



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 387 of 2008

HARIT AMRITLAL SHETH (Suing as the
legal representative of the estate of the

late JUSTUS KANTET OLE TIPIS).....PLAINTIFF/APPLICANT

VERSUS

LEMERIAN OLE MOIJOI.....1ST DEFENDANT/RESPONDENT

YUSSUF MOHAMMED.....2ND DEFENDANT/RESPONDENT

NANYIKU OLE NTUTU.....3RD DEFENDANT/RESPONDENT

LOOYIEYOI OLE NTUTU.....4TH DEFENDANT/RESPONDENT

LEMEK GROUP RANCH.....5TH DEFENDANT/RESPONDENT

RULING

On 15th March 2001 the plaintiff filed an Originating Summons (OS) under **Section 30** the **Registered Land Act Cap 300**, **Sections 7, 37 & 38** of the **Limitation of Actions Act Cap 22** and **Order 36 Rules 3D & 7** of the **Civil Procedure Rules** in Nairobi HCCC No. 411 of 2001 (OS). That suit has since been transferred to Nakuru and given the above number.

In the OS the plaintiff sought:

A. A declaration that:-

- (i) L.R. No. Cis-Mara/Lemek/1757 allotted to Lemerian Ole Moijoi.
- (ii) L.R. No. Cis-Mara/Lemek/1851 allotted to Yusuf Mohammed Hussein.

(iii) L.R. Nos. Cis-Mara/Lemek/1861, 1862 & 1863 all allotted to Nanyiku Ole Ntutu.

(iv) L.R. No. Cis-Mara/Lemek/1864 allotted to Looyieyio Ole Ntutu

and/or any purported proprietary interest in any parcel of land forming a portion of the land adjacent to **L.R. No. Cis-Mara/Lemek 161** (the whole of which I will hereinafter refer to as the suit land) occupied by the plaintiff as part of the estate of the late Justus Kantet Ole Tipis (the deceased) are held by the said defendants jointly and severally in trust for the plaintiff.

B. That the plaintiff be forthwith registered as the proprietor of the above pieces of land in place of the above named registered owners thereof.

C. That accordingly the defendants be restrained by a permanent injunction from trespassing upon, wasting, alienating and/or interfering with these pieces of land in any manner whatsoever prejudicial to the plaintiffs' proprietary interest thereof.

D. The costs of the suit.

The application was supported by the affidavit of the plaintiff sworn on 14th March 2001 in which she deposed that in or about 1971 Lemek Group Ranch allocated the late Justus Kantet Ole Tipis and his family of the then unregistered portion of land bordering and/or adjacent L.R. No. Cis-Mara/Lemek/.161 measuring approximately 1078 acres. Since then the deceased and/or his family took possession of the suit land, fenced it with wooden posts, eucalyptus and cyprus trees and has since then been openly, conspicuously and exclusively cultivating it. In 1992 in its further distribution of its land to its members, Lemek Group Ranch reconfirmed the allocation of the suit land to the family of the deceased.

In 1999, taking advantage of the death of the deceased and reneging on the said allocation of the suit land to his family, some of the officers of Lemek Group Ranch, the 5th defendant started interfering with the plaintiff's quiet and peaceful occupation of the suit land in a bid to alienate the same to prospective buyers and/or members of the said Group Ranch. In furtherance of that scheme, on 20th and 28th April 1999 the officers of the 5th defendant accompanied by hired goons as well as the Narok District Land Registrar, Narok District Land Adjudication Officer and a private surveyor went to the suit land to subdivide it but they were successfully repulsed by the plaintiff's workers. That forced the plaintiff to file Nairobi HCCC No.1362 of 1999 in which she, on 8th July 1999, obtained a temporary injunction to restrain the defendants and/or their servants or agents from wasting, damaging, alienating, disposing of or in any way interfering with the suit land. In breach of the said order of injunction and the principle of *lis pendens* and before the said suit was discontinued on 12th March 2001, the 5th defendant proceeded to alienate its purported proprietary interest in the suit land to the 1st, 2nd, 3rd and 4th defendants. The plaintiff therefore prays in the OS that having been in open and continuous occupation of the suit land since 1971 she should be registered as the owner thereof in place of the current registered owners.

On 20th June 2003 the 3rd and 4th defendants filed an application under **Order 6 Rule 13(1)(d)** and **(3)** of the **Civil Procedure Rules** and sought the dismissal of this suit on the grounds that the plaintiff's claim was time barred; that the applicant had failed to comply with **Section 21(1)** of the **Registered Land Act Cap 300** as advised by the Narok District Land Registrar vide his letter of 11th January 2001; that the applicant had also failed to comply with **Sections 21(4)** and **26(1)** of the **Land Adjudication Act Cap 284** and that the 5th defendant ceased to exist in 1999 and this suit is therefore an abuse of the process of the court.

When the said application came up for hearing before Hon. Justice Lenaola on 5th May 2004 he ordered *suo moto* that this matter "cannot be determined by affidavits and striking out application. Land is a sensitive matter and parties ought to have all the opportunity to have their respective cases determined on merits. I suggest that the matter should go to full trial soonest possible." Counsel for both the parties consented to that and the suit was set down for hearing and the hearing commenced before Justice Ojwang on 27th January 2005.

On 10th May 2006, however, the matter went before the Hon. Lady Justice Aluoch, who finding that the suit was not ready for further hearing on that day, ordered that "parties need to sort out the issue of the 5th defendant" before a date is taken for further hearing. That order prompted the 1st, 3rd and 4th defendants to file the application dated 23rd May 2006 and brought under **Order 1 Rules 10(2)** and **13** of the **Civil Procedure Rules** in which they sought the striking out the name of the 5th defendant from this OS with costs to the 1st, 3rd and 4th defendants. That application is based mainly on the ground that the 5th defendant ceased to exist in 1999 and in any case having been registered under the **Land (Group Representatives) Act Cap 287** of the **Laws of Kenya** it should have been sued through its representatives as provided for under **Section 7** of that **Act**. This ruling is on that application.

In his submissions before me on that application Mr. Kinyanjui for the 1st, 3rd and 4th defendants cited **Sections 5** and **10** of the **Land (Group Representatives) Act** and reiterated the above grounds and the averments in the affidavit in support of the application.

On his part Mr. Njagi for the plaintiff submitted that in view of Justice Lenaola's said order directing that the application to strike out the suit be abandoned and the suit be heard, Justice Aluoch's subsequent direction was made without jurisdiction. In his view the matter is therefore *res judicata*. He strongly disputed the allegation that the 5th defendant has been deregistered arguing that if it had it could not have filed a defence. He further contended that what was closed as is clear from the copy annexed to the supporting affidavit as **Exh. 3** was the title. He urged me to dismiss the application.

I have carefully read the file and considered these rival submissions. I have, in this file two previous and conflicting orders made by my fellow judges who are of coordinate jurisdiction with me. As I have said Justice Lenaola directed that the matter should go to hearing when the 3rd and the 4th defendants' application dated 10 June 2003 and filed on 20th June 2003 went before

him for hearing. As is clear from his order he did not determine the application. Mr. Njagi's contention therefore that this matter is *res judicata* is not correct. Thereafter the matter was partly heard by the Hon. Justice Ojwang. There is nothing on record to show that the Hon. Justice Aluoch was aware of or her attention was drawn to the earlier order made by Justice Lenaola. In the circumstances I find that she made the order directing that the position of the 5th defendant be determined in error and in ignorance of the court record. It is true as Mr. Kinyanjui argued that under **Section 7** of the **Land (Group Representatives) Act**, (and not under **Sections 5** and **10** as he claimed) the 5th defendant should have been sued through its registered representatives. A reading of that section and Section 8 thereof makes that quite clear.

There is on record a defence filed by M/S O.T. Ngwiri & Co Advocates for and on behalf of the 5th defendant. This application has been brought by the 1st, 3rd and 4th defendants. Mr. Kinyanjui who acts for them is not on record for the 5th defendant. I am not quite sure how those defendants and/or Mr. Kinyanjui can bring this application on behalf of a party he does not act for. True the 1st, 3rd and 4th defendants got their pieces of land transferred to them by the officials of the 5th defendant. After that, however, I cannot appreciate the 1st, 3rd and 4th defendants' authority to urge this application on behalf of the 5th defendant of which they are not the registered representatives.

Besides this the letter annexed to the supporting affidavit claiming that the 5th defendant was deregistered is not from the Registrar of the Group Representatives but from the Land Adjudication Officer. There is therefore no clear evidence that the 5th defendant has ceased to exist. In addition to this the striking out of the 5th defendant from this suit will not dispose of the whole matter. The plaintiff's claim against the other defendants will still remain unresolved.

For these reasons I dismiss the 1st, 3rd and 4th defendants' application dated 23rd June 2006 with costs to the plaintiff and order that the suit should be fixed for further hearing.

DATED and delivered this 26th day of November, 2009.

D. K. MARAGA

JUDGE.