds, then it is not time barred.

On the second issue, I find that the Plaintiff failed to plead fraud, misrepresentation or other fact that he was relying upon contrary to **Order 2 Rule (10) (a)** of the **Civil Procedure Rules** which provides as follows;

“10 (1) Subject to subrule (2) every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing (a) particulars of any misrepresentation, frauds, breach of trust, willful default or undue influence on which the party pleading relies.”

This requirement is in mandatory terms. Failure to plead the above particulars was a serious omission.

Even more serious to the Plaintiff's case was failure to prove any fault on the part of the Defendants. It is trite law under **Section 107 of the Evidence Act** that he who alleges must prove.

In this case, the only thing that the Plaintiff did was to allege that he did not sell the suit land to anybody. This is contradicted by the overwhelming evidence in the register for the suit parcel showing that he sold the land to Mumira Kamau.

It was incumbent upon the Plaintiff to prove that the signature on the application form for consent as well as the one on the Transfer Form were not his. He failed in this basic requirement.

In contradistinction, it is the Defendants who have proved that there was sale of suit land by the Plaintiff to Mumira Kamau.

For the above reasons, I find the Plaintiff's case has not been proved on a balance of probabilities.

I dismiss the Plaintiff's suit with costs to the Defendants.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21ST DAY OF FEBRUARY, 2022.

M.N. GICHERU

JUDGE