



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Civil Case 167 of 2004

NTEETE OLE KIPIPA PLAINTIFF

VERSUS

1. MOSES TAISWA KIPIPA)

2. NEBATUM LESINKO) DEFENDANTS

3. OLE MOI LESINKO NAIRE)

JUDGMENT.

The plaintiff stated in his plaint that the first and the third defendants are step brothers while the second defendant is the mother of the third defendant. The subject matter of this dispute is a parcel of land known as **Transmara/Enanyieny/431**, hereinafter referred to as “**the suit land**”. The same measures 13 hectares or thereabout. The plaintiff averred that he is the registered proprietor of the suit land. He further stated that on or about April 2004 the defendants unlawfully trespassed onto the suit land and have since then remained in unlawful occupation and use of the same. He sought eviction orders against the defendants and a permanent injunction to restrain them from entering the suit land thereafter.

The defendants filed a joint statement of defence and counter claim. They denied the plaintiff’s claim and stated that the first defendant is a blood brother of the plaintiff while the second defendant is a sister in-law and the third defendant is a nephew of the plaintiff. The defendants conceded that the suit land was registered in the name of the plaintiff but that was done upon the death of one **Kipipa Ole Naitiri**, who was the father of the plaintiff and the first defendant. The plaintiff was meant to hold the suit land in trust for the first defendant who had not been allocated any portion of the family land. They asserted that the plaintiff was holding the suit land in trust for the first defendant. They further denied that they had unlawfully entered the suit land, saying that they had resided thereon since the adjudication process in the area commenced.

By way of a counter claim, the first defendant stated that the plaintiff is his elder brother who, upon the death of their father during the adjudication process, was endorsed by the Kipipa family to take over and be registered as the proprietor of the family land which is now the suit land. As such, the plaintiff was holding the suit land in trust for the first defendant. He alleged that the plaintiff had breached the said trust by, *inter alia*, arrogating unto himself the exclusive right to the suit land and by refusing to subdivide and transfer half of the same to the first defendant. He sought a declaration that the plaintiff was holding the suit land in trust for him. He also sought an order to direct the plaintiff to subdivide and transfer half of the suit land to him failing which the Executive Officer of this court be directed to sign all the relevant documents.

In his reply to defence and defence to the counter claim, the plaintiff denied that the first plaintiff is his real brother and averred that the first defendant is his nephew, since his father is one **Leshingo Naitiri**

who is the plaintiff's real brother. He further stated that the second defendant is a wife to the plaintiff's aforesaid brother while the third defendant is a son to the plaintiff's brother. The said Leshingo Ole Naitiri has five wives and the second defendant is one of them. Leshingo Ole Naitiri has his separate parcel of land registered as **Transmara/Enanyieny/421** where the defendants should live, the plaintiff contended. He also denied that he is registered as the proprietor of the suit land in trust for the first defendant. The plaintiff further denied that Kipipa Ole Naitiri was the father of both the plaintiff and the first defendant. He further denied that the defendants had always resided on the suit land as alleged.

The plaintiff further averred that his aforesaid brother was one of the members of the adjudication committee who gave him the suit land without any objection.

During the hearing, the plaintiff produced the title deed for the suit land as the plaintiff's exhibit 1. The same was issued on 16th May 2001. The adjudication process was done between 1989 and 1990 when he was a young man. The plaintiff reiterated the contents of his pleadings that the first defendant is his nephew because he is a son of his brother, Leshingo Ole Naitiri, that the second defendant is a sister in-law, being a wife of Leshingo Ole Naitiri and that the third defendant is a son of the second defendant. He further testified that his aforesaid brother is the registered proprietor of a parcel of land registered as Transmara/Enanyieny/421. The first defendant moved to the suit land in 2004. Prior to that year the first defendant had filed a complaint against the plaintiff before the District Land Registrar, Transmara, claiming a share of the suit land. The Land Registrar heard the dispute and advised him to file a suit in court. The plaintiff told the court that it was only the first defendant who was still living on the suit land, the second and third defendants had moved to their rightful property.

Regarding his relationship with the first defendant, the plaintiff repeated that the first defendant was sired by Leshingo Ole Naitiri and one of his wives known as Keramatisho. The first defendant was therefore entitled to inherit from his father, Leshingo.

In cross examination, the plaintiff stated that his late father had only one wife known as Maiyian Ole Naitiri who had only two sons, himself and Leshingo Ole Naitiri also known as Sagirian Ole Naitiri. He reiterated that Keramatisho Naitiri is a wife of his brother and not his step mother. His father was a member of Enainyieny Group Ranch and he died before the land was subdivided. His share was subdivided between himself and his brother. He denied that the suit land was registered in his name in trust for the first defendant.

The first defendant said that he was living on the said land which he admitted was registered in the plaintiff's name. He said that the plaintiff is a step brother. He further stated that their father, Naitiri Ole Kipipa, had two wives, Maiyian Ole Kipipa (the plaintiff's mother) and Keramatisho Ole Kipipa (his mother). Their father died in 1985 when the first defendant was about five years old. When he testified, the first defendant was 23 years old. At the time of land adjudication in the area the plaintiff was registered as a proprietor of the suit land in trust for the entire family.

The first defendant further testified that the house of Maiyian has two sons namely, Leshingo Ole Naitiri and the plaintiff while the house of Keramatisho has three sons – himself, Lepuki and Ledama. That notwithstanding, the second house had not been given any share of the suit land by the plaintiff. He further testified that the second defendant is a wife of the plaintiff's brother, Leshingo Naitiri while the third defendant is a son of the second defendant. He conceded that the second and third defendants were living on Transmara/Enaiyieny/421 which is registered in the name of Leshingo Ole Naitiri. When he filed a complaint over the suit land before the Land Registrar, Transmara District, the said officer directed that the suit land be shared between the two houses but that was not done. He produced a copy of the proceedings relating to the said dispute. However the finding of the Land Registrar was that there may have been some irregularities in issuing the two titles for Transmara/Enaiyieny/421 and 431 and consequently a restriction was placed on the two titles under **Section 136** of the **Registered Land Act** pending a determination of the land dispute herein.

In cross examination, the first defendant denied that Leshingo Ole Naitiri was his father and stated that he was his brother. When Naitiri Ole Kipipa died, Keramatisho was claiming a share of her

husband's land but none was given to her as the suit land was registered in the plaintiff's name.

The defendants called a witness by the name **Cornelius Kaikai, DW2**. When he testified he was 77 years old. DW2 was a member of Enaiyeny Group Ranch before it was subdivided. He said that the land was subdivided after the death of Naitiri Ole Kipipa and his share was registered in the name of the plaintiff in trust for the entire family of his late father. That was because under the Masaai Customary Laws land is not owned by women. DW2 further stated that the plaintiff's father had two wives, Maiyian and Keramatisho. Maiyian had two sons, Leshingo Ole Kipipa and Nteete Ole Kipipa (the plaintiff). Keramatisho had three sons, Moses Taisua Ole Kipipa (the first defendant) and two others. The first defendant was therefore a son of Naitiri Ole Kipipa and not Leshingo Ole Kipipa. He stated that Leshingo did not take his late father's wife, Keramatisho, after the death of his father. The witness said that the second defendant is a wife of Leshingo Ole Kipipa and the third defendant is a son of Leshingo. The second and third defendants were not living on the suit land, the witness added.

In cross examination, the witness said that the first defendant had already been born by the time Naitiri Ole Kipipa died. He denied that Leshingo inherited his late father's wife, Keramatisho, saying that under Masaai Customary Laws a son cannot inherit his late father's wife. Keramatisho and the first defendant were therefore rightfully living on the suit land, DW2 stated.

The parties through their respective advocates filed written submissions. I have perused and considered the same.

From the evidence on record, it is necessary that the history of the suit land be established. The relationship between the plaintiff and the first defendant must also be determined. The determination of these two main issues will lead to an appropriate conclusion as to whether the plaintiff's claim is factual or whether the first defendant's claim that the plaintiff holds the suit land in trust for him has any basis.

It is not in dispute that the suit land was part of Enanyeny Group Ranch. The plaintiff's father, Kipipa Ole Naitiri, was a member of the said group ranch. How many wives did Kipipa Ole Naitiri have? According to the plaintiff, his father had only one wife, Maiyian Kipipa, who gave birth to two sons, Leshingo and himself, the plaintiff.

However, according to the first defendant and DW1, Kipipa Ole Naitiri had two wives, Maiyian Kipipa and Keramatisho Kipipa. That was denied by the plaintiff. He implied that Keramatisho was initially married to his father but when he died, the plaintiff's brother, Leshingo, inherited her. That assertion was strongly denied by DW2, who is a masai elder and was well known to the plaintiff's father. DW2 said that the first defendant was about five years old when Kipipa Ole Naitiri died. In any event, under Masai Customary Laws, a son cannot inherit his father's wife upon demise of his father.

This issue can be resolved by looking at the record of the proceedings that were taken on 6th August, 2003 when the parties appeared before the District Land Registrar, Transmara; D. Exhibit 1. In those proceedings, the plaintiff recognized Keramatisho as his step mother, acknowledging that she had been married to his late father.

On her part, Keramatisho testified that she had been married to Kipipa Ole Naitiri who also had another wife, Maiyian, the plaintiff's mother. When her husband died, his share of land at Enanyeny Group Ranch was registered in the plaintiff's name and she was thus claiming a portion of the same as a representative of her late husband's second house.

The plaintiff's blood brother, Leshingo Ole Naitiri, also known as Sagirian Ole Naitiri, told the District Land Registrar that he was the eldest son in Naitiri's family and that his father had two wives, Maiyian and Keramatisho. Their mother (Maiyian) died when the plaintiff was an infant and their grandmother took care of the plaintiff until Sagirian got married. Thereafter their father married Keramatisho as his second wife. When Enanyeny Group Ranch was formed, their father and himself, since he was an adult, became members of the same, each having his own share. Sagirian's share became No. 421 and their late father's share was No. 431. When their father died before the group ranch had been subdivided, Sagirian

gave the name of his brother, the plaintiff, to replace their late father's name as a shareholder of the group ranch. The plaintiff was therefore holding the suit land in trust for himself and the house of Keramatisho, Sagirian stated. That evidence was corroborated by **John Ole Sawoyo**, a cousin of Naitiri Ole Kipipa and whose land is the most immediate to both the suit land and parcel No. 421 as well as by **Cornelius Kaikai, DW2**.

From those proceedings and from the evidence on record, I find and hold as follows:

- **The suit land was originally part of Enanyieny Group Ranch and Kipipa Ole Naitiri was a registered member of the said ranch.**
- **Kipipa Ole Naitiri had two wives, Maiyian and Keramatisho. Maiyian was the mother of the plaintiff and Leshingo, also known as Sagirian.**
- **The first defendant is a son of Keramatisho and his father is Kipipa Ole Naitiri and not as alleged by the plaintiff. The first defendant was indeed about five years old when his father died.**
- **There is no evidence that the first defendant was sired by Leshingo and Keramatisho because, apart from the fact that prior to the death of Kipipa Ole Naitiri the first defendant had already been born between the union of Keramatisho and Kipipa Ole Naitiri, under Masai Customary Laws, a son cannot inherit his late father's wife. Keramatisho is not Leshingo's wife, she is a widow of the late Kipipa Ole Naitiri.**
- **Upon the death of Kipipa Ole Naitiri, his share of the aforesaid group ranch was registered in the name of the plaintiff in trust for himself and the house of Keramatisho. DW2 told the District Land Registrar, Transmara, that at the material time the children of Keramatisho were very young. It was therefore decided that the suit land be held in trust by the plaintiff.**

In view of the above findings, the plaintiff's claim must fail and I hereby dismiss the same with costs to the defendants.

As regards the first defendant's counter claim, it was proved that a constructive trust was implied in the registration of the suit land in the name of the plaintiff as the proprietor thereof. The registration of a person as the proprietor of a parcel of land under **Sections 27 and 28** of the **Registered Land Act** does not relieve such a proprietor from any duty or obligation to which he is subject as a trustee, even if it is a first registration, see **MUMO –VS- MAKAU**, [2002] 1 E.A. 170.

In **MBUI –VS- MBUI**, [2005] 1 E.A. 256, the Court of Appeal held that customary law rights may give rise to a trust which would be subject to protection under the **Registered Land Act** and which would constitute an overriding interest recognizable under **Section 30** of the **Act**.

The first defendant has established existence of the aforesaid trust and breach of the same by the plaintiff. Consequently, I allow the counterclaim and declare that the plaintiff holds half of the suit land, **TRANSMARA/ENAINYIENY/431** in trust for the first defendant and indeed all the members of the late Kipipa Ole Naitiri's second house, though they did not testify. The plaintiff is ordered to sub divide and transfer half of the suit land to the first defendant. If he fails to do so within the next thirty (30) days from the date hereof, this court's deputy registrar shall sign all the necessary papers and forward the same to the District Land Registrar, Transmara, who shall do the needful. A copy of this judgment should therefore be served upon the said Land Registrar. The first defendant shall have the costs of the counterclaim.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF MAY, 2009.

D. MUSINGA

JUDGE.

25/5/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Koina Onyancha for the plaintiff

Mr. Ochwangi for the defendants.

COURT: Judgment delivered in open court.

D. MUSINGA

JUDGE.