



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 511 OF 2017

FOREMRLY KISII ELC NO. 1243 OF 2016

JOSEPH NDOYIO KAAPEI.....1ST PLAINTIFF/APPLICANT

SAMSON SENEWA KAAPEI.....2ND PLAINTIFF/APPLICANT

KING'ASUNYE CHEPTIM KAAPEI.....3RD PLAINTIFF/APPLICANT

-VERSUS-

SIMON SWAKEI KAAPEI.....1ST DEFENDANT/RESPONDENT

TIPIKEI NASHURU KAAPEI.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

By a plaint dated 26th May, 2009 the Plaintiff filed the suit herein claiming the following: -

- i. A declaration that the Defendants herein hold $\frac{1}{8}$ th share of parcel No. 87 Olosakwana Adjudication Section, measuring approximately 2200 acres and parcel No. 9 Olosakwana Adjudication Section, measuring approximately 800 acres or thereabouts, respectively, on trust for and on behalf of each and respective plaintiffs.
- ii. An order directing the Defendants to excise each Plaintiff's portion measuring $\frac{1}{8}$ th of the total acreage from the respective suit lands and have the same reflected in the adjudication register as such.
- iii. An order of injunction or status quo be issued restraining the defendants by themselves and/or agents from interfering with the Plaintiffs occupation and/or cultivation or use of the suit parcels or portions presently in their occupation and user in any manner whatsoever, until the interests thereon are defined and registered in the names of the Plaintiffs.
- iv. Costs of this suit be borne by the Defendants.

It is the Plaintiff's case that the 1st and 2nd Plaintiffs are blood and biological sons of the 3rd Plaintiff born out of marriage between the 3rd Plaintiff and Mzee Tolota Ole Kaapei (now deceased) who is also the husband to the 2nd plaintiff herein and that at all material times including 1978 the late Mzee Tolota Ole Kaapei was the owner and proprietor of a parcel of land No. 87/Olosakwana Adjudication Section measuring approximately 2200 acres and Land Parcel No. 9/Olosakwana Adjudication Section measuring approximately 800 acres and was married to the 3rd Plaintiff and the 2nd defendant who have survived him and were blessed with 7 children.

The Plaintiff contends that upon the suit land being declared an adjudication Section and in conformity with the Maasai culture all the members of the family appointed the 1st Defendant who was the eldest son to have the suit land registered in his name for the limited purposes of registering and processing titles in respect of the parcels of land. However, the 1st Defendant caused parcel No. 9 Olosakwana Adjudication Section to be registered in his name but caused the other parcel to be registered in his name and that of 2nd Defendant without the blessings of the other family members.

That Plaintiff further contends that sometime in September 2008 they approached the 1st and 2nd defendants with a view to settle the issue but the Defendants ignored them and thus aver that the defendants herein hold the suit parcels on behalf of other members of the Kaapei

Family who are all in occupation and have been cultivating the land and that they are entitled to $\frac{1}{8}$ th each of the suit land being their entitlement held in trust on their behalf by the Defendants.

The Plaintiff states that a trust had been created to show that they are all brothers, sons and mothers and the suit land is their only ancestral land that the 1st defendant was appointed to ensure the interest of the family are protected and being a member of the Land Adjudication Committee he will perform his fiduciary duties with ease.

The Plaintiff further contend that since 25th May, 2009 the Defendants have threatened them with eviction from the suit land.

The Defendants jointly filed a defence and in their joint defence do admit that the Plaintiffs are their blood relatives and are sons of the 3rd Plaintiff.

The Defendants contend and deny the suit parcels of land belong to their deceased father and state that the suit land was adjudicated and registered in their names and they deny any consensus that they reached with the Plaintiffs in respect of the suit but state that there was consensus on Land Parcel 308 Olosakwana Adjudication Section.

When the suit came up for hearing the plaintiff testified and stated that the 1st and 2nd defendants are his brothers and the 3rd Plaintiff is his mother. He stated that parcel No. 87 is a family land and it belonged to his father and the same is now registered in the name of the 1st and 2nd defendant and he produced a certificate of search.

On cross-examination he stated that they have no claim whatsoever in respect of land Parcel No. 9 and that their claim relates to parcel No. 87. The plaintiff called one Samuel Ngatuny who testified.

I have considered the pleadings and the testimony of the witness in the case and there is no doubt that the parties in the suit are related by blood and I do believe the testimony of the Plaintiff and that of his witness they were steadfast and truthful and the issues for determination before me is whether evidence that has been tendered before me and the plaintiff claim has established a trust and whether the registration of the suit land in the name of the 1st Defendant was fraudulent.

Whether a trust was created, the same is an issue that must be proved. In the instant case the Plaintiff averred that the suit land was registered and held in trust for them by the 1st Defendant.

In the case of **MUMO -VERSUS- MAKAU (2002) EA 170** the court of appeal held that:

“the issue of trust is a question of fact that must be proved by evidence” and hence has the plaintiff in the matter discharged that burden. From the record, it is evident and not disputed that the suit land was the ancestral home of all parties and they have all lived on the suit parcel of land and from this evidence, it is my considered view that there was an implied trust that was created by the parties to have the suit land registered and held in trust for the other members of the family and for the 1st Defendant now to claim that the land is his absolutely is an act of fraud and greed to disinherit the rest of his siblings. His duties as a trustee for his siblings was not extinguished by the fact that he was the registered owner of the suit land.

From the foregoing it is my finding that the suit land is ancestral land and the plaintiffs from their testimonies have proved their case on a balance of probability and that they are entitled to a share and/or portion of the suit and in the circumstances, I issue orders in the following terms: -

1. A declaration do issue that the Plaintiffs are each entitled to an $\frac{1}{8}$ th share of parcel No. 87 Olosakwana Adjudication Section and parcel No. 9 Olosakwana Adjudication Section which is held in trust for them by the Defendants.
2. That an order do issue directing the Defendants to excise, surrender and transfer $\frac{1}{8}$ th for each of the Plaintiffs' of Land Parcel No. 87 and Parcel No. 9 Olosakwana Adjudication Section and cause the same to reflect in the Adjudication register within 30 days of this judgement.
3. Each party shall bear its costs in the suit.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **11th** day of **July, 2019**

Mohammed Noor Kullow

Judge

11/7/19

In the presence of:

Mr Kiptoo holding brief for O.M. Otieno for the Plaintiff

Ms Namunyak holding brief for Ogutu for the Defendant

CA:Kimiriny

Mohammed Noor Kullow

Judge

11/7/19