



**Nkoliai & 4 others v Seriani (Environment and Land Judicial Review
Appeal 20 of 2021) [2022] KEELC 3425 (KLR) (23 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND JUDICIAL REVIEW APPEAL 20 OF 2021**

EM WASHE, J

MAY 23, 2022

BETWEEN

OLE NKOLIAI 1ST APPELLANT
STEPHEN NKOLIAI 2ND APPELLANT
DAVID NKOLIAI 3RD APPELLANT
NDEGE KIPOS 4TH APPELLANT
DAVID MPILEL 5TH APPELLANT

AND

JAMES OLOOLKEYAI OLE SERIANI RESPONDENT

JUDGMENT

1. The Appellants herein filed an Appeal on the 10th of February 2020 before the Environment & Land Court in Narok pursuant to a Memorandum of Appeal dated February 16, 2020.
2. The reason as to why they filed the Memorandum of Appeal dated February 16, 2020 was because they were dissatisfied with the entire judgement and Decree emanating from Kilgoris Principal Magistrates Court sitting as an Environment & Land Court in Case Number 15 of 2019 (hereinafter referred as the trial court) issued on the 30th of January 2020.
3. The Memorandum of Appeal outlined about 18 grounds of Appeal appertaining to the said Judgement and Decree issued on the 30th of January 2020.
4. The Record of Appeal was filed on the 25th of October 2021 and thereafter submissions by Appellants and Respondents followed on the 8th February 2022 and 11th February 2022 respectively.



5. According to the proceedings contained in the Record of Appeal, the dispute between the parties herein began on the 4th of July 2016 by the Respondent filing a suit in the Environment & Land Court sitting in Kisii seeking inter-alia for the following Orders:-
 - i. Declaration that the Respondent (Plaintiff) is the registered owner and/or lawful owner of the property known as Transmara/olomismis/972.
 - ii. An Order of eviction against the Appellants (Defendants), their agents and/or servants from the property known as Transmara/olomismis/972.
 - iii. Permanent injunction restraining the Defendants either by themselves, agents, servants and/or anyone claiming under the Defendants from entering upon, re-entering, trespassing onto, cultivating, building on, grazing on, interfering with and/or in any other manner dealing with the suit property, that is LR No. Transmara/olomismis/972.
 - iv. General Damages on Trespass.
 - v. Special Damages in the sum of Kshs 72, 755.37 only.
6. The Appellants being the Defendants in that original suit, responded by filing a Statement of Defence & Counter-Claim dated 28th July 2016.
7. The Statement of Defence disputed the Respondent's (Plaintiff's) allegations contained in the Plaint dated 30th June 2016 by alleging fraud in the manner that the Respondent (Plaintiff) had acquired the property known as L.r.no. Transmara/olomismis/972.
8. In addition to the above, the Appellants (Defendants) filed a Counter-Claim seeking the Court to direct the Respondent (Plaintiff) to relinquish and surrender title to parcel No. Transmara/olomismis/972 for cancellation and/or annulled.
9. The parties relied on various documents in support of their cases with the Appellants filing a List of Documents dated 28th June 2016 and the Respondent filing their List of Documents on the 30th of June 2016.
10. Thereafter, the matter was dodged with numerous interlocutory applications for a lengthy period of time until 30th May 2020 wherein the substantive hearing began before the trial court being presided over by Hon. R.M. Oanda.
11. The Respondent (Plaintiff) called a total of Four (4) Witnesses who included the Stephen Githinji (Land Registrar, Transmara), Henry Owuor (District Land Surveyor – Transmara) and Julius Langat (Forest Officer) to articulate the Respondent's (Plaintiff's) Case.
12. On the other hand, the Appellants (Defendants) called two witness namely Lekakeny Kibosi and Stephen Lemeshon who gave evidence in support of the Appellants (Defendants).
13. The Record of Appeal does not contain the submissions by the parties filed upon conclusion of the hearing by the trial Court but the judgement was subsequently read out on the 30th January 2021.
14. The Trial Court in the judgement pronounced on the 30th of January 2021 entered judgment in favour of the Respondent (Plaintiff) and directed the Appellants (Defendants) to vacate the property known as L.R.NO. Transmara/olomismis/972 within 90 days failure to which an eviction Order would be issued.



15. The Appellants being dissatisfied with the Judgement of the Trial Court delivered on the January 30, 2020 have now filed this Appeal.
16. Section 65(1) of the *Civil Procedure Act*, cap 21 provides as follows;-
 - “Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an Appeal shall lie to the High Court (Court of Equal status)-
 - (b) from any original decree or part of a decree of a sub-ordinate court, other than a magistrate’s court of third class, on a question of law and fact.”
17. The above provision of the law gives the High Court (and Courts of Equal Status) with the necessary legal authority to hear and determine Appeals from the sub-ordinate courts on both issues of facts and the law.
18. In the Case of *Sure & 9 others Versus- Nyamaiko*(1988) eKLR, the Court of Appeal held as follows;-
 1. An Appellate court has jurisdiction to review the evidence in order to determine whether or not the conclusion originally reached upon that evidence should stand. This jurisdiction , however, should be exercised with caution.
 2. The test is that if there is no evidence to support a conclusion, the appellate court will not hesitate so to decide but if the evidence can be regarded as justifying the trial court’s conclusion and especially if it was arrived at on conflicting testimony involving the observation and hearing of witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial court as to credibility was entitled to great weight.”
19. The Court having satisfied itself to the jurisdiction of entertaining Appeals and what to consider in determining an Appeal, a comprehensive analysis of the Grounds of Appeal in this Appeal can now be undertaken.
20. Generally, the 18 grounds of appeal can be consolidated and summarised in the following substantive grounds of Appeal.
 - A. The Creation Of The Property Known As L.r.no. Transmara/ Olomismis/ 972.
 - B. The Legality Or Illegality Of The Respondent To Own The Property Known L.r.no. Transmara/olomismis/972.
 - C. Whether Or Not The Respondent In This Appeal Is Entitled To The General And/or Special Damages Pleaded In The Complaint Dated 30Th June 2015.
21. Issue No. 1- The Creation Of The Property Known As L.r.no. Transmara/olomismis/972.
22. The Appellant in the Memorandum of Appeal dated February 16, 2020 challenges the manner in which the property known as Transmara/ Olomismis/972 was created and thereafter registered in the name of the Respondent.
23. The Appellants point of departure is that the Respondent was not allocated this property known as Transmara/olomismis/972 by Olomismis Group Ranch directly.
24. The Appellant submits that according to the evidence of the Respondent, the acquisition of the property known as Transmara/olomismis/972 was through purchase of three (3) different parcels belonging to three different members of Olomismis Group Ranch.



25. The Appellants further indicate that from the evidence adduced at the trial, the three parcels of land purchased by the Respondent were in different areas and therefore incapable of being amalgamated to produce the portion measuring 12.309 Ha currently registered as Transmara/olomismis/972 in the name of the Respondent.
26. At this juncture, it is imperative that the court turns to the evidence tendered during the trial of this matter and evaluates it afresh.
27. According to the Witness statement of the Respondent sworn on the 30th June 2016 and adopted as evidence of the Respondent during the trial on the 30th of May 2020, the Respondent states that the registration of the property known as Transmara/olomismis/972 was pursuant to a sub division and allocation of the same by Olomismis Group Ranch.
28. The Respondent's evidence on Page 291 of the record state that the three (3) different parcels of land were purchased from three members of Olomismis Group Ranch Namely Loice Nyariseiyi Kisiwa, Baikitok Makala And Tinyo Tembo.
29. Upon purchase of these three (3) separate parcels of land, the Group Representative of Olomismis Group Ranch resolved to merge (amalgamate) the three portions and register the same as one parcel of land.
30. In cross-examination, the Respondent stated that the three portions purchased from Loice Nyariseiyi Kisiwa, Baikitok Makala And Tinyo Tembodid not share a common boundary.
31. In other words, the three parcels of lands were not touching each other.
32. However, the Respondent went further and stated that he surrendered the three portions which were not touching one another to the Group Representatives and was given one parcel of land measuring 30 acres.
33. The Plaintiff's second witness was Stephen Githinji who is the District Land Registrar Transmara East and West.
34. The Plaintiff's Second Witness confirmed that one of the key duties bestowed on his office by law is the registration of land and issuance of title.
35. The Plaintiff's Second witness further confirmed that the area known as Olomismis registration section was within his jurisdictions and had handled the registration of the titles therein.
36. According to this witness, the Group representatives of Olomismis Group Ranch presented a registered Mutation (Exhibit 8) and a list of beneficiaries (Exhibit 9).
37. The Plaintiff's witness confirmed that the registered mutation and list of beneficiaries shows who owns what size of land and should be given a title deed.
38. On parcel number 972 which became Transmara/olomismis/972, The Group Representatives Of Olomismis Group Ranch authorised him to issue the title to the Respondent.
39. The Plaintiff's second witness stated in his examination in chief that he had no powers to refuse or reject the list of beneficiaries or registered mutation submitted by the Group representative of the Olomismis Group Ranch.
40. In cross-examination, the Plaintiff's Second witness reconfirmed that he relied on the registered mutation and list of beneficiaries provided by the Olomismis Group Ranch and issued the title to Parcel 972 in favour of the Respondent (Plaintiff).



41. The Appellants at the trial called two witnesses, namely Lekakeny Kibosi And Stephen Lemeshon.
42. According to the evidence of Defence Witness 1 known as Lekakeny Kiboso,he did not know the registration number of the property appertaining the suit property.
43. What the Defence Witness 1 indicated was that the property being claimed by the Respondent (Plaintiff) belonged to his brother who has also been sued.
44. The 2nd witness was Stephen Lemeshon who is the son of the Defence Witness 1 Lekakeny Ole Kibosi.
45. The 2nd Witness stated that the property known as Transmara/olomismis/972 Belonged To One Ndege Kipos the 4th Appellant.
46. The 2nd witness testified that the Respondent (Plaintiff) had a number of parcels of land within the Olomismis area but not the ones which made up property known as Transmara/olomismis/972.
47. The 2nd Witness blamed the Group Representative for causing adjudication problems.
48. The 2nd witness further confirmed that one of the ways of acquiring land was by way of purchasing the same.
49. However, the 2nd witness could not understand how the Respondent (Plaintiff) had managed to be allocated this portion 30 acres and get registered as the owner of the same.
50. In cross-examination, the 2nd witness indicated that his father the Defence 1st witness Lekakey Ole Kibosi owns parcel 969.
51. The 2nd witness further stated that all the Appellants (Defendants) are occupying parcel 972 because the land was vacant.
52. According to the Record of Appeal, there are no proceedings of any other witnesses and therefore the Court will evaluate the evidence of the proceedings in the Record.
53. Looking at the testimonies of the witnesses who gave evidence in the Trial Court and the Documentary evidence produced, it is no doubt that the Respondent (Plaintiff) herein has a Title Deed to the property known as Transmara/olomismis/972 issued in his favour by the District Land Registrar, Transmara.
54. In is not also in dispute that the Respondent's (Plaintiff's) title was a registration of a sub-division from a larger parcel of land that was knowns as Transmara/olomismis/1 which had been registered in the name of Olomismis Group Ranch.
55. Olomismis Group Ranch had a list of officials who then would undertake the process of registering the beneficiaries and what portions such beneficiaries would be allocated.
56. The Respondent's (Plaintiff's) evidence is that apart from his share as a member No. 695 of Olomismis Group Ranch,the Respondent (Plaintiff)purchased other portions of land from three persons namely Loice Nyariseiyi Kisiwa, Baikitok Makala And Tinyi Tembo.
57. These portions of land were in different areas but on request to the Group representatives, the Respondent (Plaintiff) surrendered the three portions in different areas and was allocated one portion of thirty (30) Acres.
58. Subsequently thereafter, the Group representative responsible with the subdivision captured the sub division in the registered mutation and forwarded the same to the District Land Registrar to issue the appropriate Title Deed for the property known as Transmara/olomismis/972 which was done.



59. In conclusion therefore, this Court is satisfied with the manner in which the property known as Transmara/olomismis/972 was created was lawful and legal.
- B.The Legality Or Illegality Of The Respondent To Own The Property Known L.r. No. Transmara/olomismis/972.
60. The Second issue relates to the legality of the Respondent (Plaintiff) as the person allocated the suit property.
61. A perusal of the Pleadings, evidence adduced in court and the documents relied upon by both parties, the issue of legality of the suit property to be owned by the Respondent is brought out in two ways; -
- i. The manner and methodology used by the Respondent (Plaintiff) to acquire the title to the suit property.
 - ii. The actually existence of the suit property on the ground.
62. In issue (i), the Appellants have challenged the legality of the Respondent to own the suit property through the particulars of Fraud pleaded under Paragraph 5 of the Statement of Defence dated 28th June 2016.
63. The particulars of the Fraud pleaded against the Respondent (Appellant) therein are as follows; -
- a. Obtaining title without valid sale agreement.
 - b. Obtaining title using forged mutations forms.
 - c. Obtaining title without valid transfer forms.
 - d. Obtaining title without valid Land Control Board Consent.
 - e. Obtaining title with a forged Land Control Board Consent.
 - f. Obtaining title without the knowledge and consent of the Appellants (Defendants), who were the occupants of part of the suit property.
64. The evidence of the Respondent in the Trial Court was that three separate portions of land were purchased from three different persons.
65. The Agreement for Sale was presented and admitted as evidence at the Trial Court.
66. In the decision of the Environment & Land Court Civil Case No. 2067 Of 2007 Between Leo Investments Limited-versus-estuarine Estates Ltd, the Learned Judge observed that it now trite law that a contract consists of three fundamental elements; offer, acceptance and consideration.
67. The Court on perusing the Appellants (Defendants) Statement of Defence dated 28th June 2016 and the evidence adduced by the Appellants (Defendants) two witnesses contained in the Record of Appeal, there is no evidence to show that the Respondent's (Plaintiff's) Agreement for Sale did not satisfy any of the three ingredients of a valid contract.
68. Similarly, the submissions filed on behalf of the Appellants (Defendants) has not addressed this particular point of fraud.
69. In fact, the Appellants (Defendants) submissions point to the valid of the Agreement for Sale produced by the Respondent (Plaintiff) save that it touched on other parcels of land and not this suit property.



70. In conclusion, it is the Court's considered view that the Plaintiff had a valid Sale Agreement with the persons known as Loice Nyariseiyi Kisiwa, Baikitok Makala And Tinyo Temboover the three separate portions of land that the Respondent Purchased.
71. Secondly, this Court having made a finding that the Agreement for Sale presented by the Respondent (Plaintiff) was valid, it now moves forward to evaluate whether or not the surrender of the three portions of land contained in the Agreement For Sale could be legally surrendered to the Group representatives and another portion of 30 acres lawfully allocated to the Respondent (Plaintiff) herein.
72. The *Land (Group Representatives) Act*, cap 287 under Part III which deals with Group Representatives provides as follows under Section 5 (1) (a)(b) and (c).
- (1) Upon being notified under Sections 23 (5) (c) of the *Land Adjudication Act* that a group has been advised to apply for group representatives to be incorporated under this Act, the Registrar shall convene a meeting of the members of the group, at a specified time and place , to;-
 - a. Adopt a constitution.
 - b. Elect not more than ten and not less than three persons to the group representatives of the group; and
 - c. Elect persons to be the officers of the group in accordance with *the constitution*.
73. According to the Certificate of Incorporation contained in Page 47 of the Record of Appeal, the Group Representatives were Olomismis Group were appointed on the 8th September 1989.
74. Section 8 (1) of the *Land (Group Representatives) Act*, cap 287, the Act provides for the powers of the group representatives as follows;-
- “The issue of a certificate of incorporation of group representatives shall, subject to this Act and any regulations made under it and to the conditions, limitations and exemptions in the Certificate of Incorporation, confer on the group representatives powers to sue and be sued in their corporate name, and to acquire , hold, charge and dispose of property of any kind, and to borrow money with or without giving security.”
75. The Appellant in this Appeal recognises the Group Representatives of Olomismis Group and accept that indeed there were validly in office.
76. The Respondent (Plaintiff) on the other hand states that the three separate portions of land purchased from the three different persons were surrendered to the Group Representatives and a new portion of 30 Acres thereafter allocated to the Respondent.
77. The provisions of section 8 (1) of the Act give express powers to the Group Representatives to acquire, hold and dispose of property of any kind on behalf of the Group Ranch.
78. In other words, in exercise of their mandate, there is nothing to stop the Group Representatives from sub-dividing, amalgamating or re-organising the occupation of the beneficiaries where a valid request or need has arisen.
79. In this particular case, the Respondent made a request to surrender the three separate portions purchased for an amalgamated portion of 30 Acres.
80. The Group Representatives received the said request and allowed the same by allocating a 30 Acre portion to the Respondent which was finally registered as the suit property.



81. In the Court's considered view, the surrender of the three separate portions of land purchased by the Respondent and the allocation of the 30 Acres suit property was legal in accordance to the powers vested on the Group Representatives.
82. The Second limb which the Appellants have raised regarding the legality of the Respondent to own the suit property emanates from the Counter-Claim.
83. According to the Appellants, the 1st Appellant was allocated Parcel 969 measuring 32.449 Ha while the 4th Appellant was allocated Parcels 968 and 970 measuring approximately 16.288 Ha and 4.050 Ha respectively.
84. The Appellants further aver that the 2nd Appellants and 3rd Appellants were entitled to a further 20 Acres as of right by being members of the Ilkabong Age Group.
85. The 5th Respondent further avers that he was a purchaser for value of some 10 acres from one Nasangei Kima and had been in occupation of the same since 1972.
86. In other words, the Appellants claim is that the suit property measuring approximately 30 acres comprises of land occupied by the 1st Appellant, 2nd Appellant and 3rd Appellant way before it was allocated to the Respondent.
87. The Appellants under Paragraph 20 (vi) of the statement of defence fault the Group Representatives of allocating the Respondent the suit property without first physically visiting the ground and preparing an appropriate survey map hence resulting to the dispute before the Court.
88. In the proceedings undertaken on the 25/07/2019, the Defence witnesses testified to the effect that the Plaintiff forcefully acquired and occupied the suit property in total disregard of their occupation.
89. The evidence of the Plaintiff's Second Witness namely Stephen Githinji confirmed to the Court that a site visit was done and the four parcels of land namely Parcels 968, 969, 970 and 972 were properly placed on the ground.
90. The Plaintiff's Second Witness evidence did not identify any portion that was in occupation of the 2nd and 3rd Appellants within the suit property.
91. The only borne of contention was a road which had been unlawfully created on the suit property which was illegal.
92. Similarly, the 2nd and 3rd Appellants failed to present evidence either through the documents filed in their list of Documents or testimonies of witness to confirm the Resolution that they were entitled to 20 Acres pursuant to them belonging to the Ilkabong Age Group.
93. The 5th Appellant on the same note alleged to have purchased for value a portion of 10 acres from one Nasangei Kima but failed to produce the Agreement For Sale or any notification to the Group Representatives of his interest on the suit property.
94. Clearly therefore, the Court having considered the proceedings, documentary evidence filed in Court and the testimonies adduced in Court, the 2nd, 3rd and 5th Appellants have not proved any proprietary rights on or over the suit property to challenge the actions of the Group Representatives or the Respondent herein.
95. The third and last limb on this discussion on the legality of the Respondent to own the suit property touches on the creation of the mutations, procurement of the Land Control Board Consents and registration of the Transfer Forms in favour of the Respondent.



96. The above issues have been raised in Paragraph 5 of the Statement of Defence dated 28th June 2016.
97. In answer to this issue, the Plaintiff's Second Witness testified that the sub-division of the property belonging to the Olomismis Group Ranch was done by the Group Representatives through a private Surveyor.
98. The Group Representatives upon completion of the sub-division and creation of the Mutation by their Licensed Surveyor, presented that same for approval and registration by the Government Lands Departments.
99. The Plaintiff's Second Witness confirmed that all the titles registered and issued within Olomismis Group Ranch were in accordance to the registered Mutation including the suit property.
100. Further to that, prior to the sub-division of the property in the name of Olomismis Group Ranch, the Group Representatives acquired the relevant Land Control Board Consent of the entire ranch as provided for in the *Land Control Act*, Cap 302.
101. The Plaintiff's Second Witness indicated that it is only after the receipt of the registered mutation, the Land Control Board Consent and a list of the beneficiaries from the Group Representatives that the valid title deeds were issued.
102. An over view of the evidence adduced by the Plaintiff's Second Witness clearly brings out the fact that all the documents required for the creation of a title under the *Land (Group Representatives) Act*, Cap 287 including the beneficiary list are prepared by the Group Representatives and not the beneficiaries therein.
103. The Appellants allegation that the Respondent either participated and/or undertook fraudulent actions to acquire the suit property are therefore misplaced and not proved at all.
104. The Appellants actions of not bringing the Group Representatives of Olomismis Group Ranch into this suit yet the law allows for them to be sued for their actions where need be is suspect.
105. During the hearing at the Trial Court, the Appellants confirmed in their Counter-Claim dated June 28, 2016 as well as the proceedings conducted on the 25/07/2019 that the 1st Appellant was registered and holds Transmara/olomismis/969 while the 4th Appellant was registered and holds two titles Transmara/olomismis/968 And Transmara/olomismis/970.
106. The Court observes that the Appellants titles mentioned hereinabove emanate from the same parcel of land owned by Olomismis Group Ranch and were created in the same manner the title appertaining the suit property owned by the Respondent.
107. If indeed the Group Mutation registered was fake, or the Land Control Board Consent was forged and the Beneficiary List giving right to the Transfer Forms was invalid, then it would mean that all the titles emanating from the Group Representatives of Olomismis Group Ranch are unlawful including those of the Appellants herein.
108. A party cannot have his cake and eat it at the same time.
109. If the Appellants believe their titles namely Transmara/ Olomismis/968,969 and 970 were validly issued to them from the sub-division of Transmara/olomismis/1, then on the same page, the Respondent's title is Transmara/olomismis/972 is equally lawful as the Appellants titles.



110. The Plaintiff's Second Witness's Ground Report produced in Court confirms that the suit property can be located on the ground although it is 27 Acres and not 30 Acres as contained in the title documents.
111. In conclusion therefore, the Court finds that the Respondent ownership of the suit property known as Transmara/olomismis/972 is lawful and was not obtained by fraud as alleged.
- B.Whether Or Not The Respondent In This Appeal Is Entitled To The General And/or Special Damages Pleaded In The Plaint Dated 30Th June 2015.
112. The last topic of discussion in this Appeal is the issue of the general and special damages claimed by the Respondent herein in the Plaint dated 30th June 2016.
113. The Trial Court in its judgement dated 30th January 2020 declined to grant any General Damages in favour of the Respondent.
114. On Special Damages, the Court did grant the Respondent of Kshs 72,755.37/-.
115. The Special Damages were based on the letter from the Kenya Forest Services dated 24th August 2015.
116. The Letter from the Kenya Forest Services dated 24th August 2015 was produced before Court together with the Demand Letter dated 2nd June 2016.
117. The quantum of Kshs 72,755.37 was never disputed and/or challenged by the Appellants.
118. The Appellants in the Statement of Defence denied trespassing and/or cutting any indigenous trees as alleged.
119. The Plaintiff's Fourth Witness Julius Langat attended Court on the 30/5/2019 and produced the Assessment Report in Court.
120. The Plaintiff's Fourth Witness confirmed a site visit where he found a total of 20 indigenous trees had been cut.
121. The Plaintiff's Fourth Witness reconfirmed the value to be Kshs 72,755.37/-.
122. The Court having made a finding earlier that the suit property is legally owned by the Respondent, any destruction undertaken by the Appellants should not go without a punishment.

Conclusion.

123. The Court having gone through the Memorandum of Appeal dated 16th February 2020, the pleadings contained in the Record of Appeal, proceedings of the Trial Court and the evidence as well, the Court hereby makes the following Orders;-
1. The Memorandum of Appeal dated 16th February 2020 be and is hereby dismissed.
 2. The Judgement of the Trial Court dated 30th January 2020 is upheld.
 3. The Appellants to bear the costs of this Appeal.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ON 23RD DAY OF MAY 2022.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:



Counsel for the Applicant: Mukoya for appellant (no appearance)

Counsel for the Respondent: Mr. Ochwangi for respondent

