



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAROK

ELC CASE SUIT NO. 22 OF 2017

SAITOTI SINTIMAIYIO KOISAMU

KILESI SINTIMATIO KOISAMU

(Suing as the Legal Representatives of the Estate of

SINDIMAIYO OLE KOISAMU (DECEASED).....PLAINTIFF

-VERSUS-

SAKINYA OLE TUUKUO.....1ST DEFENDANT

DAVID KISERA TUUKUO.....2ND DEFENDANT

MBATINGA OLE TUUKUO.....3RD DEFENDANT

KAROE OLE TUUKUO.....4TH DEFENDANT

JUDGEMENT

A. INTRODUCTION

1. The plaintiffs commenced this suit by a plaint dated 7th December, 2012 which was later amended on 14th March, 2018. The defendants filed a statement of defence and a counterclaim dated 8th March, 2018 and a reply to the defence and counterclaim was filed by the plaintiffs on 24th May, 2018. All through this judgement, the plaintiffs shall remain so similarly to the defendants even if their titles do change in the counterclaim and the reply thereto.
2. The dispute is centred around Land Parcel **L.R. Number NAROK/CIS/MARA/NAIRAGIE–ENKARE/85** (the **suit property**).
3. The plaintiffs claim that they have been in possession of the suit property where they were born and grew up; that their father Keruge Ole Koismu (**hereinafter the ‘deceased’**) settled in the suit property in 1960 where they have been living peacefully with other families in line with the Maasai customs and traditions; that on or about 11th March 2011 the defendants unilaterally and without any notice obtained title to the suit property to the exclusion of the plaintiffs. The plaintiffs averred that if the title was not obtained unprocedurally, then the same is held in trust in equal undivided shares with a bona fide proprietary interest as is the norm in Maasai customs and traditions.
4. Further, the plaintiffs particularised the allegations of fraud and breach of trust by the defendants. The plaintiffs prayed for judgement against the defendants that a declaration the suit property registered in the names of the defendants is held in trust in divided and equal shares between the defendants and the plaintiffs; and the Commissioner of Lands do ensure compliance and any further orders and costs.
5. In their defence and counterclaim, the defendants denied the allegations by the plaintiffs and in particular that they had been living peacefully with the plaintiffs on the suit land from the year 1960. The defendants denied the particulars of fraud and breach of trust as alleged by the plaintiffs.
6. In their counterclaim, the defendants listed the previous disputes between themselves and the plaintiffs, which were allegedly determined in the defendants’ favour. The defendants prayed for judgement against the plaintiffs that they are the registered proprietors of all that suit

land, an order that the deceased's body be exhumed from the suit land, an order of eviction for the removal of the plaintiffs, costs and interest of the suit.

7. The plaintiffs filed a reply to the defence and counterclaim and aver mainly that the Mao Local Council did not approve the defendants' deceased father application as alleged. The defendants' deceased father was required to have the boundaries with neighbours determined by either the demarcation committee or the local sub - committees but he failed to do so; that the demarcation committee visited the suit land and allocated property to the Koisamu and Tuukuo family who opted for joint allocation of the suit property but the defendants' deceased father failed to bring this to the attention of the Mao Local Council. Further, the title deed was illegally issued to the defendants' deceased father Kisera Tuukuo on 4th January 1984 whereas the said Kisera died nine years earlier in the year 1975.

8. The suit proceeded by way of viva voce evidence and the parties filed written submissions which I have duly considered.

B. DISCUSSION AND DISPOSITION

9. I have carefully considered the pleadings by both the plaintiffs and the defendants, their respective exhibits in support of their case, the witness statements on record and their respective rival submissions. On that account, it is this court's opinion that the issues for determination arising therefrom are:-

i. Whether the suit land was fraudulently acquired and registered in the names of the defendants.

ii. Whether the suit land is/was jointly owned.

iii. Appropriate orders the court can make.

10. Turning to the first issue, the plaintiffs submitted that the title deed to the suit land issued to the defendants on 11th March 2011 was a result of fraud stemming from the illegal issuance of a title deed for the suit property to the defendants' deceased father Kisera Tuukuo on 4th January 1984 who died nine (9) years earlier on 6th July 1975. Further, there was no proof of boundaries which were demarcated by then and the defence did not call a witness from the adjudication office to explain the transaction hence the suit land was acquired through fraud and is therefore null and void.

11. On the other hand, the defendants submitted that their deceased father applied to the Mao/Osupuko Local Council in 1965 and the land was allocated to their deceased father alone in the year 1966; and not as a trustee for anybody including the plaintiffs' deceased father.

12. The defendants further submitted that the suit property was declared an adjudication and once the suit property was placed under adjudication law, then demarcation was set up which process commenced on 26th September 1972 prior to the demise of their deceased father in 1975. The defendants also submitted that the suit property was first opened for registration on 4th January 1984 and the first entry in the green card was in their deceased father's sole name.

13. I have considered the evidence on record. The suit property was initially governed by the now repealed Land Adjudication Act Cap 284 (2012). On 17th May 1968, Kisera Ole Tuukuo (deceased) was directed by the office of the Mao Local Council that his application for ranch at the Nairagie Enkare was approved. However, the now deceased was required to have boundaries with his neighbouring people set up by the demarcation committee of the Mao Local Council or by the sub-committee presided over by the chief in his area (**DEXH1**). This court observes that there is no indication that this special condition as required to be done by the deceased was adhered to. This fact was alluded to by the plaintiffs in their reply to the defence to the counterclaim.

14. On the 31st July 1972, the Nairagie Enkare Adjudication Section where the suit land is located was declared an adjudication area. Thereafter, on 26th September 1972 the then Land Adjudication Officer appointed persons to be members of the Land Adjudication Committee including the said deceased, Kisera Ole Tuukuo to be part of the committee to carry out the functions outlined under Section 20 of the Act over the Nairagie Enkare area where the suit land is located.

15. Section 8 (1) of the Land Adjudication Act provides any committee of member who has interest, direct or indirect to any land within the adjudication areas, is required to declare as such. It is not hard to see that the now deceased Kisera Ole Tuukuo whether real or imagined, may have been conflicted. He was part of the adjudication committee which decided the adjudication of the suit property in which he had a direct interest.

16. In addition, both parties are in agreement that Kisera Ole Tuuko died in the year 1975. The entries in the green card of the suit land show that the title to the suit land was first registered in the name of the deceased in the year 1984. Section 23 of the Land Adjudication Act provides an elaborate procedure on the aftermath after preparation of the adjudication record.

17. Section 23 (6) provides:-

“When completed, the form shall be signed by the chairman and the executive officer of the committee, and by the owner of each interest in the parcel or his authorized agent (or in the case of joint owners by at least one owner or his authorized agent), and the signature of the owner or authorized agent shall be witnessed:” (emphasis mine)

18. The strict provision is that the owner who has in interest in the parcel of land within the adjudication areas, should append his/her signature and the same witnessed. The adjudication register is then sent to the Chief Land Registrar for the registrations to be effected **see**

Section 28 of the Land Adjudication Act.

19. The defendants have not proved to this court if prior to the death of their father in 1975 that the deceased did append his signature against the suit land in the adjudication register. They did not produce before this court a copy of the adjudication register. I do not see how a dead person would have been able to append his signature. It is no brainer or rocket science to discern the mischief and collusion done by the staff at the Lands Registry. If indeed the defendants were interested in protecting the interest of their deceased's father's suit land, they would have obtained letters of administration to have the capacity to sign the adjudication register on behalf of their deceased father if at all their deceased father did not sign prior to his demise.

20. Section 26 of the Land Registration Act provides as follows :-

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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original. **(emphasis supplied).**

21. Section 26 of the Land Registration Act guides the courts to take the person named on the Certificate of Title of land to be the owner of the land unless the contrary is proven. I am satisfied that on a balance of probabilities the plaintiffs have established that there was indeed fraud in the allocation of the suit land to Kisera Ole Tuukuo who had died nine years earlier prior to the land being registered in his name; and the subsequent beneficiaries of the illegal action, the defendants, who obtained the title on 11th March 2011. A court cannot aid and sanction an illegality or otherwise an illegal action.

22. I therefore find that the suit land was fraudulently and illegally acquired by the defendants.

23. On the second issue, it is the plaintiffs' contention that they occupy half of the suit land and the defendants do occupy the other half. **Olakira Ole Kerore** testified as "PW1." It was his testimony that it was the plaintiffs' deceased father who lived in the suit property first before he was joined by Kisera Ole Tuukuo the defendants' deceased father. That when the demarcation process was being done, both families opted for a joint allocation as opposed to individual ones.

24. The defendants on the other hand, argue that it is their deceased father who accommodated the plaintiffs' deceased father and his family during the drought and therefore they have no right to the land.

25. It is notable that when the demarcation process commenced prior to the death of Kisera Ole Tuukuo, he did not attempt to evict the plaintiffs and/or their families from the suit land. The defendants did not avail any other witness apart from themselves to contradict the assertions that both families lived on the suit land. I am also cognizant and take judicial notice of the fact that from both families, their deceased persons, have been buried in the suit land over the years and presumably on the portions occupied by each family. Were it the case of one family having dominance over the suit land, the father of the plaintiffs who preceded the father of the defendants, would not have been buried on the suit property owing to the objections of the defendants' deceased father. This court also takes judicial notice that among the Maasi community prior to individual ownership of land and even some to date, they live as a community without distinct parcels of land. I am therefore convinced that the suit land was jointly occupied by the families of both the plaintiff and the defendants but each family was allocated its distinct half share but they opted for joint allocation.

26. In the end, I make the following orders:-

a. That the suit ELC Case No. 22 of 2017 be and is hereby allowed in the following terms:-

i. It is hereby declared that the title to the suit property L.R. No. NAROK/CIS/MARA/NAIRAGIE/ENKARE/85 registered in the names of the defendants be and is hereby cancelled.

ii. It is further declared that the suit property L.R. No. NAROK/CIS/MARA/NAIRAGE/ENKARE/85 is being occupied in divided and equal shares between the plaintiffs and the defendants.

iii. The Land Registrar in Narok do issue separate and individual titles to each of the families of the plaintiffs and the defendants after the suit land has been surveyed to ascertain the exact size of each portion of land with each family getting an equal share.

b. The counterclaim filed by the defendants be and is hereby dismissed.

c. The plaintiff shall have the costs of this suit.

DELIVERED SIGNED AND READ VIRTUALLY AT MIGORI THIS 8th DAY OF NOVEMBER, 2021

MOHAMED KULLOW

JUDGE

Judgement delivered in presence of:-

Ms. Mirichi for the Plaintiff

Mr. Kilele for the Defendant

Tom Maurice - Court Assistant