



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL MISC. NO. 912 OF 2013**

**KOKAL KONOR..... PLAINTIFF**

**VERSUS**

**EMILY NAIPANOI KASAINÉ.....1<sup>ST</sup> DEFENDANT**

**LORNGUSUA GROUP RANCH ..... 2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR .....3<sup>RD</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> Defendant by a Notice of Motion dated 24<sup>th</sup> January 2014 brought under Order 2 Rules 15 (b) and (d) of the Civil Procedure Rules seeks the following orders:-

1. That the plaint filed on 25<sup>th</sup> July, 2013 be struck out as against the 1<sup>st</sup> Defendant/Applicant.
2. That the plaint herein filed on 25<sup>th</sup> July 2013 be struck out as against the 1<sup>st</sup> Defendant/Applicant for being scandalous, frivolous or vexatious and amounts to an abuse of the court process,
3. That the costs of this Application be borne by the plaintiff/Respondent.

The application firstly is premised on the grounds that appear on the face of the application and secondly on the annexed supporting affidavit sworn by **Emily Naipanoi Kasaine**, the 1<sup>st</sup> Defendant herein on 24<sup>th</sup> January 2014. The 1<sup>st</sup> Defendant/Applicant premises her application inter alia on the following grounds:-

- a. That the claim against the applicant is nugatory and in vain.
- b. That the claim is scandalous, frivolous and vexatious.
- c. That the plaintiff/respondent is guilty of court fraud.

The 1<sup>st</sup> Defendant asserts that she is the registered proprietor of the suit property Title **NO. Kajiado/Lorngusua/395** as evidenced by the Title Deed issued on 18<sup>th</sup> April 2001 annexed and marked “**ENK1**” and the certificate of official search dated 11<sup>th</sup> October 2012 annexed and marked “**ENK2**”. The 1<sup>st</sup> Defendant avers that pursuant to a sale agreement dated 16<sup>th</sup> April 2001 made between the plaintiff and the 1<sup>st</sup> Defendant she purchased the plaintiff’s share in the 2<sup>nd</sup> Defendant and paid the full consideration of 20 cows and 20 goats whereupon the said plaintiff’s share in the 2<sup>nd</sup> Defendant was transferred to her thereby becoming entitled to be registered as the owner of the parcel of land that was represented by the said share in the Groups Ranch. The share sale agreement was duly executed by the

plaintiff and the 1<sup>st</sup> Defendant and was approved by the officials of the Group Ranch who gave effect to the same.

The 1<sup>st</sup> Defendant further states the plaintiff after a lapse of about 10 years referred the issue as a dispute before the **Kajiado Land Dispute Tribunal** vide case **NO.TC 698/07/2011** where the matter was heard and the Dispute Tribunal upheld the 1<sup>st</sup> Defendant's purchase of the plaintiff's share in the 2<sup>nd</sup> Defendant's and the 1<sup>st</sup> Defendant's registration as the owner of the suit land. That before the Kajiado Land Disputes Tribunal the plaintiff acknowledged the agreement and transaction with the 1<sup>st</sup> Defendant that resulted in the transfer of the plaintiff's shares in the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant leading to the registration of the 1<sup>st</sup> Defendant as the owner of the suit property.

The 1<sup>st</sup> Defendant in the premises asserts the plaintiff's suit against her raises no cause of action, is frivolous and is otherwise an abuse of the process of the court and the same ought to be struck out.

The plaintiff in response to the 1<sup>st</sup> Defendant's application through the replying affidavit dated 26<sup>th</sup> February 2014 denies that he had agreed to sell the entire parcel of land and states that he only intended to sell a portion and alleges that the 1<sup>st</sup> Defendant maliciously transferred the entire parcel of land in collusion with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The plaintiff further under paragraphs 4 and 5 of his affidavit avers that the stated consideration of 20 cows and 20 goats was inadequate and/or insufficient for the parcel of land. The plaintiff further avers that his entire family were not involved in the transaction and they ought to have been involved and given their approval and consent to the transaction since he held the shares and the land on their behalf and he could only have been entitled to sell the share that he would have gotten as his inheritance.

The plaintiff by his plaint affirms that he was a member of Loilngusua Ranch Group the 2<sup>nd</sup> Defendant and was a member NO. 395 and that by virtue of his membership he acquired shares in the 2<sup>nd</sup> Defendant which entitled him to be allocated a parcel of land with title documents as evidence of his sole proprietorship. Under paragraphs 7 and 8 of the plaint the plaintiff pleads thus:-

**7. That the 2<sup>nd</sup> Defendant at all material times kept a register of members and corresponding allocated parcels of land and it is by that record that the 2<sup>nd</sup> Defendant was to cause registration and issuance of title documents by the 3<sup>rd</sup> Defendant.**

**8. That despite the plaintiff having fulfilled each and every obligation the 2<sup>nd</sup> Defendant inexplicably expunged the plaintiff's name from its register and caused the 3<sup>rd</sup> defendant to mistakenly register and issue title documents for land parcel no. KJD/LOLNGUSUA/395 to the 1<sup>st</sup> Defendant.**

The plaintiff under paragraph 9 of the plaint avers that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently and mistakenly colluded to deny and defeat the plaintiff's rightful claim to the suit land. The particulars the plaintiff gives of fraud are that the 1<sup>st</sup> Defendant misrepresented to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that there was a contract for sale of the plaintiff's parcel of land when the 1<sup>st</sup> Defendant knew that was not true. Further that the 2<sup>nd</sup> Defendant without the plaintiff's knowledge or consent substituted the plaintiff's name in its register with that of the 1<sup>st</sup> Defendant and finally that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant colluded to present to the 3<sup>rd</sup> Defendant documents for the registration of the suit land knowing that the said land belonged to the plaintiff and failed to disclose all the relevant facts.

The parties in their filed submissions reiterate the facts as set out in their respective affidavits. The issue for the court to determine is whether on the basis of all the pleadings and the material placed by the parties before the court the plaintiff has a cause of action and/or has demonstrated his suit against the 1<sup>st</sup> Defendant raises any triable issue or issues and that the suit ought to be allowed to proceed to trial or that the suit is frivolous and vexatious and/or is otherwise an abuse of the process of the court.

In determining whether the suit raises a cause of action and/or whether there is a triable issue the court requires to evaluate and consider all the pleadings and the material that has been placed before it while taking caution not to constitute itself as the trial court that needs to receive and take evidence and have the same tested through cross-examination. If the court finds there is a triable issue, the court ought not to strike out and/or dismiss the suit at an interlocutory stage. The court should only strike out a suit when it is patently clear that the suit is hopeless and is unsustainable so that to allow it to proceed would in itself constitute injustice as it would amount to delaying meting out justice to the deserving party and further putting the parties through the unnecessary expense of a trial when the outcome is obvious.

In the instant case the 1<sup>st</sup> Defendant is the registered owner of the suit property having been so registered on 18<sup>th</sup> April 2001 as per the exhibited Title Deed. The copy of the certificate of official search dated 11<sup>th</sup> October 2012 duly signed by the Land Registrar confirms the 1<sup>st</sup> Defendant was at the time the search was carried out the registered proprietor of the suit land having been so registered on 18<sup>th</sup> April 2001. Under section 24(a) of the Land Registration Act NO. 3 of 2012 the registered proprietor of land is vested with absolute ownership of the land in question.

Section 24 provides:-

24. Subject to this Act-

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto,**

Further under section 25 (1) of the Land Registration Act the rights of a proprietor of land are protected and are not liable to be defeated except as provided in the Act. The only instances where the title of a registered proprietor may be challenged are as provided under section 26(1) of the Act on the ground of fraud or misrepresentation to which the person is proved to be a party or where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26(1) of the Act provides:-

**26.(i) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

**(a) on the ground of fraud or misrepresentation to which the person is proven to be a party or**

**(b) where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.**

The 1<sup>st</sup> Defendant has explained and shown how she got to be registered as the owner of the suit land and in that regard has produced the copy of the agreement the plaintiff executed when he sold his share(s) in the 2<sup>nd</sup> Defendant. The plaintiff has in the replying affidavit acknowledged there was indeed an agreement though he says he did not agree to sell his entire parcel of land. The Agreement dated 16/4/2001 is clear that the plaintiff was selling and transferring his membership in the **Lorngusua Group Ranch** and all that went with it. The agreement under clause 4 clearly authorized the Group Ranch representatives to replace the plaintiff's name with that of the 1<sup>st</sup> Defendant and further mandated the Group Ranch representatives to allocate the parcel of land that had been earmarked for the plaintiff by reason of his membership to the 1<sup>st</sup> Defendant. This is what was done and the 1<sup>st</sup> Defendant was consequently registered as the proprietor of the suit land.

The plaintiff in 2011 filed a dispute before the **Kajiado Central Land disputes Tribunal** where evidence was adduced and the Tribunal came to the finding that the subject parcel of land was genuinely

transferred and was rightfully owned by the 1<sup>st</sup> Defendant.

Having carefully considered the evidence and material placed by the parties before the court I am satisfied that the 1<sup>st</sup> Defendant was legally registered as the proprietor of the suit parcel of land following a regular process of sale. Whereas the plaintiff may feel that he transferred his interest in the land at what he now considers to be inadequate consideration, I wish to restate that as long as there is consideration a contract is not vitiated by reason of what a contracting party may consider to be insufficient consideration. The quantum of the consideration is not relevant where it is clear the parties intended to be bound by the contract.

The only issue is whether the parties intended to be bound by the contract and whether there was a meeting of the minds. In the instant case it is clear that the consideration was paid and the contract executed and implemented. The plaintiff cannot unilaterally take back the clock and he remains bound by his actions.

In my view the alleged acts of fraud are unsubstantiated and cannot stand in the face of the evidence availed on the part of the 1<sup>st</sup> Defendant and that it would be unnecessary to prolong this litigation when there is no issue to take to trial.

One other issue I wish to comment on even though non of the parties has raised it is the question of limitation. The 1<sup>st</sup> Defendant was registered as owner of the suit land on 18<sup>th</sup> April 2001 and the plaintiff instituted this suit on 25<sup>th</sup> July 2013. By dint of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya this suit is time barred to the extent that is is a claim to recover land.

Section 7 of the Limitation of Actions Act provides:-

**7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person.**

In the premises the cause of action having accrued as from 18<sup>th</sup> April 2001 when the 1<sup>st</sup> Defendant was registered as owner of the suit land the claim by the plaintiff became statute barred on 17<sup>th</sup> April 2013 such that the plaintiff could only file any action to recover the land after that date if he sought and obtained leave to bring the action out of time.

In the circumstances and in view of the reasons I have advanced in this ruling I have come to conclusion and holding that the plaintiffs suit against the first Defendant is unsustainable and that the same is frivolous and vexatious and I order the same to be struck out as against the 1<sup>st</sup> Defendant.

Having regard to the circumstances of the suit I will make no order as to costs as to the application and the struck out suit and I direct that each party shall bear their own costs.

Ruling dated, signed and delivered this 30th day of July, 2014.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

..... For the Plaintiff

..... For the Defendant