



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 249 OF 2013**

PETER TOMITO ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPH S. KETERE..... 2<sup>ND</sup> PLAINTIFF  
MICHAEL O. KIRUSUA ..... 3<sup>RD</sup> PLAINTIFF

**VERSUS**

KORINKO N. NKOLIAI .....1<sup>ST</sup> DEFENDANT  
JONATHAN K. KETERE..... 2<sup>ND</sup> DEFENDANT  
BENARD KETERE ..... 3<sup>RD</sup> DEFENDANT  
STEPHENE M. OLULTULET ..... 4<sup>TH</sup> DEFENDANT  
DAVID KIRIONKI .....5<sup>TH</sup> DEFENDANT  
SAMSON LIMPAI ..... 6<sup>TH</sup> DEFENDANT  
OLE NANYOKIE KITIAPI ..... 7<sup>TH</sup> DEFENDANT  
LESHAN KUKUU .....8<sup>TH</sup> DEFENDANT  
SAMSON KALAMAYO..... 9<sup>TH</sup> DEFENDANT  
OLELEBOI KAIKAI ..... 10<sup>TH</sup> DEFENDANT  
OLOMISMIS GROUP RANCH .....11<sup>TH</sup> DEFENDANT  
THE DISTRICT LAND REGISTRAR, TRANSMARA..... 12<sup>TH</sup> DEFENDANT  
THA NATIONAL LAND COMMISSION ..... 13<sup>TH</sup> DEFENDANT

**J U D G M E N T**

**Introduction and Background:**

1. The plaintiffs instituted the present suit against the defendants as a representative suit on their own behalf and on behalf of other members of the Olomismis Group Ranch an incorporated group under the provisions of the Land (Group Representatives) Act, Cap 287 Laws of Kenya. The names of the persons they sought to represent were appended on the schedule attached to the plaint dated 31<sup>st</sup> May 2013 filed in court on 6<sup>th</sup> June 2013. The 1<sup>st</sup> to the 10<sup>th</sup> defendants were the officials and/or group representatives of Olomismis Group Ranch, the 11<sup>th</sup> defendant hereof.

2. The 11<sup>th</sup> defendant, as such Group Ranch was the registered proprietor of land parcel **LR No. Transmara/Olomismis/1** measuring 9640

hectares or thereabouts. Pursuant to a resolution of the members of the Group Ranch and with the approval and sanction of the Director of Land adjudication and Settlement, the Group Ranch members were permitted to dissolve the Group Ranch and to subdivide and allocate the land to its members. It is the process of subdivision and allocation of the land to the members that the plaintiffs claim was irregular and unlawfully carried out to the detriment and prejudice of the members. The plaintiffs contended that the defendants did not exercise their mandate in a transparent, fair and open manner and did not abide with the agreement and/or resolution of the members of the 11<sup>th</sup> defendant.

**The Pleadings by the Parties:**

3. The plaintiffs vide the plaint claimed that contrary to the resolution or agreement of the members, the 1<sup>st</sup> to the 10<sup>th</sup> defendants allocated both agricultural and commercial plots to none members of the group and further the defendant allocated some members parcels of land that were more than 60 acres and others less than 60 acres contrary to the agreed equal acreage of 60 acres per member. The plaintiffs further averred some sons of the members of the Group Ranch were allocated parcels of land larger than 10 acres and others less than 10 acres contrary to the agreement that they would be allocated equal parcels of 10 acres each.

4. The plaintiffs further averred that the 1<sup>st</sup> to 10<sup>th</sup> defendants' inspite of demands failed and/or neglected to give explanations for their irregular actions in regard to the survey, subdivision and the allocation of the 11<sup>th</sup> defendant's land to the members. The plaintiffs stated further attempts and efforts to have the dispute settled amicably was futile rendering the institution of the present suit necessary. The plaintiffs by the plaint sought judgment against the defendants jointly and severally for:-

**a. A permanent injunction restraining the 1<sup>st</sup> to the 13<sup>th</sup> defendants either by themselves, their agents and/or servants from managing, running and or interfering with the affairs of the 11<sup>th</sup> defendant, namely Olomismis Group Ranch, and more specifically from proceeding with any survey, subdivision, allocation and/or alienation of part of any parts of all that land known or formally known as Narok/Transmara/Olomismis/1 and/or any resultant titles**

**b. A permanent injunction restraining and/or the 13<sup>th</sup> defendant from proceeding with any processing and or issuing of any titles resulting from the unfair, illegal and flawed survey, subdivision and allocation of all that land known as Narok/Transmara/ Olomismis/1 and/or any resultant titles.**

**c. A declaration that any survey, subdivision, allocation and/or alienation processing and issuance of titles being carried out or already carried out by the 1<sup>st</sup> to the 11<sup>th</sup> defendants and/or their agents and/or servants is illegal, flawed unfair and/or unlawful and is therefore null and void and that the same ought to be voided and fresh adjudication, survey, subdivision, allocation and issuance of titles ought to be carried out on the 11<sup>th</sup> defendants land in a transparent, fair, legal and open manner.**

**d. A mandatory injunction do issue compelling the 12<sup>th</sup> and/or the 13<sup>th</sup> defendants to reverse the effecting of any subdivision carried out on all that land formally known as Narok/Transmara/ Olomismis/1 and to cancel any resultant titles.**

**e. An order that fresh adjudication, survey, subdivision and allocation be carried out on all that land known or formally known as Narok/Transmara/Olomismis/1, in a transparent, legal, fair and open manner and in any case in accordance with the resolution and/or agreement of the bonafide members and/or bonafide beneficiaries of members of 11<sup>th</sup> defendant.**

**f. An order all that land known as formally known as Narok/Transmara/Olomismis/1 be freshly surveyed and subdivided between registered members of the 11<sup>th</sup> defendant who were numbering 365, as at 18/10/2008, (and if deceased their legal representatives and/or bonafide beneficiaries), and as per the resolution and/or agreement of the members at the General meeting of 18/10/2008.**

**g. In the alternative and without prejudice to the foregoing, an order that the 13<sup>th</sup> defendant do hold an enquiry into the adjudication of 11<sup>th</sup> defendants land and it do monitor any subsequent survey, subdivision, adjudication and allocation and subsequent issuance of titles and do ensure equitable and/or fair subdivision and allocation of all that land known as/or formally known as, Narok/ Transmara/Olomismis/1 to the bonafide members of 11<sup>th</sup> defendant and/or their legal representatives and/or beneficiaries.**

**h. An order that the 1<sup>st</sup> to 10<sup>th</sup> defendants be compelled to personally meet the cost of any fresh adjudication, survey and subdivision.**

**i. An order that a general meeting of 11<sup>th</sup> defendant and elections be conducted and the 1<sup>st</sup> to 11<sup>th</sup> defendants be compelled to release all documentations and information of the 11<sup>th</sup> defendant to the newly elected group representatives.**

**j. Costs to this suit and interest.**

**k. Any other or further reliefs this honourable court deems fit to grant.**

5. The 1<sup>st</sup> - 6<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants entered appearance to the suit through the firm of M/s Oguttu Mboya & Co. Advocates and filed a joint statement of defence dated 2<sup>nd</sup> June 2016 filed in court on 3<sup>rd</sup> June 2016. The office of the Attorney General entered appearance for the 12<sup>th</sup> and 13<sup>th</sup> defendants but did not file a defence though the land registrar, Transmara filed a replying affidavit in response to the plaintiffs Notice of Motion filed contemporaneously with the plaint seeking conservatory orders. The plaintiffs Notice of Motion seeking injunctive

orders against the defendants was heard on its merits and the same was dismissed by the court on 4<sup>th</sup> April 2014 with the court holding that the plaintiffs had not demonstrated they had a prima facie case with probability of success.

6. In the statement of defence filed on behalf of the 1<sup>st</sup> - 6<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants, the defendants averred that the resolution to dissolve the Group Ranch was taken at the Group Ranch's Annual General Meeting held on 20<sup>th</sup> November 1992 and not 18<sup>th</sup> October 2008 as pleaded in the plaint by the plaintiffs. The defendants denied that they acted contrary to the directions given by the Annual General Meeting and asserted that general meetings were routinely convened by the 11<sup>th</sup> defendant to update the members respecting the process of survey and subdivision and allocation of the land to the members. The defendants stated that the subdivision of the Group Ranch land was carried out lawfully and in a transparent manner. The defendants explained that members who sold portions of their land (shares) had their respective parcels subdivided and the purchasers allocated their portions in accordance with the terms of the agreements they had entered into with the members. The defendants position was that no land was allocated to none members as alleged and stated that any none members allocated land were those who had purchased land from members and had valid agreements.

7. The defendants further pleaded under paragraph 13 of the statement of defence that the plaintiffs suit was misconceived, bad in law and legally untenable and inter alia contended that:-

**i. This court lacks jurisdiction by reason of the provisions of the Land (Group Representatives) Act, Cap 287 Laws of Kenya.**

**ii. The suit was premature, misconceived and bad in law.**

**iii. The plaint does not disclose any reasonable cause of action against the defendants.**

**iv. The plaintiffs are non-suited and the suit constitutes an abuse of the due process of the court.**

#### **Evidence of the Parties:**

8. The suit was heard before me on diverse dates. The 1<sup>st</sup> plaintiff, Peter Tomito Koriuko (PW1) testified as the sole witness on behalf of the plaintiffs. The 1<sup>st</sup> defendant, Korinko N. Nkolia (DW1) and Stephen Waithaka Githinji (DW2), the land registrar, Transmara testified on behalf of the defendants.

9. PW1 in his testimony relied on his witness statement made on 31<sup>st</sup> May 2013 filed together with the plaint. He also relied on the bundle of documents filed simultaneously with the plaint as per the list dated 31<sup>st</sup> May 2013. The documents were admitted in evidence as the plaintiffs exhibits ("PEX.1-4"). PW1's evidence was to the effect that he and the other two plaintiffs and the persons whose names were on the schedule attached to the plaint were members of the **Olomismis Group Ranch** which was registered some time in 1975. The purpose for registering the Group Ranch was to safeguard the community land and eventually to settle the members on the land. The Group Ranch was registered as proprietor of land parcel **Transmara/Olomismis/1** measuring 9,640 Hectares or thereabouts. That the members on 23<sup>rd</sup> December 1992 made a resolution to have the Group Ranch dissolved and to have the land registered in the name of the Group Ranch subdivided and members allocated individual title deeds for their respective parcels of land.

10. PW1 affirmed that the 1<sup>st</sup> – 10<sup>th</sup> defendants were appointed the Group Representatives and they were to oversee the process of subdividing and allocating individual land parcels to the members of the Group Ranch. The witness acknowledged that the Group Ranch had a Constitution that regulated its affairs. PW1 further stated that the defendants (1<sup>st</sup> – 10<sup>th</sup>) being the Group Representatives were under an obligation to keep the members informed about all the transactions that were taking place respecting the Group Ranch which according to the witness they failed to do.

11. The witness testified that at the annual general meeting held on 18<sup>th</sup> October 2008 it was resolved and agreed by the members that:-

**i. The group ranch land be subdivided and all the members of the group be allocated equal portions of land measuring approximately sixty (60) acres.**

**ii. That all original members of the group be allocated one commercial plot of 50ft by 100ft.**

**iii. That the sons of the members who were living in the group ranch as at 2008 and of the same age group be allocated 10 acres each.**

**iv. Another group of 10 persons who were living on the group ranch but who were not registered members were also to be allocated 10 acres each.**

12. The witness testified that the officials (defendants) did not abide by the agreement of the members and did not keep the members abreast of the goings on. The witness stated in his evidence that it was in 2013 that they came to discover that survey had been done when the survey records together with the area list were lodged with the land registrar for registration. He stated that according to the records none members had been allocated land while some members had not been allocated land. He further stated that there were members who had been allocated parcels of land which were far less than the agreed 60 acres while there were others who were allocated land that was in excess of 60 acres. The witness maintained that the officials ought to have called an annual general meeting of the group ranch to explain the survey and the subdivision process to the members.

13. The witness pointed to what he said were anomalies in the allocation area list and the Green Cards (abstracts of title) prepared by the

office of the land registrar. He stated that as per the area list his parcel of land is land parcel No. 535 though as per the Green Card, the register shows the land is in the name of the Group Ranch. He stated that many members have not obtained title deeds for their parcels of land.

14. Under cross examination by Mr. Oguttu Mboya advocate for the 1<sup>st</sup> - 6<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants, PW1 admitted that some of the persons shown in the schedule attached to the plaint as having given their authority to the plaintiffs to institute the present suit on their behalf, were infact dead as at the time the suit was filed. He stated that the kin or next of kin of the deceased persons are the ones who actually signed the authority. Further he conceded that some of the persons shown to have granted their authority had denied ever doing so but stated they may have been coerced to deny that they gave authority.

15. The witness in further cross examination stated that their complaint was that the affairs of the group ranch were not being properly managed by the defendants and they were not happy with the manner the group representatives were handling the affairs of the group ranch. He admitted the Constitution of the Group Ranch provided a mechanism for handling any disputes between members but stated that their request to the chairman to call a general meeting to discuss the matters of the Group Ranch was not complied with. The witness stated they did not make any appeal to the Registrar of Group representatives against the officials' non-compliance with their request for a general meeting. PW1 in further cross examination admitted some members sold portions of their land to third party purchasers. PW1 also stated he sold a portion of his land parcel No. 1524 which measures 5.295 acres. He agreed that he also had another land parcel 535 whose acreage was 53.077 acres giving the combined total acreage of the two parcels as 58.370 acres. He affirmed he was allocated the two parcels of land by reason of being a member of the Group Ranch. The witness agreed that he was not only allocated 53.45 acres as he had stated in his witness statement.

16. PW1 further admitted his co-plaintiffs, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, were equally allocated parcels of land commensurate with their entitlement of 60 acres. The 3<sup>rd</sup> plaintiff, Michael Kirusua was allocated parcels 853 and 854 whose aggregate acreage was about 163 acres. The 2<sup>nd</sup> plaintiff was allocated land parcel 523 which the witness stated was less than 60 acres. He further stated he was not aware the 2<sup>nd</sup> plaintiff sold portions of his land to third party buyers. PW1 further stated he was not aware how the 3<sup>rd</sup> plaintiff ended up having land that was in excess of 60 acres. He stated that the Group Ranch consisted of 368 members and each was supposed to get 60 acres and one commercial plot. PW1 however stated in addition to the 368 members there were the sons of the members "Ilkambongi age group" who were to get 10 acres each. He stated these were 78 in number though there was no authenticated list of the persons comprised in the group.

17. PW1 stated that the land registrar Transmara declined to furnish them with the certified copy of the area list and he indicated they got the unsigned and unauthenticated copy of the area list included in the bundle of documents from the surveyor. The witness conceded that there were indeed persons who purchased portions of land from members but stated he did not know their particulars and/or whether they were allocated land.

18. DW1, Korinko N. Nkoliai testified that he was a member and chairman of the 11<sup>th</sup> defendant, Olomismis Group Ranch. He started that at the time of registration, the group had about 226 members but by 1992 the membership had increased to 368 members. He stated that the Group Ranch was registered to safeguard the community interest in the area where they were residing. The Group Ranch was registered as the owner of land parcel **Transmara/Olomismis/1** which the members later agreed to have subdivided and the members allocated and issued with individual title deeds.

19. DW1 explained that they sought and were granted consent by the Registrar of Group Representatives to dissolve the Group Ranch. The witness referred the court to letters dated 23<sup>rd</sup> December 1992 and 19<sup>th</sup> October 1993 by the Director of Land Adjudication and Settlement annexed to the defendants bundle of documents (pages 19 and 20) which set out the conditions and terms of the consent for dissolution of the group and subdivision of the Group Ranch. In the letter dated 19<sup>th</sup> October 1993, addressed to the Chairman, the Director of Land Adjudication and Settlement inter alia stated:-

**"I hereby grant consent to dissolve the incorporated Group Representatives of Olomismis. On receipt of this letter, you will thereafter apply to Narok Land control Board for another consent to enable the subdivision of the ranch among the registered members as you so wish.**

**You will remain in the office to sign all necessary documents, until the subdivision process is over, making sure that each and every registered member is allocated an individual plot with a title deed."**

20. DW1 further stated that the Group Ranch members who were to be allocated land at the time were 368, then, there was Ilkambongi age group who comprised sons of the members who were not originally registered as members. The Ilkambongi group was identified and registered by the committee and were 103 in number as per the list exhibited at pages 36-38 of the defendants bundle of documents. The witness further explained there was another group of persons known as "acceptees" who came later after registration and were accepted and assimilated amongst the members. They were 10 in number. Further the witness stated there were 2 cultural leaders/elders who were accepted as they were residents within the group ranch.

21. The witness stated that the agreement was that all members would be allocated 60 acres and one commercial plot of 50ft by 100ft. The members of the Ilkambongi group were each to be allocated 10 acres and both the acceptees and the cultural elders were to get 10 acres each. The witness further explained there were also those persons who had purchased land from members. The persons who had purchased land from members were required to furnish to the committee, copies of the agreements on the basis whereof they were allocated land which was removed from the members' land entitlements.

22. DW1 testified that the committee engaged the services of a surveyor to carry out the subdivision exercise. He referred to the Survey Agreement with **D. K. Gichuki T/a Gichuki & Associates** dated 15<sup>th</sup> June 2009 annexed in the defendants' bundle of documents at page 16. He stated that the surveyor carried out the subdivision and curved out all the members' plots, roads of access and the public utility plots.

Altogether the surveyor created 1,699 plots and produced the mutation form which was duly registered on 13<sup>th</sup> May 2013. The surveyor prepared and produced the area list indicating the area of each of the plots and the person allocated each of the plots. The area list attached to the defendants supplementary list of documents dated 22<sup>nd</sup> March 2017 as document no. 9 shows all the 1699 plots, the area of each plot and to whom each plot was allocated. The witness stated that the surveyor forwarded the area list to the land registrar who was to register the same and to process the issue of individual title deeds to the allottees.

23. DW1 explained that the number of plots rose to 1,699 because apart from the members, those persons who had purchased plots from members had also to be allocated separate plots and besides there were the Ilkambongi group, the acceptees group and the requirement for each member to be allocated a commercial plot. The witness also explained that some members had to be allocated more than one plot as not all members could get the allocation of 60 acres on the spot where they had settled. The witness stated that the committee faithfully executed its mandate as they ensured that each member of the Group Ranch got their land entitlement. He disagreed with the plaintiffs that there were any members who never got allocated land from the subdivisions. Further, the witness disagreed that there were members who were allocated smaller plots than 60 acres and/or larger plots than 60 acres. The witness explained any variances were as a result of members having sold portions of their land which were hived off from their parcels of land. Further variances were as a result of making provisions for the access roads and public utility plots. DW1 nonetheless contended that any variances in the sizes were within the acceptable limits having regard to the nature of the subdivision.

24. In particular, DW1 disputed the plaintiffs' claims that there were members who were not allocated land. In the case of one Samuel Ole Makau who PW1 claimed had not been allocated land, DW1 stated that he had in fact been allocated land parcel 761 measuring 13.8 acres and that he had sold the rest of the land to purchasers. DW1 further disputed that PW1 had only been allocated 53.3 acres as he had alleged stating that in fact PW1 had been allocated Plot Nos. 535 and 1524 measuring 52.991 acres and 5.287 respectively as shown in the area list. PW1 was also allocated a commercial plot. DW1 stated that the combined land allocation to PW1 was over 58.2 acres which was well within the agreed allocation of 60 acres per member. DW1 further stated that the 2<sup>nd</sup> plaintiff was allocated land parcel 523 measuring 25.106 acres while he sold the balance of his land to various purchasers who were allocated land parcels 519, 521, 522, 524 and 525 as itemized in schedule 10 attached to the defendants bundle of documents at page 62. The aggregate allocation to the 2<sup>nd</sup> plaintiff and the purchasers who purchased from him was 57.13 acres approximately.

25. As concerns the 3<sup>rd</sup> plaintiff, Michael O. Kirusua, DW1 explained that he was allocated land parcels 853 measuring 74.0 acres and 854 measuring 89.0 acres both aggregating 163.0 acres. The witness explained the 3<sup>rd</sup> plaintiff's land parcels exceeded the agreed 60 acres because he had purchased additional portions from the members which were added to his land entitlement of 60 acres. The witness thus explained that any member's land that was less than 60 acres was either because a member had sold and/or the member's land had been split and allocated to several family members at the member's request. Those whose parcels were larger than 60 acres were principally because they had purchased additional portions from other members. Where a member had 2 or more wives he could request that his land be subdivided and registered in the names of his wives and/or sons. The witness gave the example of Kuka Olewapiee whose land was upon request subdivided into 8 parcels being land parcel 648-656 and Joshua Ole Seroi whose land was subdivided into 5 portions being land parcels 544-548.

26. The witness thus asserted the officials did not create any extra plots as alleged and they did not allocate any persons who were not entitled either as members or purchasers. DW1 reiterated that the officials executed their mandate as per the wishes of the members and in accordance with the agreement and resolution of the members. He stated that the members were kept informed of what was happening. He stated all members were allocated land as per the resolution of the members. He stated the officials carried out their mandate in accordance with the Constitution of the Group Ranch and that no member raised any complaint respecting their conduct. If any member was dissatisfied with the conduct of the officials, such member could have requisitioned for a general meeting and/or could have appealed to the Registrar of Group Representatives for intervention. The witness asserted that the plaintiffs suit was misconceived and without any basis and prayed for the dismissal of the same.

27. In cross-examination, DW1 clarified that the issue of allocating buyers land was not resolved at any general meeting of the members but as officials they accepted members who had sold their land to give portions of the sold land to the buyers. The members were producing the sale agreements with the buyers to support the excision of their parcels of land. The witness affirmed that after subdivision the mutation and area list was forwarded to the lands office by the surveyor after the Director of Surveys had approved the same. He further stated that all the members were shown their plots.

28. DW2, Stephen Waithaka Githinji, the Senior Land Registrar, Transmara Sub-county gave evidence and he confirmed that Olomismis Group Ranch was registered as the proprietor of land parcel **Transmara/ Olomismis/1** measuring 9,640 hectares on 26<sup>th</sup> May 1975. He stated that on 13<sup>th</sup> May 2013 he registered a mutation in respect of the land parcel for land parcels No. **10-1699** following which the title for land parcel **Transmara/Olomismis/1** was closed. The witness stated that the mutation was accompanied with the area list which the land office used for the preparation of the Green Cards in respect of each of the land parcels. The land registrar explained that some time in 2013 some members presented a caution for registration against land parcel **Transmara/Olomismis/1** but he was unable to register the same since the title had been closed following the registration of the mutation form creating the subdivisions. He explained that the mutation was validly and regularly registered as it complied with all the necessary requirements. The Land Registrar further explained that land parcels **Transmara/Olomismis/1-9** were registered as public utility plots. The Land Registrar stated he had opened registers for all the land parcels **10-1699** as per the area list. He indicated that he had not received any complaint from any member of the Group Ranch claiming that he had not been allocated any land. He further affirmed that he had issued about 200 titles to members but issuance of the other titles was stayed pending the determination of the suit. The land registrar explained that each parcel owner is required to execute a transfer before a title can be issued in his favour. He clarified the officials of the Group had already executed their part.

#### **Submissions, Issues and Analysis:**

29. The plaintiffs and the defendants filed their final closing submissions following the closure of the trial. Having reviewed the pleadings, the evidence and the submission by the parties, the following issues stand out for determination:-

1. Whether the plaintiffs had proper locus to institute the instant suit as a representative suit?

2. Whether the plaintiffs had exhausted the dispute resolution mechanism under the Group Ranch's Constitution and/or whether the court had the jurisdiction to sustain the plaintiffs suit?

3. Whether the plaintiffs' suit discloses a reasonable cause of action against the defendants.

4. Whether the plaintiffs have proved their case on a balance of probabilities and whether they are entitled to the reliefs sought?

**Representative suit:**

30. The plaintiffs, it is clear and apparent from the plaint that they were instituting the present suit on their own behalf and on behalf of other members of Olomismis Group Ranch, the 11<sup>th</sup> defendant herein. The plaintiffs annexed a schedule listing members who had purportedly authorized them to file the representative suit on their behalf. The plaintiffs vide the Notice of Motion dated 31<sup>st</sup> May 2013 filed simultaneously with the plaint inter alia under prayer (2) sought an order as follows:-

**“That the plaintiffs do have leave of this honourable court to give notice of the institution of this suit to all persons on whose behalf and for whose benefit they have instituted the suit, by public advertisement in one of the local daily newspapers.”**

31. This order was appropriately given by the court. The defendants however contended that a number of persons that the plaintiffs had shown to have given authority for the bringing of the suit were deceased as at the time the suit was brought and could not therefore have executed the authorization list posthumously. PW1 in his evidence before the court stated that the persons who appended their signatures on the list were aware of the filing of the suit. In the evidence before the court PW1 stated as follows:-

**“I cannot however confirm whether all of them were alive at the time of filing the suit. About 10 of them may have been dead. Some of the dead are the ones marked at page 61 of the defendants' bundle of documents. There were others who were dead such as Kituna Oludereti, Ole Lenko Loira, Shunkula Ole Nareyio.... The persons who were dead are shown to have thumb printed against their names. On the face of it the implication is that the person was present.”**

32. The witness faced with this predicament sought to explain that the deceased next of kin are the ones who thumb printed on behalf of their deceased relatives. DW1 was also at pains to explain why some of the people who were included in the schedule as having given their authority denied having done so and even swore affidavits denying they had signed the list to signify they had given their authority for the filing of the suit. DW1 was referred to the affidavits of Kiritori Ole Mokire and lepers Kiputa, who allegedly had given authority as shown in the plaintiffs schedule at Nos. 69 and 8 respectively, and he remarked that they may have been coerced to change their minds to support the suit although he offered no evidence.

33. The schedule furnished by the plaintiffs also shows several persons who signed as next of kin. In law, these persons would have no capacity to represent the estates of the deceased unless they had been duly appointed as administrators of the deceased estates. Section 82 of the Law of Succession Act Cap 160 Laws of Kenya makes it clear that only a legal personal representative has capacity to represent the estate of a deceased person. Section 82(a) provides:-

**82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-**

**a. to enforce, by suit or otherwise, all cause of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;**

The next of kin therefore would have had no capacity to represent their deceased parents and give authority for the institution of the suit without first obtaining grant of representation.

34. From the evidence, it is clear that the list of persons that the plaintiffs presented as having authorized the bringing of the suit on their behalf was not authentic. If it was, there ought not to have been names of people who had died several years before the suit was initiated and further there needed not be persons denying the giving of authority. As observed earlier, the persons shown to have given authority as next of kin lacked any capacity and/or authority to represent the deceased members. The evidence suggests that the plaintiffs may just have extracted a list of members of the Group Ranch, inserted identification numbers and got signatures and thumb prints to be affixed by whomever they could find. On the evidence, I am not satisfied the list as appended in the schedule was authenticated. There was even no evidence to illustrate that the persons who appear in the list were infact members of Olomismis Group Ranch.

35. The common denominator was that, one had to be a member of the Group Ranch. There was no evidence availed to connect the persons on the list to membership of Olomismis Group Ranch. As it is, any person's name could have been put on the list and there was no way of verifying whether or not such a person was a member of the Group Ranch. In the premises, it is therefore my holding and finding that the plaintiffs have not demonstrated that they had the authority to represent the members of Olomismis Group Ranch. They in my view lacked the capacity and authority to sustain the suit as a representative suit on behalf of themselves and on behalf of members of Olomismis Group Ranch. However, as there is evidence that the 3 plaintiffs were members of the Olomismis Group Ranch and they had specific claims attaching to their membership as specifically set out in the witness statements filed with the plaint, they were entitled to prosecute the suit in their own right.

**Jurisdiction of the Court:**

36. The defendants have submitted that the 1<sup>st</sup> – 10<sup>th</sup> defendants were the duly appointed officials of the 11<sup>th</sup> defendant and were as such officials mandated to carry out and execute the affairs of the Group Ranch in the manner provided in the Constitution of the Group Ranch. The defendants contend there was no deviation from this mandate and in case the plaintiffs felt the affairs of the Group Ranch were not being conducted in the appropriate manner, the Constitution of the Group Ranch provided a mechanism through which the issue could be resolved. The relevant part of the 11<sup>th</sup> defendants Constitution annexed to the plaintiffs bundle of documents and at page 5 provides as follows:-

**“If:**

**a. The Registrar of group representatives;**

**b. A majority of the group representatives;**

**c. One fifth of the group members;**

**d. Any person who considers that the affairs of the group are being conducted in a manner oppressive to some part of the members and who has obtained the written consent of the Registrar of Group Representatives; or**

**e. The District Agricultural Committee, so request the chairman (or in his absence the Vice-Chairman, the Secretary, or the Registrar of Group of Representatives) shall convene a general meeting of the group within 21 days after the request.”**

37. The defendants submitted that the plaintiffs did not invoke the procedure for dispute resolution set out in the groups Constitution as aforesaid as they were obligated to do and consequently their resort to court was premature and the court lacked the jurisdiction to deal with the matter. In support of their submission the defendants relied on the case of **The Speaker of the National Assembly -vs- James Njenga Karume [1992] eKLR** where the court held:-

**“...where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”**

38. The plaintiffs in response to the issue of the jurisdiction of this court submitted that the issue had previously been raised by the defendants before Okongo, J. during the hearing of the interlocutory application and the Judge had held the court had jurisdiction and there was no appeal against that holding. I have perused the ruling delivered by Okongo, J. on 4<sup>th</sup> April 2014 and it is clear the issue of jurisdiction of the court raised before him related to the interpretation of Section 10 of the Land (Group Representatives) Act, Cap 287 Laws of Kenya which confers jurisdiction on the Magistrates Court to determine who the lawful officials of a group incorporated under the Act are in the event of a dispute. Section 10 provides thus:-

**10(1) If it appears to the registrar that there has been a dispute among the officers or members of a group so that he is not satisfied as to who are the officers of the group, the registrar may in writing require the officers of the group to produce to him evidence of either-**

**a. The settlement of the dispute and the proper appointment of officers of the group; or**

**b. The institution of proceedings for the settlement of the dispute and for a declaration as to who are the officers of the group.**

**And where he does so the officers shall provide evidence accordingly within the time specified and it shall be signed by at least three of the officers.**

**(2) A District Magistrate’s Court shall have jurisdiction to settle disputes and make declarations for the purpose of proceedings instituted under subsection (1) (b) of this section.**

39. Before Okongo, J. there was no consideration of the application of the dispute resolution mechanism set out under the Constitution of the Group Ranch. The provisions of Schedule II of the Act are deemed to be incorporated in the Constitutions of all Land Groups incorporated under the Act such as the 11<sup>th</sup> defendant. The copy of the Constitution of the 11<sup>th</sup> defendant annexed to the plaintiffs’ bundle of documents reproduces Schedule II of the Act.

40. On the basis of the pleadings and the evidence of PW1 the plaintiff’s allegations and/or complaints was that the 1<sup>st</sup> to 10<sup>th</sup> defendants were not running the affairs of the group properly and they had failed to call for a general meeting to discuss the affairs of the group. In essence the plaintiffs’ complaint was to the effect that the defendants were conducting the affairs of the group in a manner that was oppressive to some of or part of the members. The plaintiffs were therefore under the Constitution of the group obliged to requisition for a general meeting in accordance with the provisions of the Constitution. As the Constitution of the group had made provision as how issues and/or disputes relating to the running of the affairs of the group were to be handled, it is my view that the procedure and process set out under the group’s Constitution had to be exhausted before the jurisdiction the court could be invoked.

41. It is instructive that the process of dissolution, subdivision and allocation of land of the group ranch (11<sup>th</sup> defendant) began way back in 1992 when the members agreed to seek approval and consent of the Registrar of Group Representatives and the Director of Adjudication and Settlement. In 2008 the Group members agreed and resolved on the modalities of subdividing and allocating the land owned by the group

ranch. In 2009, a surveyor was identified to carry out the subdivision and ultimately in 2013 completed the subdivision when the mutation and the survey plans were approved by the Director of Surveys and the area list showing the allottees issued. It is thus evident that the subdivision and allotment process of the group ranch spread over the period 1992 to 2013, a period of about 20 years. The production of survey plans and the allocation list (area list) against which individual titles were to be issued was a lengthy process and not an event.

42. The defendants, 1<sup>st</sup> – 10<sup>th</sup> defendants are the ones who oversaw the process over the period of 20 years and during the period any member of the group who felt the defendants were not conducting the affairs of the group in accordance with the group Constitution could have sought intervention as provided by the Constitution. It is my view therefore, that the group representatives having executed their mandate in accordance with their Constitution, this court lacks the jurisdiction to interfere. In the case of **Patel & Others -vs- Dhanji & Others [1975] EA 301** the court stated:-

**“The courts will entertain suits by members of societies or clubs for improper expulsion or violation of the principles of natural justice, based on members rights in properties but that the courts should be slow to interfere in the running of club affairs, the remedy being in the hands of the members.”**

43. In the present case, the 1<sup>st</sup> – 10<sup>th</sup> defendants were entrusted with the mandate to oversee the dissolution of the group ranch and subdivision and allocation of the group land to the members of the group who were to get individual land titles for the land allocated to them. That is the process that the defendants oversaw and supervised up till members were issued with individual title deeds. The plaintiffs had the opportunity to hold the defendants to account before the process was completed in case the defendants executed the process in a manner that was contrary to the group’s Constitution. They did not do so and in my view the court lacks the jurisdiction to make an inquiry as to how the defendants exercised the mandate that they had the authority to exercise unless it is perhaps demonstrated that the defendants acted with utter impunity and in blazen abuse of their mandate, which the plaintiffs have not done.

#### **Disclosure of Cause of Action:**

44. The defendants have argued that the plaintiffs’ suit is misconceived and discloses no reasonable cause of action. The plaintiffs’ case is anchored on allegations that the 1<sup>st</sup> – 10<sup>th</sup> defendants in subdividing and allocating land of the group acted in contravention of the agreement and resolution of the members made at a general meeting held on 18<sup>th</sup> October 2008. That meeting resolved that every member of the group was to get an equal portion of land; members were to pay survey fees; members were to be kept informed of all transactions carried out by the officials during general meeting; and any member who had any problem to present the same to the chairman. Although the acreage to each member was not agreed at this meeting, there is evidence as per the agreement with the surveyor dated 15<sup>th</sup> June 2009 that each member was to get 60 acres and one commercial plot of 50ft by 100ft.

45. The plaintiffs’ principal allegation is that the subdivision resulted in some people getting larger and/or smaller portions than 60 acres and they attributed this to the officials allocating land to none members. The defendants through the chairman clarified that in addition to the members there were the sons of the members “**Ilkambongi Group**” who it was agreed would get 10 acres each and another group of acceptees who were also to get 10 acres each. The chairman further explained that purchasers who had purchased land from members were allocated land equivalent to the size they had purchased and the members portion reduced proportionately. The chairman further explained there were those members who requested their parcels of land to be subdivided amongst the family members and gave examples of such members. The chairman added that those who got portions larger than 60 acres like the 3<sup>rd</sup> plaintiff had purchased additional land from members and those who got portions less than 60 acres had either sold portions of their land and/or had subdivided their land to family members. The chairman further explained that the number of plots increased because it was impractical to allocate members the 60 acres in one piece leading members to be allocated 2 or more parcels of land. He cited the case of the 1<sup>st</sup> plaintiff as an example as he was allocated land parcel **535** measuring 52.991acres and **1524** measuring 5.287acres.

46. The defendants submitted the decisions and actions taken by the officials were within their mandate as the group representatives and were made known to the members. The defendants further submitted the plaintiffs were aware purchasers were being allocated land and members were allowed to subdivide their parcels of land on request. The defendants stated the 2<sup>nd</sup> plaintiff had sold portions of his land to several purchasers who were allocated parcels of land out of his land.

47. The group representatives have power under Section 8(2) of the Act to make decisions which are for the benefit of all members provided there is consultation with the members. It provides thus:-

**8(2) The group representatives are under a duty to hold any property which they hold as such, and to exercise their powers as such, on behalf and for the collective benefit of all the members of the group and fully and effectively to consult the other members of the group on such exercise.**

48. On the evidence adduced by the parties, I find the allegations by the plaintiffs largely unproved and unsupported. The plaintiffs have for instance not shown evidence of any person who was allocated land and was neither a member or a purchaser and/or a family member allocated land pursuant to subdivision of family land. The plaintiffs claim that there were members who were allocated less land than 60acres agreed was equally unsupported and/or proved. No evidence was tendered to prove this fact and where a member was allocated land that was less than 60 acres there was credible explanation. The explanation by the Chairman of the group representatives that less land to members resulted from land sales and subdivisions by members was well supported. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were shown to have gotten their land entitlements. The 1<sup>st</sup> plaintiff was allocated 2 parcels of land with an aggregate acreage of slightly more than 58.2acres and was also allocated a commercial plot. The 1<sup>st</sup> plaintiff’s allegation that he was only allocated 53.0acres was disapproved. The 2<sup>nd</sup> plaintiff was shown to have sold portions of his land to at least 5 persons who were given portions of land from his land entitlement. The aggregate acreage of the land portions was 57.173acres and the reduction of the acreage was explained by the fact that some of the land was taken up by the access roads resulting from the subdivision. The 3<sup>rd</sup> plaintiff was one of those who got larger parcels because he bought additional land from members. Clearly the claims attaching to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were satisfactorily answered and explained.

49. No specific person came before the court to testify that he was a member of the group ranch and was allocated no land. The assertion of the defendants that every member was allocated land was not rebutted. The area list furnished respecting the subdivision included each and every member. Given the enormity of the exercise of subdivision and allocation of land and the time it took, the exercise was bound to be gruesome and it was expected that mistakes and/or errors could occur but these would be isolated and only at individual level and could be handled on a case by case basis whenever they are identified. On the evidence placed before the court, there are no errors and/or mistakes apparent in the magnitude alleged by the plaintiffs. The plaintiffs have not proved any of the allegations they made to justify the rescission of the decisions and actions executed by the defendants. Upon the whole evaluation of the evidence and material placed before the court, I am persuaded the defendants in exercising their powers as the group representatives acted in the best interest of the members. Indeed, it is my view that the group representatives infact ought to be lauded for ensuring the Group Ranch was actually subdivided and each and every member got their rightful share. The landscape is replete with many land buying companies where endless wrangles have prevented shareholders from getting title to their land or where genuine shareholders have totally lost out to none shareholders. In Olomismis Group Ranch there has been no evidence of a genuine member who was left out of the allocation.

50. In the present suit, I am not satisfied the plaintiffs have demonstrated a reasonable cause of action. The plaintiffs merely threw out allegations in respect of which they offered no evidence in support. The allegations were too generalized. The defendants, I am satisfied aptly answered the allegations.

51. The plaintiffs in their submissions have faulted the subdivision of the Group Ranch into 1699 parcels/plots arguing that the consent that was given in 1993 was for only 380 subdivisions. Those were the members then. However, the modalities of subdivision and who was to be allocated was not agreed until the surveyor was identified in 2009. The plaintiffs in their pleadings admit there were to be at least 2 subdivisions for each member being firstly, one for 60 acres and secondly, one for a commercial plot. There was also to be subdivisions for the Ilkambongi Group and the acceptees group. The essence of the consent issued in 1993 was to facilitate the subdivision of the Group Ranch to settle the members. As the subdivision was not done in 1993 the scope altered materially such that in 2009 the beneficiaries of the subdivision had equally changed substantially. The consent was fundamentally to enable the subdivision of the group ranch for the settlement of the members and it was the group representatives who were mandated to determine the number of subdivisions which was dependent on the allottees. The land board consent was consequently deemed amended to reflect the subdivisions that were eventually reflected in the mutation form registered by the Land Registrar on 13<sup>th</sup> May 2013. The Group Representatives were the persons empowered to certify and approve the subdivisions and the consent having been given for the subdivision of the group ranch to settle its members, there would have been no basis to seek fresh consent.

52. The Land Registrar accepted and processed the mutation form on the basis of the survey maps approved by the Director of Surveys. The Land Registrar certified the area list lodged together with the mutation form and closed the Register of **LR No. Transmara/Olomismis/1** and proceeded to open new registers for each of the 1699 subdivisions. He has issued over 200 titles against the Area list that he registered.

**Conclusion:**

53. All in all, it is my conclusion that the plaintiffs have failed to prove their case on a balance of probabilities. I hold that the subdivisions carried out in respect of **LR No. Trans Mara/Olomismis/1** creating 1699 subtitles was validly and procedurally carried out and that the Area list furnished to the Land Registrar together with the mutation form registered on 13<sup>th</sup> May 2013 should be utilized to process the individual title deeds for the persons whose names appear in the area list. The Registry Index Map(s) (RIM) furnished together with the mutation form should be the ones to be used to identify and locate the parcels of land.

54. The plaintiffs are not entitled to any of the reliefs sought in the plaint. Their suit is hereby ordered dismissed.

55. Costs are at the discretion of the court and considering the circumstances giving rise to the present suit, it is my determination that each party bears their own costs of the suit.

56. Orders accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 5<sup>TH</sup> DAY of OCTOBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Change for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs

Mr. Ollando for the 1<sup>st</sup> to 6<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants

N/A for the 12<sup>th</sup> and 13<sup>th</sup> defendants

Ruth Court assistant

**J. M. MUTUNGI**

**JUDGE**