



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 476 OF 2017**

MUTUNICET MAYA SAYIANOI.....1<sup>ST</sup> PLAINTIFF  
SITEYIA ENE SEIYIANOI.....2<sup>ND</sup> PLAINTIFF  
SAIYATO ENE SAYIATTANO MURAYA.....3<sup>RD</sup> PLAINTIFF  
TANA EK ENE SEYIANOI.....4<sup>TH</sup> PLAINTIFF

**-VERSUS-**

THE CHAIRMAN OSILALEI GROUP RANCH.....1<sup>ST</sup> DEFENDANT  
THE SECRETARY OSILALEI GROUP RANCH.....2<sup>ND</sup> DEFENDANT  
THE TREASURER OSILALEI GROUP RANCH.....3<sup>RD</sup> DEFENDANT  
BOI OLE PARKISALE.....4<sup>TH</sup> DEFENDANT  
LENKISHIRINI OLE TIONGA NKULIDI.....5<sup>TH</sup> DEFENDANT  
THE DISTRICT LAND REGISTRAR KAJIADO.....6<sup>TH</sup> DEFENDANT  
THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT

**JUDGEMENT**

By a Plaint dated the 18<sup>th</sup> day of July, 2016 the Plaintiffs pray for judgment against the Defendants for:

- a) An order directing the 6<sup>th</sup> Defendant to cancel or revoke Certificate of Titles for Land Reference No. Kajiado/Osilalei/173 and Land Reference No. Kajiado /Osilalei/179 issued and registered in the names of the 5<sup>th</sup> and 4<sup>th</sup> Defendants respectively under the provisions of sections 80 of the Land Registration Act, 2012.*
- b) An order directing the 6<sup>th</sup> Defendant to visit the site for purpose of ascertaining the clearly boundary between the parcel of land owned by the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, that is the Osilalei Group Ranch.*
- c) An order of permanent injunction against the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from allocating any further the aforesaid Plaintiff's parcel of Land.*
- d) An order of eviction against the 4<sup>th</sup> and 5<sup>th</sup> Defendants.*
- e) General damages*
- f) Costs of this suit and interest thereon*

*g) Any other relief and / or further relief that this Honourable Court may deem fit to grant at the circumstances.*

### **The 4<sup>th</sup> and 5<sup>th</sup> Defendants Defence**

By Statement of Defences dated 8<sup>th</sup> November, 2016 and filed on even date the 4<sup>th</sup> and 5<sup>th</sup> Defendants pray that the Plaintiffs suit be dismissed with costs.

The 4<sup>th</sup> and 5<sup>th</sup> Defendants aver that they are the legal and absolute proprietors with exclusive and indefeasible rights, interests and title vested on them to Land Reference Numbers Kajiado / Osilalei / 179 and Kajiado / Osilalei /173 respectively and have not conspired to encroach , invade or trespass on the Plaintiffs' parcels of land.

In response to the particulars of encroachment, invasion and or trespass, the 4<sup>th</sup> and 5<sup>th</sup> Defendants aver that they were rightfully and legally allocated Land Reference Numbers Kajiado / Osilalei / 179 and Kajiado / Osilalei /173 respectively and deny that they have illegally settled on the said lands. They further deny knowledge of the beacons and contend that there are within the boundaries of the Group Ranch.

The Plaintiffs filed a Reply to the Defences of the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants where they reiterated their claim as above. I however note the 6<sup>th</sup> and 7<sup>th</sup> Defendants Defence is not within the Court File.

The matter proceeded for hearing with the Plaintiffs' calling four witnesses while the Defendants' had five witnesses.

### **Evidence of the Plaintiffs**

**PW1 MUTUNICET MAYA SAYIANOI** testified that her land had been taken away by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. She explained that she owns Land Reference No. Kajiado/Lorngusua/960 which was a subdivision from the Lorngusua Group Ranch which was allocated to her father who in turn bequeathed it to her. She stated that she had lived on the land for 40 years and there was no dispute. Further, that the dispute herein started four years ago in 2013. She averred that she discovered that the land had been taken when the 4<sup>th</sup> and 5<sup>th</sup> Defendants came to the side of her land. She stated that she took Surveyors who advised them to move out but they failed to do so. Further, that she took officials of both Osilalei and Lorngusua Group Ranches to assist her move the 4<sup>th</sup> and 5<sup>th</sup> Defendants out of her land, but they failed to resolve the dispute. She confirmed knowing that the boundaries of the suit lands were on top of Maparasha Hills and explained that the same had been put by the Surveyor and shown to her by her father including the Group Ranch officials.

In cross examination she confirmed that the title for the Group ranch was first issued to her father. Further, that Boundaries of Osilalei and Lorngusua Group Ranches were shown to her father. She testified that the father did not inform her of any dispute between the two ranches and she did not know if the 4<sup>th</sup> and 5<sup>th</sup> Defendants have titles to their land. She further testified that she was not there when the demarcation of the boundary was undertaken between the two group ranches and did not see the beacons. It was her testimony that she sued the Land Registrar because of the boundary dispute and wants the Registrar to rectify the said boundary. Further, that the Surveyor could resolve the boundary dispute between the two group ranches. She produced the following documents as exhibits: Copy of National ID, Copy of Title for Kajiado/Lorngusua/960, Copy of Demand letters and 4<sup>th</sup> and 5<sup>th</sup> Defendants response letter.

**PW2 SITEYIA ENE SEIYIANOI** testified that she inherited Land Reference No. Kajiado/Lorngusua/964 from her late husband who got it from the Group Ranch. She averred that the 4<sup>th</sup> and 5<sup>th</sup> Defendants who are from Osilalei Group Ranch had encroached on her land. It was her testimony that she had resided on the suit land for 40 years and had told the 4<sup>th</sup> including 5<sup>th</sup> Defendants to move from her land but they declined. She explained that she never got help from Osilalei Group Ranch to aid in moving the 4<sup>th</sup> and 5<sup>th</sup> Defendants out of her land. She testified that the 4<sup>th</sup> and 5<sup>th</sup> defendants had been told to stop cutting trees from her land but they failed to do so. She further testified that a surveyor confirmed that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were on her land. Further, that she knew the boundaries to her land which she was shown by the surveyor and her late husband.

In cross examination, she confirmed that her land is at Lorngusua Group Ranch where her husband was a member and he is the one who showed her the beacons of Osilalei and Lorngusua Group Ranches. She insisted that she was never informed of any dispute between the two Group Ranches. She explained that the private surveyor confirmed that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were on her land. She further confirmed that the title deed of her land was first issued to her husband and it emanated from a subdivision of Lorngusua Group Ranch. She testified that if a Government Surveyor and Land Registrar visited the suit land, they could resolve the boundary dispute. She produced the following documents as exhibits: Copy of the National ID and Copy of Title for Kajiado/ Lorngusua/ 964.

**PW3 SAIYATO ENE SAYIATTANO MURAYA** testified that the 4<sup>th</sup> and 5<sup>th</sup> Defendants had encroached on her land Reference No. Kajiado/Lorngusua/2746 for four years. She averred that she told them to move out and even called the officials of Osilalei Group Ranch but they failed to do so. She confirmed knowing where her boundaries were. Further, that the same was showed to her by her husband.

In cross examination she explained that she was shown the suit land by the husband and not the officials of Lorngusua Group Ranch. She contended that she knew the boundaries between her property and Osilalei Group Ranch but explained that she was absent when the boundary between the two group ranches were being demarcated. She confirmed using a private surveyor who showed her the boundaries. She reiterated that a Government surveyor would be the best person to determine the boundaries. She however did not know whether the 4<sup>th</sup> and 5<sup>th</sup> defendants had title deeds to their land. She produced the following documents as exhibits: Copy of National ID and Copy of Title for Kajiado/ Lorngusua/ 2746.

**PW4 TANA EK ENE SEYIANOI** testified that the 4<sup>th</sup> and 5<sup>th</sup> Defendants have encroached on her Land Reference No. Kajiado/Lorngusua/962 which she got from the husband. She however explained that she did not know where the husband got the land. It

was her testimony that the husband showed her the boundaries to their land when he was alive. She confirmed that the dispute herein started four years. She testified that when the dispute begun she told the 4<sup>th</sup> and 5<sup>th</sup> Defendants to move from her land and even reported to the officials of the Osilalei Group Ranch officials to resolve the dispute but they failed to do so. She claimed that the 4<sup>th</sup> and 5<sup>th</sup> Defendants have blocked the path used by her cattle to the water point and have put up houses thereon. Further, they have cut trees and destroyed the grass. In cross examination, she contended that she knew the boundary to her land and the group of people who invaded it as they came from Osilalei Group Ranch which borders Lorngusua Group Ranch. Further, that each member of the group is entitled to a certain portion of land but they have invaded a bigger portion. She confirmed that the Surveyor came to show her the boundaries in the presence of the 4<sup>th</sup> and 5<sup>th</sup> defendants. She further stated that the Government surveyor and Land Registrar could resolve the boundary dispute. She produced the following documents as exhibits: Copy of the National ID, Copy of Title for Kajiado/ Lorngusua/ 962, Mutation Form, A map, Notice of declaration for Osilalei Group Ranch dated 30<sup>th</sup> July, 1973 and Notice of declaration for Olorngosua Group Ranch

### **Evidence of the Defendants**

**DW1 BOI OLE PARKISALE** testified that he is a member No. 1082 of Osilalei Group Ranch. It was his testimony that he had documents to prove the suit land belongs to him and did not acquire the Title through fraudulent means. In cross examination he explained that their Ranch was dissolved after which he took his Title. Further, that the Chairman of their Ranch was called Ole Nkopei, the Secretary was called Ole Solongo and the current office bearers were not present when he got his title in 2007. It was his testimony that the declaration dated the 30<sup>th</sup> July, 1970 was for the parcels of land allocated before the Group Ranches were formed. He confirmed being shown his land by Group Ranch officials. He contended that when the boundary of Osilalei Group Ranch was being determined the Officials from Osilalei Group Ranch, District Surveyor and Land Registrar were present. Further, that his Title Deed Kajiado/ Osilalei/179 was issued by Land Registrar Kajiado. He insisted that at the time of being allocated his land, there were officials from Lorngusua and Osilalei Group Ranches and no one complained on the said date. He reaffirmed that his Certificate of Title emanated from Osilalei Group Ranch. He produced the following documents as exhibits; Copy of Title Deed for Kajiado/ Osilalei/179, Copy of Search, Copy of a map from Osilalei Group Ranch.

**DW2 LENKISHIRINI OLE TIONGA NKULIDI** testified that he had a title deed over his land. In cross examination, he confirmed being a member of Osilalei Group Ranch but did not know when the Group Ranch was dissolved. Further, he did not have any document to prove that he was a member of the Osilalei Group Ranch. He stated that he was given his Certificate of Title after a sub-division during the Moi era. He explained that at the time of allocation of the land, the Chairman was called Ole Nkobe. Further, the persons who were present when he was being allocated land were Chairman Ole Nkobe, Secretary Ole Solongo but he could not recall the Vice chairman. He recalled when there was a site visit on the disputed parcels. He claimed he did not know if the Land Registrar and Surveyor produced a report. He further insisted that he was not encroaching on any one's land but was on the portion of land he was allocated. He reiterated that his Land is from Osilalei Group Ranch. He produced a copy of the Certificate of Title and Certificate of Official Search as his exhibit.

**DW3 KELEI OLE KIRWA** testified that he was a vice-chairman for 16 years for Osilalei Group Ranch. He averred that he knew the boundary between Osilalei Group Ranch and the other Group Ranches. Further, he knew the 4<sup>th</sup> Defendant as a member of Osilalei Group Ranch. He testified that the 4<sup>th</sup> Defendant was allocated land at Osilalei Group Ranch but could not recall the parcel number. He confirmed that the 4<sup>th</sup> Defendant had a Certificate of Title to that effect and had adhered to the legal process to get it. He further confirmed being present when the 4<sup>th</sup> and 5<sup>th</sup> Defendants were shown their land. He averred that the officials of Lorngusua Group Ranch were not present as they had already sub-divided their land. He stated that he knew the beacon E-31 separating Osilalei and Lorngusua Group Ranches. He further stated that he was present at a site visit when the Surveyor was identifying the beacons separating Osilalei and Lorngusua Group Ranches. He claimed to have shown the said Surveyor, the boundary between Lorngusua and Osilalei as beacon E-31 and another one on the Hill top. He further confirmed seeing the report from the Surveyor and insisted that the 4<sup>th</sup> and 5<sup>th</sup> Defendants reside on land belonging to the Ranch while the Plaintiffs were from the family of Muraya. He reiterated that since they allocated the suit land to the members there were boosters erected on the land and they never heard any dispute.

In cross examination he confirmed that he did not have the register in court to show that the 4<sup>th</sup> and 5<sup>th</sup> defendants were members of Osilalei Group Ranch. He explained that it is the Land Adjudication officer who keeps the members' register. He stated that during the site visit he was able to identify beacons he knew. He confirmed that the group ranch was dissolved in 1991 and they showed members their land in 1996. He contended that the 4<sup>th</sup> and 5<sup>th</sup> Defendants had not delayed in taking their titles as there are over 200 members who are yet to take their titles. He further confirmed knowing Ntesiloi who was a committee member for Nentenai Group Ranch. He was emphatic that Osilalei Group Ranch was dissolved before Nentenai Group Ranch. He also confirmed that Ntesiloi was present on the day of the site visit.

He was emphatic that the dispute herein did not arise from the subdivision of Osilalei Group Ranch as in 2006, the Land Registrar and Surveyor confirmed the position of the boundary between Nentenai and Osilalei Group Ranches. He could not recall the name of the Land Registrar but stated that the Surveyor was called Mr. Ole Narok.

It was his testimony that the report was not correct as according to the old map, there was nowhere indicating they had encroached on a third party's land. Further, that it was not accurate as the former officials used the old declarations and maps. He reiterated that the Registrar and Surveyors who prepared the report are custodians of the same and in case of a dispute the same can be used as reference.

He explained that he did not follow up on the 2006 report nor come with it during the site visit as he assumed it was within their office. He insisted that they did not allocate land that did not belong to Osilalei Group Ranch. It was his testimony that the title deeds were issued late because not all members had paid the requisite fees at the same time. Further, that the Title deeds were issued after the Land Registrar and Surveyor confirmed that all members had been allocated land before they commenced issuance of title deeds. He reaffirmed that the Registrar refers to Area List and Map before issuing a title deed.

**DW4 LAND REGISTRAR** David Nyandoro Nyambasyo produced a report dated the 27<sup>th</sup> February, 2018 emanating from a site visit conducted on 16<sup>th</sup> and 17<sup>th</sup> January, 2018 in respect to a boundary dispute on parcel number 179 Osilalei Group Ranch. He presented the findings in the report and referred to maps as well as the Osilalei and Lorngusua declarations. He explained that they found beacons on the grounds as follows: Points E-31 and K-31 which were not in dispute. Further, that the disputed beacons were YT-53. He confirmed that the

main beacon SKP-41 separates Mailua, Osilalei and Nentanai Group Ranches. Further, Beacons SKP-41, YTS-3, K-31, E-31 are all on Maparasha Hills.

He averred that many of the beacons are in valley or on flat ground. He stated that they made a determination after site visit. Further, that all the advocates, parties, surveyors, the Land Registrar actively participated during the visit but the Defendants' Advocate was absent at the time of preparation and finalization of the report.

He contended that the dispute herein is whether boundary between SKP-41 and E-31 is a straight line or not. Further, if they took it as a straight line, the dispute arose. He also contended that Beacon YTS-31 also separates an individual Ranch No. 4 from Nentanai Group Ranch. It was his testimony that the Defendants' disputed and denied knowledge of beacon YTS-31 and proceeded to explain that assuming the said beacon is misplaced, they referred to the demarcation done at the time of declaration. He further confirmed that the Registry Index Maps (RIMs) should be drawn in accordance with the two declarations which were in tandem with respect to the boundary features.

He proceeded to explain that the Declaration for Osilalei Group Ranch at Paragraph 7 covers the disputed area. Further, that the dispute is between SKP-41 and Indoinyo Orindoon Hills. The Declaration indicates the boundary is along Maparasha Hills. Paragraph 3 of the Lorngusua declaration referred at the last sentence indicates boundary along Maparasha Hills. He reiterated that Maparasha Hills should be boundary between Osilalei and Lorngusua Group Ranches.

He contended that the four beacons are on top of Maparasha hills which are several Hills and that Nentanai Group Ranch and Individual Ranches were part of the larger Lorngusua. Further, that they had done a sketch of the disputed area including the variance. He clarified that as per records held in Kajiado Lands Office, the Green card for Kajiado / Lorngusua/ 4 was opened on 22<sup>nd</sup> November, 1976 while the titles for the disputed area on Osilalei side were opened on 22<sup>nd</sup> January, 2007. He insisted that these were many years in between and Osilalei Group Ranch ought to have sorted the discrepancy before subdividing the land to its members.

He reaffirmed that the Chairman for Nentanai Group Ranch actually confirmed and approved that the beacon YTS-3 is the one separating individual ranches from Nentanai Group Ranch. He stated that it is important to interpret boundary as it was demarcated by the demarcation committee. Further, that both parties have titles in respect of Osilalei and Lorngusua Group Ranches but the problem is on Osilalei as their titles overlapped on Lorngusua. He opined that if the boundary between the two group ranches is taken as a straight line, then it will not fall on Maparasha Hills contrary to the declarations and contends that any party affected in the dispute should revert to the respective group ranches for their shares. Further, that SKP-41 was removed but it is a pillar which has coordinates. He also confirmed that Osilalei Group Ranch had the first declaration dated 30<sup>th</sup> July, 1970 while Lorngusua's is dated 30<sup>th</sup> December, 1970. He affirmed that the 4<sup>th</sup> and 5<sup>th</sup> Defendants hold genuine Title Deeds issued by Land Registrar Kajiado and proceeded to produce his report as an exhibit.

**DW5 MUMEITA OLE KOITALEL** testified that he is a member and vice chairman of Osilalei Group Ranch which borders Lorngusua, Mailua, Oloitoktok as well as Dalalekutuk Group Ranches. He claimed he knew the beacons that indicate the boundary of the Group Ranch as they are in steel. He confirmed that the boundary between Osilalei and Lorngusua Group Ranches are two beacons which are on Oldoinyoorindon and Maparasha Hills and are a straight line. He confirmed that he did not have any documentation to confirm the boundary.

He testified that he was present during the site visit which was conducted for purposes of identifying the two beacons. He averred that the Osilalei Group Ranch had not encroached on the Plaintiffs' land. He was emphatic that Osilalei was the first Group Ranch to be demarcated. He further confirmed that they were aware the Plaintiffs' had their own individual ranch.

He disagreed with the Land Registrar's report and stated that it is not correct that Osilalei Group Ranch encroached on the Plaintiffs' land. He was not aware of any document relied upon by the Land Registrar and District Surveyor. He reaffirmed that the Defendants were allocated land by Osilalei Group Ranch. He explained that the beacons were on a Hill showing boundary of Osilalei and Lorngusua and that it is a straight boundary on the Hill.

He claimed to have seen beacons showing the boundary while with the Surveyor Mr. Narok. He denied that something was removed from the boundary between Osilalei and Lorngusua Group Ranches

#### **1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs' Submissions**

The Plaintiffs submitted that they were the rightful owners of their respective parcels of land known as LR No. KJD/LORNGUSUA/960, LR No. KJD/LORNGUSUA/964, LR No. KJD/LORNGUSUA/2746 and KJD/LORNGUSUA /962. Further, that they had produced their respective Certificates of Title dated the 21<sup>st</sup> February, 2000, which were issued by the District Land Registrar, Kajiado. They insisted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants had encroached on their land. To buttress this argument they relied on the report by the District Land Surveyor filed on 25<sup>th</sup> February, 2015, the Notice of Declaration –Osilalei, Notice of Declaration – Lorngusua. They contended that the Land Registrar had powers to determine the Boundary Dispute and they were hence entitled to the prayers sought including costs. To buttress their arguments, they relied on **Sections 24, 25 and 26(1) of the Land Registration Act and the cases of ELC No. 65 of 2013, Christopher Kitur Kipwambok vs Vipulratilal Dodhia & 3 others** and **ELC No. 222/15 (Kisumu) Victoria Distributors vs Joseph Abwao Nyawir; Andrew Marita Kebaso & another vs Christopher Getuno Onkeo [2017] Eklr; Sections 18, 19 and 20 of the Land Registration Act of 2012 and the cases of ELC No. 3 of 2015, Azzuri Ltd vs Pink Properties Limited and Samuel Wangau vs AG & others (200) eKLR**. They reiterated that the Land Registrar's report dated 27<sup>th</sup> February, 2018 indicated among other things that the boundaries of the disputed properties are determined by the contents of the Declaration for both the Lorngusua and Osilalei Group Ranches and recommended the same to be adopted by allowing Plaintiffs' reclaim their property.

#### **4<sup>th</sup> and 5<sup>th</sup> Defendants submissions**

The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that they were the rightful owners of land parcel number Kajiado/ Osilalei/ 173 and 179 respectively having been issued with the Certificates of Title by the Kajiado Land Registrar on 22<sup>nd</sup> January, 2007 and 29<sup>th</sup> March, 2007 . It was their submission that there is no evidence to prove they acquired their Certificates of titles through an illegal and unprocedural manner. They denied encroaching on the Plaintiffs' properties. They did not dispute that the Land Registrar had the powers to determine the Boundary dispute but argued that the report had placed unproportional weight on the Declarations for Osilalei and Lorngusua Group Ranches in total disregard to all requirements pertinent to determination of a land boundary dispute including the Registry Index Map and Individual Ranches thus should not be adopted. It was their submissions that as per the report submitted, it absolved them from any wrong doing and they cannot be held accountable for the mistakes of individual Group Ranch Officials. They reiterated that the report should not be adopted as it did not conclusively indicate they were responsible for the purported encroachment and it will be unjust to rely on the said report to dispossess them without any clear method of compensation.

### **Analysis and Determination**

Upon consideration of the Plaintiff, Statements of Defence, Witnesses' Testimonies, Exhibits including rivalling submissions, the following are the issues for determination:

- Whether the Plaintiffs' are the rightful owners of land parcel numbers Kajiado/Lorngusua/960, Kajiado/Lorngusua/964, Kajiado/Lorngusua/2746 and Kajiado/Lorngusua/962 respectively.
- Whether the 4<sup>th</sup> and 5<sup>th</sup> Defendants' have encroached on the Plaintiffs' aforementioned parcels of land.
- Whether the Plaintiffs' are entitled to the orders sought in the Plaintiff.
- Who will bear the costs of the suit.

As to whether the Plaintiffs' are the rightful owners of land parcel numbers Kajiado/Lorngusua/960, Kajiado /Lorngusua /964, Kajiado/ Lorngusua/ 2746 and Kajiado/ Lorngusua/ 962 respectively. The Plaintiffs aver that they are the legal and absolute proprietors with exclusive indefeasible rights, interest and titles vested on them in respect to Land Reference Numbers Kajiado /Lorngusua /960, Kajiado /Lorngusua /964, Kajiado /Lorngusua /2746 and Kajiado /Lorngusua /962. In their testimonies they confirmed how they acquired the said parcels of land and produced their respective Certificates of Title to that effect. None of the Defendants' controverted the Plaintiffs' evidence in respect to ownership of the aforementioned parcels of land. In their submissions, they argued that there was no evidence on record or claim by the Defendants to indicate they acquired their titles illegally, unprocedurally or through corrupt scheme. In line with the said averments, I wish to make reference to section 25 and 26(1) of the Land Registration Act which provides that: ' 25 (1) **The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. 26. (1) 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 proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'**

In the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: ' **the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**'

See also the case of **Christopher Kitur Kipwambok vs Vipulratilal Dodhia & 3 others.**

Based on the facts as presented while relying on the legal provisions cited above including associating myself with the decisions I have quoted, I find that the Plaintiffs are the rightful owners of land parcel numbers Kajiado/Lorngusua/960, Kajiado/Lorngusua/964, Kajiado/Lorngusua/2746 and Kajiado/Lorngusua/962 respectively.

As to whether the 4<sup>th</sup> and 5<sup>th</sup> Defendants have encroached on the Plaintiffs' aforementioned parcels of land. The Plaintiffs' contend that Defendants have conspired to encroach, invade and or trespass on their respective parcels of land, by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants allocating Land Reference No. Kajiado / Osilalei/173 and Land Reference No. Kajiado/ Osilalei/ 179 to the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Plaintiffs' further aver that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants are intending to allocate more land to wit: Land Reference No. Kajiado / Osilalei/ 171 and Land Reference No. Kajiado/ Osilalei/ 172 to Parkisale Ole Parboi and Sapati Nkiu Kipise respectively. In their evidence they insist that the boundaries and beacons were long determined and placed at the top of Maparasha Hills clearly indicating the exact boundary between their land and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Group Ranch. They insist that they never sold their parcels of land to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Plaintiffs claim the 6<sup>th</sup> Defendant issued Certificates of Title to land reference numbers Kajiado/ Osilalei/ 173 and Land Reference No. Kajiado / Osilalei / 179 to the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The 4<sup>th</sup> and 5<sup>th</sup> Defendants insist they are the rightful owners of Land Reference No. Kajiado/Osilalei / 173 and Kajiado/ Osilalei/ 179 having been issued with Certificates of Title by the Kajiado Land Registrar on 22<sup>nd</sup> January, 2007 and 29<sup>th</sup> March, 2007. Further, no party controverted the said titles. I note the Land Registrar had been tasked by the Court to undertake a site visit of the disputed parcels to determine the boundary between the Plaintiffs' and the 4<sup>th</sup> and 5<sup>th</sup> Defendants' parcels of land. PW1 in her evidence contended that the boundary to her land which she inherited from her father is on Maparasha Hills. She however had never seen beacons but confirmed the dispute herein arose in 2013. PW2 who got her land from her husband explained that it is

her husband who showed her the beacons and she had never heard of any dispute. PW3 confirmed that she got the land from her husband. Further, the dispute arose four years ago. She was emphatic that her husband showed her the beacons. PW4 who also got her land from her husband confirmed he is the one who showed her the beacons. Further, that the dispute arose four years ago. DW1 informed court that the Declaration dated the 30<sup>th</sup> July, 1970 was for parcels of land allocated before the Osilalei Group Ranch was formed. Further, that the Osilalei Group Ranch boundary was determined in the presence of the officials, Land Registrar and Surveyor. DW2 confirmed there was a previous site visit to determine the boundaries but he did not avail any report. DW3 who was the Vice Chairman of the Group Ranch explained that he was present when the 4<sup>th</sup> and 5<sup>th</sup> Defendants were shown their land and when the Surveyor was identifying beacons separating Osilalei and Lorngusua Group Ranches. He confirmed the Group Ranch was dissolved in 1991 and the members were showed their land in 1996. He was emphatic that Osilalei Group Ranch was dissolved before Nentanai Group Ranch. Further, in 2006, the Land Registrar and Surveyor confirmed the positions of the boundary between Osilalei and Nentanai Group Ranches. DW4 who was the Land Registrar noted that beacons YT – 53 and SPK P – 41 separate Mailua, Osilalei, and Nentanai Group Ranches. Further, that the said beacons are on Maparasha Hills. He admitted that many of the beacons are also on the valley and flat ground while the main dispute was whether beacon SKP – 41 and E31 are on a straight line or not. He insisted the Registry Index Map should be drawn in accordance with the two Declarations as they both indicated where the boundaries of Osilalei and Lorngusua Group Ranches were located. He confirmed that Nentanai and Individual Ranches were part of Lorngusua Group Ranch. I note in the Land Registrar’s report, wherein he elaborated on the location of the respective beacons, he was emphatic that the beacons were on Maparasha Hills on a straight line. The Land Registrar explained that there was an overlap between the two group ranches. He however never provided the exact measurements nor extent to which the 4<sup>th</sup> and 5<sup>th</sup> Defendants had encroached on the Plaintiffs’ parcels of land. Further, the Plaintiffs confirmed that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were residing on their parcels of land and the dispute only arose four years ago. All the Plaintiffs confirmed inheriting their respective parcels of land and intimated that they had never known of any boundary dispute from the persons they got the land from and were never present when the said boundaries were demarcated. To my mind, it seems the issue of the boundary raised by the said Plaintiffs was an afterthought. The Land Registrar raised the issue of the overlaps between the Lorngusua and Osilalei Registration Sections but I note this was not an issue in dispute. At this juncture, I wish to point out that the parties herein are bound by their pleadings. From the analysis of the evidence above, I find that the dispute herein relates to general boundaries as there was no evidence presented that specific boundaries of the Plaintiffs’ and 4<sup>th</sup> and 5<sup>th</sup> Defendants lands had already been clearly demarcated. To my mind, parties were simply using approximations on where their respective boundaries were.

In the case of **Azzuri Limited v Pink Properties Limited [2017] eKLR**, it was held that: ‘ **In his paper, “The Role of the Registry Index Map (RIM) in Land Management in Kenya”, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”**

The paper defines “General Boundaries” as follows:

***“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”***

In the case of **Ali Mohamed Salim vs Faisal Hassan Ali (2014) eKLR**, this court held as follows:

***“The type of survey that generated the Registry Index Map is what was known as “general boundaries” which has been defined in Section 18(1) of the Land Registration Act, 2012 to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.”***

In the current scenario, I note boundaries between the Plaintiffs and the 4<sup>th</sup> and 5<sup>th</sup> Defendants’ parcels of land were not fixed. The provisions of section 18 and 19 of the Land Registration Act are clear in instances where the boundaries are not fixed, it is the Land Registrar mandated to fix the same. However, the owners of the adjoining parcels of land in question have to be notified. In this case, the Land Registrar in the presence of all parties undertook his legal mandate and proceeded to the site but failed to provide the extent of the measurement by which the 4<sup>th</sup> and 5<sup>th</sup> Defendants had encroached on the Plaintiffs’ parcels of land. Instead he focused on the overlap between Osilalei and Lorngusua Group Registration Sections including the localities and features of the beacons. I note the declarations in respect to the two ranches all provided the general boundary but did not fix the same. Insofar as the Land Registrar insisted that it is the parcels of land emanating from the Osilalei Group Ranch that overlapped but without specificities, this court cannot proceed to confirm that the said 4<sup>th</sup> and 5<sup>th</sup> Defendants had indeed encroached on the Plaintiffs’ parcels of land. It emerged in evidence that Lorngusua and Osilalei Group ranches have since been subdivided, hence right now it is individuals holding their respective titles which individuals were not parties herein. I note that twice some previous Land Registrars and Surveyors were involved in resolving the boundary dispute between the two ranches and no party produced the said reports. Further, there was no indication if the Land Registrar referred to their reports. From the Surveyor’s report which was included in the Land Registrar’ Report, it referred to a disputed area measuring 250. 58 Hectares (619) acres but did not indicate the extent of the 4<sup>th</sup> and 5<sup>th</sup> Defendant’s encroachment. Based on my analysis above while associating myself with the aforementioned decisions as well as the legal provisions cited above, I am unable to make a determination that the 4<sup>th</sup> and 5<sup>th</sup> Defendants indeed encroached on the Plaintiffs’ land. I opine that the burden of proof was upon the Plaintiffs’ to prove the extent of the encroachment as envisaged by section 107 of the Evidence Act and furnish court with the measurements on how far the 4<sup>th</sup> and 5<sup>th</sup> Defendants’ had encroached on their land but in this instance, I find that they have failed to do so. Since the issue of the registration sections was not in dispute herein, I will decline to adopt the Land Registrar’s report as it is. It is my recommendation that the Government through its relevant agencies should institute an inquiry on how the various registration sections overlapped on each other and properly demarcate the boundaries which are not clear, before any of the affected titles can be rectified. In the circumstance, I hold that the 1<sup>st</sup> to 5<sup>th</sup> Defendants did not encroach on the Plaintiffs’ respective parcels of land.

As to whether Plaintiffs' are entitled to the orders sought in the Plaintiff.

The Plaintiffs sought for injunctive orders as well as cancellation of the 4<sup>th</sup> and 5<sup>th</sup> Defendants' titles, eviction and general damages. They further sought for the Land Registrar to demarcate the boundary between Osilalei Group Ranch and the Plaintiffs' Land. On the issue of injunctive reliefs sought, and in relying on the principles established in the case of **Giella Vs Cassman Brown (1973) EA 358**, further since I have held that the Defendants' are registered proprietors of their respective portions of land, I find that the Plaintiffs have not established a prima facie case as against them to warrant the injunctive orders sought. As for the issue of demarcation of the boundary, except for identifying the respective beacons, the Land Registrar never took exact measurements and noting that the said group ranch is no longer in existence as it has since been subdivided, with resultant subdivisions now owned by different individuals who were not parties to this suit nor involved in the site visit as per the Land Registrar's report, I find that the Land Registrar only proceeded to flag out the overlaps in the Registration Sections but did not determine the said boundaries. As for the issue of cancellation of the 4<sup>th</sup> and 5<sup>th</sup> Defendants' titles, I wish to rely on section 143 of the Registered Land Act (repealed) which was in place when the register to the suit lands was opened that stipulated thus: **'(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.'**

The provisions in section 143 cited above are similar to section 80 of the Land Registration Act which provides that: **'(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'**

In the case of **Mary Ruguru Njoroge V John Samuel Gachuma Mbugua & 4 others (2014) eKLR**, the Court held that: **'It is upto the party seeking rectification, whether under the relevant statutory provisions or the equitable principles to satisfy the court or the Registrar, for that matter, that their intervention is justified. The evidence must in my view be convincing. Even though the ordinary standard of proof on a balance of probabilities applies the evidence ought to be sufficient to overcome the inherent probability that what is sought to be rectified was what was intended all along.'**

Based on the facts as presented and in associating myself with the decision cited above, while relying on the quoted laws, I am not convinced that the Plaintiffs have proved that the 4<sup>th</sup> and 5<sup>th</sup> Defendants acquired their respective titles through omission, fraud or mistake. I note the Land Registrar, even admitted in his testimony that the said titles were legally issued by his office. Further, the representatives of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants admitted that they had allocated them their respective parcels of land. In the circumstance, I will decline to make an order of cancellation of the Certificate of Titles for Land Reference No. Kajiado/Osilalei/173 and Land Reference No. Kajiado /Osilalei/179 in the name of the 4<sup>th</sup> and 5<sup>th</sup> Defendants. From these findings I decline to make any orders of eviction as against the 4<sup>th</sup> and 5<sup>th</sup> Defendants as they reside on their land. As for General Damages, I find that the Plaintiffs failed to prove the same and will decline to grant them. I note the Plaintiffs never furnished any evidence in court to the effect that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' intended to allocate Land Reference No. Kajiado / Osilalei/ 171 and Land Reference No. Kajiado/ Osilalei/ 172 to Parkisale Ole Parboi and Sapati Nkiu Kipise respectively and will decline to make any order to that effect.

As to who should bear the costs of this suit.

Since the Defendants are the inconvenienced parties, I will proceed to award the costs to them.

It is against the foregoing, that I find that the Plaintiffs have not established their case on a balance of probability and will proceed to dismiss it with costs.

**Dated Signed and Delivered Virtually at Kajiado this 3<sup>rd</sup> March, 2021.**

**CHRISTINE OCHIENG**

**JUDGE**