



**Kaikai v Kalasinga (Environment and Land Appeal 1 of 2022)
[2023] KEELC 16080 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16080 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 1 OF 2022**

EM WASHE, J

MARCH 6, 2023

BETWEEN

JAMES KAYIONI KAIKAI APPELLANT

AND

DANIEL LEURU KALASINGA RESPONDENT

(Originating from a judgement by Hon D K Matutu, Principal Magistrate pronounced on the 19th of november 2019 in Kilgoris Pm Elc Case No 21 of 2018)

JUDGMENT

1. The appellant herein filed a memorandum of appeal dated November 25, 2019 (hereinafter referred to as “the present Appeal”) seeking to set-aside the judgement of DK Matutu, Principal Magistrate pronounced on the November 19, 2019 (hereinafter referred to as “the Trial Court Judgement”).
2. The appellant listed 14 grounds challenging the Trial Court Judgement which are outlined as follows; -
 - i. That the learned trial Magistrate erred in holding that the respondent was regularly and lawfully registered as proprietor of land known as Transmara/Olomismis/1329.
 - ii. That the learned trial court Magistrate erred in law and fact by finding that the land purchased by the respondent was the land comprised in the Land Reference No Transmara/Olomismis/1329.
 - iii. That the Learned Trial Magistrate erred in law in conferring a benefit to the respondent on outright disregard of section 6 (1) of the Land Control Act (cap 302) Laws of Kenya.
 - iv. That the learned trial Magistrate erred in law in failing to find that the respondent’s sale agreement were null and void in terms of section 6(1) of the Land Control Act.



- v. That the learned trial Magistrate failed to consider the law governing the sale of land and the *Land Control Act* controlled transactions.
 - vi. That the learned trial Magistrate erred in law in granting a permanent injunction against the Land Reference Transmara/Olomismis/1329 when the same was not available from the evidence, facts and the law of this case.
 - vii. That the learned trial Magistrate misdirected himself by finding that the appellant had entered the respondent's land after the issuance of title and therefore failed in error by ordering vacant possession.
 - viii. That the learned trial Magistrate erred in law in holding that the appellant had trespassed on the respondent's land, while there is no evidence to that effect.
 - ix. That the learned trial Magistrate erred in law in overlooking the fact the Land Reference Transmara/Olomismis/1329 was different from that purchased by the respondent.
 - x. That the learned trial Magistrate erred in law in overlooking the fact that the only remedy open to the respondent was to seek orders against the committee of the Olomismis Group Ranch.
 - xi. That the learned trial Magistrate erred in law and fact by failing to find the appellant was entitled to the 10 acres of land he occupies in Land Reference Transmara/Olomismis/1329.
 - xii. that the learned trial Magistrate did not take to account the appellant's evidence submission and the law in his determination of the suit.
 - xiii. That the Learned Trial Magistrate erred in law be determining issued not pleaded and grounds not submitted.
 - xiv. That the Learned Trial Magistrate failed to consider the authorities submitted guiding the ownership of property and specific performance.
3. This Appeal emanates from proceedings commenced by respondent through a plaint dated July 28, 2015 (hereinafter referred as "the plaint") which sought for the following reliefs; -
- a. Declaration that the plaintiff is the registered and/or lawful owner of LR NO Transmara/Olomismis/1329.
 - b. An Order of eviction against the defendant, his agents and/or servants from LR NO Transmara/Olomismis/1329.
 - c. Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering upon, re-entering, trespassing onto, cultivating, building on, interfering with and/or in any other manner dealing with the suit property, that is LR NO Transmara/Olomismis/1329 and/or any portion thereof.
 - d. General damages for trespass.
 - e. Interest on (d) hereof at court rates.
 - f. Costs of this suit be borne by the defendant.
 - g. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.



4. The appellant herein being the defendant in the trial court proceeding filed his defence on the August 26, 2015 seeking the dismissal of the respondent's suit with costs.
5. The hearing commenced on the January 22, 2019 with the evidence of Daniel Kalasinga as PW1.
6. PW 1 introduced himself as farmer.
7. PW1 informed the court that he had purchased a piece of land measuring approximately 5 acres on the 7/04/2008.
8. PW 1 stated that the transaction was one of willing seller willing buyer.
9. Thereafter, PW 1 purchased another parcel of land measuring approximately 11 acres from one Robert Memusi on the August 18, 2009.
10. To support these testimony, PW 1 produced two agreements for sale dated April 7, 2008 and August 18, 2009 as plaintiff's exhibit 1 and 2 respectively.
11. Thereafter, PW 1 was issued with a title deed for the property known as LR NO Transmara/Olomismis/1329 on the May 16, 2013 for an area measuring approximately 8.256 Hectares (hereinafter referred to as "the suit property").
12. PW 1 produced the title deed of the property known as LR NO Transmara/Olomismis/1329 together with a copy of an official search of the same property dated February 10, 2015 as plaintiff's exhibit 3 and 4 respectively.
13. PW 1 informed the trial court that he took possession of the suit property by fencing it and grazing his cattle therein.
14. The appellant without any lawful reason went and placed a caution on the green card of the suit property.
15. On discovering the appellant's actions, PW 1 wrote a letter to the land registrar dated 4/05/2015 which he produced as plaintiff's Exhibit No 5.
16. On the 5/05/2015, the Land Registrar-Transmara West acknowledged the letter dated May 4, 2015 and notified the appellant of the intention to have the said caution removed through his letter dated May 5, 2015 which was produced as plaintiff's exhibit 6.
17. In addition to the above letter dated May 5, 2015, the Land Registrar, Transmara West proceeded to write a second letter dated May 19, 2015 directing the appellant to maintain *status quo* until the hearing of the caution is heard and determined.
18. This letter dated May 19, 2015 by the Land Registrar, Transmara West was produced as plaintiff Exhibit No 7.
19. The Land Registrar, Transmara West then issued summons for the hearing of the caution on the May 19, 2015 which the plaintiff produced as plaintiff's exhibit No 8.
20. The Land Registrar, Transmara West then conducted a hearing appertaining the caution placed by the appellant and upon his consideration decided to remove the said caution placed therein.
21. PW 1 produced the proceedings and determination by the Land Registrar, Transmara West dated 19/06/2015 as plaintiff exhibit No 9.



22. PW 1 informed the trial court that the appellant's claim was based on beneficiary interest over the suit property.
23. However, PW 1 stated that they are not related to the appellant and neither was he a broker.
24. The appellant's claim was that he was a son of member of the group ranch.
25. The caution was subsequently removed and PW 1 obtained an official search dated July 2, 2015 confirming this position.
26. PW 1 produced the search dated July 2, 2015 same as plaintiff's exhibit No 10.
27. Despite the determination by the Land Registrar, Transmara West, the appellant still forcefully trespassed on the suit property and worked on it in total disregard to the ownership rights of the respondent herein who is the registered and lawful owner.
28. The actions by the appellant forced the respondent to make a formal report to the police.
29. The police arrested the appellant and charged him in court through the charge sheet No 933 of 2015 dated 16/07/2015.
30. PW 1 produced copies of the charge sheet of the proceedings instituted by the police as plaintiff's exhibit 11 (a) and (b).
31. PW 1 further produced photos of the suit property at the time he took possession and requested the appellant to vacate the same.
32. The photos of the suit property were then produced as plaintiff's exhibit 12.
33. In concluding his evidence in chief, PW 1 requested the court to declare him the rightful owner of the suit property and evict the appellant and permanently be restrained from forcefully occupying the suit property.
34. PW 1 also wanted mesne profits and costs of the case from the appellant.
35. On cross-examination, the appellant refused to ask any questions to PW 1 on the basis that his counsel was not there.
36. The court then adjourned the matter to the March 26, 2019 for the defence hearing.
37. On the March 26, 2019, the defence asked for a further adjournment and the court rescheduled the same to the 4/06/2019.
38. On the June 4, 2019, the appellant began his defence hearing as DW 1.
39. DW 1 informed the court that he works for the Ministry of Agriculture and Livestock.
40. DW 1 stated that he knew why he had come to court and requested to adopt his statement of defence dated August 25, 2015 as part of his evidence.
41. DW 1 confirmed that he had been sued over a parcel of land measuring approximately 20 acres within Olomismis Group Ranch.
42. DW 1 testified that he has never sold any land to the respondent herein.
43. According to DW 1 knowledge, the respondent had bought some portion of land from members of the group ranch.



44. DW 1 confirmed that the respondent is in occupation of the portions of land he purchased and therefore had no claim whatsoever over the same.
45. DW1 testified in the trial court that the two portions purchased by the respondent comprised of 11 acres sold to him by Robert Memuse and a further 5 acres sold to him by David Chepirion.
46. DW 1 stated that the respondent's property was located in Ngare River while his portion was located in Mogor River.
47. According to DW 1, the asset of the group ranch was duly shared out among its members by consent.
48. DW 1 stated that he was a member of the Group Ranch as of his own right and also a son of a member.
49. By virtue of being a son of a member, the Group Ranch had resolved to allocate 10 acres for their age group.
50. Based on this resolution, the DW 1 moved from plot 96 to 97 within Olomismis Group Ranch.
51. The portion 10 acres which is occupied by DW 1 does not belong to the respondent.
52. DW 1 testified that the 10 acres allocated to him was as of a right bestowed to his age group being sons of members.
53. DW 1 stated that the respondent was not a member of the Group Ranch.
54. However, DW 1 admitted that the respondent's property was LR NO Transmara/Olomismis/1329.
55. DW 1 stated that the only reason the respondent was litigating that matter was simply to harass him.
56. DW 1 accused the respondent of illegally taking his portion of 10 acres and registering it in his name.
57. DW 1 informed the court that indeed he had been charged for forcible detainer but was acquitted thereafter.
58. DW 1 wondered how the respondent acquired the title deed over the portion of 10 acres which he occupies yet it was his land.
59. In conclusion thereof, DW 1 testified that the respondent's Title be cancelled.
60. In cross-examination, the DW 1 confirmed that he is in occupation of a part of the suit property owned by the respondent.
61. DW 1 stated that he had not trespassed on the property known as Transmara/Olomismis/1329.
62. DW 1 confirmed to the court that he did not have a title deed of the land which he is in occupation of.
63. The only reason why DW 1 was on the portion he has occupied is because he is a member of the group ranch and his name appears on the record thereof.
64. DW 1 confirmed that the respondent had a valid title which he had not challenged.
65. However, DW 1 alleged that the respondent had grabbed his land.
66. DW 1 further confirmed that both persons who sold their properties to the respondent were known to him and were also members of the Group Ranch.
67. DW1 confirmed the existence of the agreements for sale although he had not sued any of those vendors for selling off his property.



68. DW 1 reiterated that he was allocated 10 acres as a member of a certain age group being a son of a cultural member.
69. DW 1 claimed that the 10 acres belong to him and even after the caution hearing, the caution was not removed.
70. DW 1 indicated that he did not require the permission of the respondent to occupy the 10 acres allocated to him as a son of a member.
71. DW 1 further testified that he was not a surveyor and had not engaged any to identify the location of his portion of 10 acres.
72. DW 1 stated that the respondent obtained the title to the suit property fraudulently and therefore will not leave the suit property.
73. DW1 indicated that the property known as Transmara/Olomismis/1329 was his and not the respondent.
74. DW1 stated that he had come with the father to Robert Memusi to testify in his support of his case.
75. In conclusion, DW 1 stated that he had never sued the respondent for fraud in his pleadings.
76. In re-examination, DW 1 confirmed that he is the one that had placed the caution.
77. DW 1 indicated that the respondent's title deed to the suit property was obtained by fraud.
78. DW 1 testified that the respondent purchased his property in the year 2009.
79. In closing his testimony, DW 1 indicated that there is a case in the Court of Appeal regarding the group ranch.
80. DW 1 then concluded his evidence and was discharged from the dock.
81. The second defence witness was Henry Kipruto.
82. DW 2 introduced himself as a resident of Olomismis group ranch.
83. DW 2 informed the court that he was 81 years old and confirmed that he sold the respondent about 10 acres near Ngare River.
84. DW 2 stated that he never sold the respondent any land near Mara-Mogor River.
85. In cross-examination, DW 2 testified that he did not know the property known as LR NOTransmara/olomismis/1329.
86. DW 2 simply stated that he had sold some land to the respondent although he did not have the agreement for sale.
87. DW 2 confirmed that he was a service officer having worked in the army hence was able to read and write.
88. In re-examination, DW 2 reiterated that he had sold some land to the respondent.
89. Nevertheless, DW 2 stated that the appellant is the one who occupies the same property that have been sold to the respondent.
90. After this re-examination, DW 2 was discharged from the dock and the defence closed its case.
91. Parties were then directed to file their submissions which were duly filed.



92. The trial court then proceeded to prepare the judgement and pronounced the same November 19, 2019.
93. This court having gone through the pleadings filed in the trial court, the proceedings thereof including the testimonies of the witnesses and the documentary evidence produced therein, the issues for determination can summarily be identified as follows; -
 - issue no 1- is the suit property lawfully created and issued with a title?
 - issue no 2- is the suit property legally registered in the name of the respondent?
 - issue no 3- does the appellant have any proprietary rights of ownership and/or occupation on any portion of the suit property?
 - issue no 4- is respondent entitled to the prayers contained in the plaint filed in the trial court?
 - issue no 5- is the appellant entitled to the reliefs sought in this appeal?
 - issue no 6- who bears the costs of this appeal & the trial court proceedings?
94. The court having identified the issues for determination in the trial court, the same will now be discussed herein below.

Issue No. 1- Is The Suit Property Lawfully Created And Issued With A Title?

95. The first issue for determination is whether the suit property was legally created.
96. The respondent's position is that he purchased two parcels of land from David Cheporian and Robert Memusi measuring approximately 5 acres and 10 acres respectively.
97. Both vendors are described as members of Olomismis Group Ranch who were disposing of a portion of their shares to the respondent.
98. The appellant has also testified at the trial court that both vendors were registered members of the group ranch and therefore had valid shares of land within the group ranch.
99. Based on the agreements for sale dated April 7, 2008 and August 18, 2009, which have been produced as plaintiff's exhibit 1 and 2, the respondent testified that the two portions were consolidated and thereafter registered as one parcel of land known as LR NO Transmara/Olomismis/1329.
100. The respondent produced the title deed of his property known as LR NO Transmara/Olomismis/1329 as plaintiff Exhibit No 3.
101. It is clear from the evidence tendered at the trial court that the area known as Olomismis Adjudication Section was being administered as a Group Ranch under *Land (Group Representatives) Act*, cap 287 Laws of Kenya.
102. It is settled law that the alienation of rights under the *Land (Group Representatives) Act*, cap 287 Laws of Kenya is strictly undertaken by the group representatives appointed by the general membership.
103. Consequently therefore, the demarcation and subsequent transfer of the asset of the group ranch is undertaken by the group representatives.
104. In this case, the suit property was a creation of the group representatives who thereafter transferred the same to the respondent herein.
105. The appellant has claimed that the suit property was registered by way of fraud on the basis that he had been allocated about 10 acres as a son of a member whose age group was to enjoy this benefit.



106. During the hearing, the appellant did not produce any resolution by the members of the group ranch to proof this allegation.
107. In the absence of this resolution by the general membership of the group ranch, the appellant was at liberty to summon any of the registered group representatives to collaborate this resolution as alleged.
108. In addition to the above, the appellant should have provided some form of a sketch map, mutation and/or deed plan of the physical location relating to the 10 acres he alleges to have been allocated to him.
109. It would have been completely irresponsible for the group representatives to simply pass as a resolution without identifying the area which such allocations could be made within the group ranch asset.
110. Referring to the evidence by the Chairman and Secretary of Olomismis group ranch during the caution hearing contained on page 29 to 31, both official confirm the lawful creation of the suit property and subsequent transferring of the same to the respondent herein.
111. It is important to state that the sell and/or purchase of the two portions by the respondent from the two members of Olomismis Group Ranch were not subject to the provisions of the [Land Control Act](#), cap 302 as the entire asset of Olomismis Group Ranch was under adjudication under the [Land \(Group Representative\) Act](#), cap 287.
112. In conclusion therefore, the court is of the view that the suit property was legally created and issued a lawful title deed as required by law.

Issue No. 2- Is The Suit Property Legally Registered In The Name Of The respondent?

113. The court having made a finding that the suit property was lawfully and legally created and issued with a title deed, the next question is whether the respondent's registration on the suit property was proper.
114. The respondent testified in the trial court that he purchased two portions of land from members of Olomismis Group Ranch.
115. According to the evidence of the chairman and the secretary of olomismis group ranch during the caution hearing before the land registrar contained in pages 29 to 31, it was their testimony that the members who sold to the respondent informed them of the transactions thereof.
116. Consequently thereafter, the suit property was transferred to the respondent by authorised group representatives and a title deed issued appropriately.
117. Both the title deed of the suit property and the copies of the official search dated July 2, 2015 confirm that the suit property is registered in the name of the respondent.
118. Section 24 and 25 of the [Land Registration Act](#), No 3 of 2012 recognises the person appearing on a title deed to be the proprietor of the land and vests absolute ownership of such a property to such a person.
119. Similarly, section 26 of the [Land Registration Act](#), No 3 of 2012 requires all courts to take the name of the person appearing on a certificate of title as *prima facie* evidence of the proprietor to the said land as the absolute and indefeasible owner thereof.
120. This court upon reviewing the facts and evidence before the trial court as well as the title deed and official searches of the suit property, it is in no doubt that the suit property was legally registered in the name of the respondent.



Issue No 3- Does The appellant Have Any Proprietary Rights Of Ownership And/or Occupation On Any Portion Of The Suit Property?

121. This issue has been raised by the appellant who claims to be have proprietary rights of ownership and/or has occupation of the suit property.
122. The appellant's claim is based on the allegation that he was entitled to an allocation of 10 acres as a son of a member belonging to a certain age group.
123. The appellant claims to be in occupation of the suit property which is rightfully his and should be allowed to own the same.
124. The respondent on the other hand states that the appellant herein simply trespassed on the suit property.
125. The respondent testified and even produced pictures of how the suit property was at the time of taking possession.
126. The two agreements for sale produced by the respondent both have specific clauses regarding possession.
127. In these two agreements for sale, the respondent indeed took possession of the two portions from their previous owners who were members of Olomismis Group Ranch.
128. In the testimony of the Chairman and Secretary of Olomismis group ranch contained in pages 29 to 31 of the proceedings before the Land Registrar in regards to the caution hearing, both officials stated that the respondent was in possession of the suit property and the appellant did not have any legal rights and/or occupation therein.
129. Clearly therefore, the appellant does not have any legal rights to ownership and occupation of the suit property which is lawfully owned by the respondent herein.

Issue No. 4- Is The respondent Entitled To The Prayers Contained In The Complaint Filed In The Trial Court?

130. The court based on the finding hereinabove is of the considered view that the respondent was entitled to the prayers sought in the complaint filed in the trial court thereof.

Issue No 5- Is The appellant Entitled To The Reliefs Sought In This Appeal?

131. On the other hand, the appellant herein having failed to prove his ownership rights and/or legal occupation of the suit property, then the reliefs sought in this Appeal cannot be granted as there is no legal bases to disturb the decision of the trial court.

Issue No 6- Who Bears The Costs Of This Appeal & The Trial Court Proceedings?

132. The costs of a litigation usually follow the outcome of the said litigation.
133. The appellant herein having not been successful in this appeal shall bear the costs as well.
134. In conclusion therefore, the court hereby makes the following orders as appertains the memorandum of appeal November 25, 2019; -
 - A. The memorandum of appeal dated November 25, 2019 be and is hereby dismissed.



- B. The judgement and decree of hon d k Matutu, principal magistrate pronounced on the 19th of november 2019 in Kilgoris Pm Elc Case No 21 of 2018 is hereby upheld.
- C. The appellant shall bear the costs of this appeal as well as the trial court proceedings.

DATED, SIGNED AND DELIVERED in KILGORIS ELC COURT on this 6TH MARCH 2023.

EMMANUEL.M. WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: NGENO

ADVOCATES FOR THE APPELLANT: NO APPEARANCE

ADVOCATES FOR THE RESPONDENT: NO APPEARANCE

