



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 937 OF 2017

(Formerly Machakos ELC Case No. 108 of 2014)

ALFRED KARASHA.....1ST PLAINTIFF

MARY KARASHA (Wife of WILLIAM M KARASHA – deceased)

who is the eldest son of SIMEON J. OLE KARASHA.....2ND PLAINTIFF

VERSUS

SIMEON JOSEPH OLE KARASHA.....1ST DEFENDANT

LAND REGISTRAR, KAJIADO NORTH SUB COUNTY.....2ND DEFENDANT

DISTRICT LAND SURVEYOR KAJIADO.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGEMENT

By a Plaint dated the 6th October, 2014, the 1st and 2nd Plaintiffs pray for judgement against the Defendants for:

- a. A permanent order of injunction to restrain the 1st, 2nd and 3rd Defendants against themselves, their agents, servants and personal assigns from registering the draft Mutation Form, developing, sub dividing, transferring, wasting, alienating and interfering with all that parcel of land known as Land Reference Numbers NGONG/ NGONG/ 506 without the consent of dependants of estate of the late Mrs. Serah Karasha.
- b. A Declaration that the 1st Defendant is merely holding the property belonging to Mrs. Serah Karasha in trust for the dependants of the deceased.
- c. A permanent order of injunction to restrain the 2nd and 3rd Defendants against themselves, their agents, servants and personal assigns from causing any registration of the Mutation Form or subdivision of all that parcel of land known as Land Reference Numbers NGONG/ NGONG/ 506 and hence issuance of new certificate of title deeds without the consent of the dependants of the deceased.
- d. Interests of a) to c) and the Costs for this suit.
- e. Any other or further relief this Honourable Court deems fit.

The 1st Defendant filed a Defence and Counterclaim dated the 7th April, 2020 where he admitted being owner of land reference numbers Ngong/ Ngong/ 506 which has since been subdivided. He denied that the Plaintiffs are his dependants and confirmed having been married to Serah Njoki Karasha under Kikuyu & Maasai Customary Law wherein they were blessed with eight (8) children. He insisted the grounds relied upon by the 1st Plaintiff to place a caution on the suit land were frivolous and vexatious. Further, that the 2nd Defendant acted legally in removing the caution. In the counterclaim, he prayed that the Plaintiffs' suit be dismissed with costs and Judgment entered in his favour against the Plaintiffs for:

- a. A declaration that the 1st Defendant is the absolute and indefeasible owner of Title Number Ngong/ Ngong/ 92641; Ngong /

Ngong/ 92642; Ngong/ Ngong/ 92643; Ngong/ Ngong/ 92644; Ngong/ Ngong/ 92645; Ngong/ Ngong/ 92645; Ngong/ Ngong/ 92646; Ngong/ Ngong/ 92647; Ngong/ Ngong/ 92648; Ngong/ Ngong/ 92649 & Ngong/ Ngong/ 92650 (arising for Sub division of Title Number Ngong/ Ngong/ 64000 ('suit properties').

- b. A declaration that the 1st Plaintiff whether by himself or his servants or agents or otherwise howsoever are wrongfully in occupation of the suit properties and are accordingly, trespassers on the same.
- c. A declaration that the 1st Plaintiff whether by himself or his servants or agents or otherwise howsoever is not entitled to remain on the suit properties.
- d. A permanent mandatory injunction to evict the 1st Plaintiff, his servants, officers, employees and/ or agents from the suit properties.
- e. A permanent mandatory injunction restraining the 1st Plaintiff whether by himself or his servants or agents or otherwise howsoever from trespassing onto the suit properties.
- f. An order that the OCS Ngong Police Station does assist forthwith in the execution of these Orders.
- g. An Order that vacant possession of the suit properties be granted in favour of the 1st Defendant.
- h. An order that the 1st Plaintiff bears the costs of removing any offending structures on the suit properties.
- i. General damages for trespass and/ or Mesne Profits payable to the 1st Defendant for loss of use of the suit properties.
- j. Costs of this suit and the Counterclaim together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

The 2nd, 3rd and 4th Defendants filed a Defence where they denied the averments in the Plaint. They explained that a notice of intention for removal of caution dated 1st July, 2014 was dispatched to the Plaintiff. Further, the notice gave its recipient a period of 30 days within which to file an objection for removal of caveat and the Plaintiffs failed to object as well as pay for the objection hearing fees within the prescribed statutory period. The 2nd, 3rd and 4th Defendants insisted that the removal of the caveat was done in a regular and procedural manner under the current statutory framework and the same was proper.

The Plaintiffs filed a reply to Defence and Defence to Counterclaim where they reiterated their claim and averred that subdivision of Ngong/ Ngong/ 506 into 18 parcels and further subdivision of Ngong/ Ngong/ 64000 into 10 parcels was irregular having been conducted contrary to a Court Order given on 8th October, 2014. Further, that their rights to the land are still recognized and protected by law. They denied that a demand for them to vacate has ever been made by the 1st Defendant.

The 2nd Plaintiff withdrew from the suit. The matter proceeded for hearing wherein the 1st Plaintiff and 1st Defendant each called one witness. The 2nd to 4th Defendants did not participate in the hearing.

Evidence of the 1st Plaintiff

The 1st Plaintiff as PW1 testified that land parcel number Ngong/ Ngong/ 506 hereinafter referred to as the 'suit land' in which his mother and himself resided on, was being disposed of. He confirmed that his mother died in October, 2013 and was buried on the suit land. He explained that after the mother's demise, the father subdivided the said land and sold it. It was his testimony that he moved to the suit land in the year 2000 and had built a permanent house between 1998 and 2000. Further, that he has permanent stone walled house, cowshed, poultry house and some rental units on the suit land. He contended that he occupied about four (4) acres of the said land. He averred that he moved to the suit land to be close to his mother who was ailing and no one objected to the same. He stated that his father has other wives who have their homesteads elsewhere. He sought to safeguard his interests and that of his siblings over the suit land. He reiterated that his father had other children whom he had allocated land elsewhere. In cross examination he confirmed being the biological son to the 1st Defendant and acknowledged him as owner of suit land which measured 43 acres. Further, that title to the suit land was issued in 1966 in the father's name though the mother contributed financially to its development. He clarified that his mother built a residential house, fenced the land, undertook farming thereon by rearing dairy cows including keeping poultry on suit land. It was his testimony that his mother died in October, 2013 and they are only three siblings who are alive. Further, his siblings gave him oral consent to file this suit. He further confirmed that they had applied for letters of administration intestate in respect to his mother's estate jointly with his father. He reaffirmed that he built a permanent house on the suit land with the 1st Defendant's consent and has occupied the premises to date. He further insisted the Caution was removed unprocedurally. In re examination he stated that his mother and brother were buried on suit land while injunctive orders were registered against it.

Evidence of the 1st Defendant

The 1st Defendant as DW1 testified that he is 90 years old. He confirmed being the registered owner of the suit land which was he was allocated by the elders. Further, that he has since subdivided it. It was his testimony that Serah Karasha (deceased) was his first wife while the 1st Plaintiff is one of his sons. Further, that he has four wives who are alive. He testified that his late wife was a farmer who kept dairy cattle and poultry for sale. He elaborated that she used to sell milk, cultivate suit land by growing vegetables thereon. He insisted the late

Serah never contributed to the acquisition of the suit land. Further, all the other four wives have their land and there was no other wife residing on Ngong/ Ngong/ 506. He contended that the Plaintiff entered and resided on Ngong/ Ngong/ 506 by force as he had allocated him land elsewhere in Ngong which he sold. Further, he entered Ngong/ Ngong/ 506 when he was in hospital and still resides thereon. He insisted he wanted him to move out of Ngong/ Ngong/ 506. He reiterated that they had never applied for Letters of Administration Intestate in respect to the estate of Serah Karasha.

In cross examination, he confirmed he had other wives who have their parcels of land but Ngong/ Ngong/ 506 belongs to him and his late wife Serah. He clarified that each of his children was entitled to get a share of land from their respective mothers'. He confirmed that land belongs to a wife and the children. Further, each child should get a portion of their mother's land. He testified that he subdivided Ngong/ Ngong/ 506 but is yet to be disposed of it. He insisted that the Plaintiff sold the land he gave him. He further explained that there is a family cemetery on Ngong/ Ngong/ 506 where three of Serah's children are buried. He reiterated that Ngong/ Ngong/ 506 was his land and he had subdivided it into eighteen (18) portions but he could not recall subdividing Ngong/ Ngong/ 64000.

In re examination he reiterated that each wife had their own land but the same was registered in his sole name. Further, his four wives were still alive. He contended that none of Serah's children had opposed the subdivision except the Plaintiff. Further, he subdivided Ngong/ Ngong/ 506 and gave each of his seven children ¼ acre of land but did not give the Plaintiff any of the resultant subdivisions.

Submissions

The Plaintiff in his submissions contends that the estate of Mrs Serah Njoki Karasha (deceased) holds an overriding and unregistered interest over land parcel number Ngong/ Ngong/ 506. He made reference to certain provisions in the Matrimonial Property Act, Sections 2, 24, 25, 26 and 93 (2), of the Land Registration Act to support his arguments. He further submitted that the 1st Defendant was holding a 50% share of land parcel number Ngong/ Ngong/ 506 in trust for the estate of Serah Njoki Karasha. To support this point, he relied on section 35 of the law of Succession Act as well as the case of **Tau Katungi V Margrethe Katungi & Another (2014) eKLR**. He reiterated that he has a beneficial interest over land parcel number Ngong/ Ngong/ 506 by virtue of being a dependant of the late Mrs. Serah Njoki Karasha. Further, that subdivisions conducted by the 1st Defendant on land parcel number Ngong/ Ngong/ 506 were unlawful and the interested party is not a bona fide purchaser for value without notice as there were existing court orders but 1st Defendant still proceeded to deal with the said land. He further relied on the case of **Mugo Muiru Investments Ltd Vs EWB & 2 others (2017) eKLR** to support his averments.

The 1st Defendant in his submissions stated that the Plaintiff lacks locus standi to institute this suit as he seeks prayers on behalf of the estate of Serah Njoki Karasha (deceased), yet he has not taken out Limited Grant Ad Litem nor sued in a representative capacity. Further, there was no consent granted by the siblings for him to institute this suit. He insisted there is no vested right of inheritance during the lifetime of one's parents. To support his arguments, he relied on the following cases; **Loice Mucheyi Masoso (suing as the administrator/ legal representative of the estate of the late Joseph Masoso – deceased) V Maurice N Karanja & another (2019) eKLR**; **Nahashon Karengi & Another V Lawrence Karengi (2014) eKLR**; **Muriuki Marigi Vs Richard Marigi Muriuki & 2 others (2008) 1KLR 1073**; **Michael Githinji Kimotho Vs Nicholas Muratha Mug Civil Appeal No. 53 of 1995**; **Edward Kipkosgei Chemurbii & Another V Charles K Kosgei & Another (2014) eKLR**; **Jacinta Wanjiku Kamau V Isaac Kamau Mungai & Another (2006) eKLR** and **MMG vJG & Another (2018) eKLR**.

Analysis and Determination

Upon consideration of the Plaintiff's Defence including Counterclaim, Witness Testimonies, and rival submissions, the following are the issues for determination:

- Whether the 1st Defendant was holding land parcel number Ngong/ Ngong/ 506 including the resultant subdivisions therefrom, in trust for the family of the late Serah Karasha and her children.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff's Counterclaim.
- Whether the 1st Defendant is entitled to the Orders sought in the Counterclaim.

As to whether the 1st Defendant was holding land parcel number Ngong/ Ngong/ 506 including the resultant subdivisions therefrom, in trust for the family of the late Serah Karasha and her children. It is not in dispute that the 1st Defendant is registered as the proprietor of land parcel number Ngong/ Ngong/ 506 including the resultant subdivisions therefrom. It is further not in dispute that the 1st Defendant was married to the 1st Plaintiff's mother Serah Karasha now deceased. The 1st Plaintiff as PW1 in his testimony stated that the 1st Defendant was holding the suit land in trust for his late mother and her children. It emerged that the 1st Plaintiff's late mother Serah Karasha including some of his siblings were buried on the suit land. The 1st Defendant as DW1 insisted he owned the suit land which was bequeathed to him by elders and could dispose of it as he willed. He contended that he has since subdivided the same and allocated each of the resultant subdivisions to some of his children except the 1st Plaintiff. PW1 in his testimony explained that he had built his home on the suit land which he has occupied since the year 2000 when his mother was alive. Further, he occupied a portion of four (4) acres wherein he had a permanent stone walled house, cowshed, poultry house and some rental units thereon. He averred that he moved to the suit land to be close to his mother who was ailing and no one objected to the same. The 1st Defendant as DW1 admitted that he was allocated the suit land in 1966 when he was already married to the Plaintiff's mother. He explained that the Plaintiff's mother was a farmer who kept dairy cattle and poultry for sale. Further that she used to sell milk, cultivate land by growing vegetables. He confirmed that all the other four wives had their respective parcels of land elsewhere but all were registered in his name and none resided on Ngong/ Ngong/ 506. He insisted he wanted the 1st Plaintiff who entered the land without his consent as he was in hospital to move out. During cross examination, DW1 clarified that Ngong/ Ngong/ 506 belongs to him and his late wife Serah. He confirmed that land belongs to a wife including her children and each child should get a portion of their mother's land. He testified that he subdivided Ngong/ Ngong/ 506 and but was yet to dispose of it. He insisted that the 1st Plaintiff sold the land he gave him but did not have any documents in court, could not recall the parcel number and did not know how long the Plaintiff had resided on the said land. He explained that there is a family cemetery on Ngong/ Ngong/ 506 where three of Serah's children are buried.

From the evidence before me, I note the 1st Defendant never objected to the 1st Plaintiff including his siblings residing on the suit land which he was bequeathed by the elders when he was together with the Plaintiff's mother. From DW1's evidence, his intentions were clear that he resided on the suit land together with his late wife Serah and her children. Even though the 1st Defendant now claims he does not want the 1st Plaintiff on the suit land, he never objected to his constructing nor putting developments thereon and is only raising the issue right now.

I note both parties presented their respective authorities which I deem relevant however I will proceed to rely on these two decisions.

In the Supreme court case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, the Supreme Court held that;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group”. (emphasis mine).

While in the case of **Gladys Njeri Muhura V Lispas Wagaturi Muthigiro (2019) eKLR**, the Court held that: ‘ Customary trust is a concept through which land may be acquired in Kenya. It is anchored in both the Constitution and statute. It is an overriding interest in land which need not be registered. Article 60 (1) (a) of the Constitution terms it intergenerational and intragenerational equity. 14. The statutory underpinnings of customary trust are found both in the repealed Act, CAP 300 and the new Registration of Land Act. The provisions of Section 27 & 28 of Registered Land Act, Cap 300 state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24, 25 26 & 28 of the Land Registration Act, 2012.’

While Section 28 (b) of Land Registration Act provides as follows;

i. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

ii. (a).....

iii. (b) trusts including customary trusts;’

See also Section 27 & 28 of Registered Land Act, Cap 300 (now repealed).

From the pleadings and evidence before court while relying on the legal provisions cited above and associating myself with the two decisions, I find that the suit land was given to the 1st Defendant and his wife Serah by the elders and registered in his name. Further, the 1st Plaintiff and his siblings were the children of the 1st Defendant and Serah. The 1st Defendant who is a polygamous man admitted that each of his wives and their respective children reside in different parcels of land which are all registered in his name. He further admitted that his children are entitled to get their share from their mother's land. Which begs me to pose this question that if indeed all his children are entitled to get their land from their mothers' then what is different as relates to the family of his first wife Serah. In applying the standards set in the Supreme Court case to the circumstances at hand, I opine that the 1st Plaintiff indeed meets the criteria set therein as he is a son to the 1st Defendant who never purchased the suit land. Further, the land in question was family land where some of the family members are buried but registered in the 1st Defendant's name. Further, the 1st Plaintiff has been utilizing four (4) acres of the said land without any interference from the 1st Defendant who is his father and 1st Plaintiff's claim is directed to the father who is the 1st Defendant herein. It is against the foregoing that I find that there was an implied element of customary trust as the 1st Defendant was merely holding Ngong/ Ngong/ 506 including the resultant subdivisions therefrom, in trust for the family of the late Serah Karasha and her children. It is trite that there was no need to have the same registered in the Green Card.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. The Plaintiff sought for orders which are enumerated above, I note the 1st Defendant admitted he had proceeded to subdivide the suit land during the pendency of this suit contrary to the Court Order granted on 9th October, 2014. In so far as the Plaintiff never furnished court with a written authority from his siblings, I opine that this does not negate the customary trust that was already created on the suit land.. The 2nd and 3rd Defendants failed to testify to confirm the averments in their Defence. In the circumstance, I find that the Defendants were hence indeed in contempt of court as they proceeded to continue dealing with the suit land despite existence of a court order restraining them from doing so. I note the Mutations were already registered and the 1st Defendant is still the registered proprietor of the suit lands which he confirmed he is yet to dispose of. Since the 1st Plaintiff admitted that he has only been utilizing four acres of land, I hold that he is indeed entitled to the same and will direct the 1st Defendant to transfer to him the said four acres.

As to whether the 1st Defendant is entitled to the Orders sought in the Counterclaim. The 1st Defendant sought for various orders which are enumerated above. Based on my findings above that an element of customary trust had been created by the Plaintiff who is the son to the 1st Defendant. Insofar as the 1st Defendant is the absolute owner of the land parcel number Ngong/ Ngong/ 506 with its resultant subdivisions

which are highlighted above, I am unable to make a declaration that the 1st Plaintiff whether by himself or his servants or agents or otherwise howsoever are wrongfully in occupation of the suit properties and are accordingly, trespassers and not entitled to remain thereon. I will further decline to make an order of permanent mandatory injunction to restrain the 1st Plaintiff from the four acres he occupies nor evict him therefrom. I further decline to make an order of vacant possession and for the OCS Ngong Police Station to assist forthwith in the execution of these Orders. I also decline to direct the 1st Plaintiff to remove his structures from the portion of the suit land he occupies. I further find that the 1st Defendant has not proved general damages for trespass or mesne profits as against the Plaintiff. In the circumstance, I will proceed to dismiss the Counterclaim.

It is against the foregoing and I find the Plaintiff has proved his case on a balance of probabilities and will proceed to make the following final orders:

- a. A declaration be and is hereby issued that SIMEON JOSEPH OLE KARASHA held the land parcel NGONG/ NGONG/ 506 and its resultant subdivisions therefrom in trust for the late SERAH KARASHA and her family.
- b. That the 1st Plaintiff being the son of SIMEON JOSEPH OLE KARASHA and late SERAH KARASHA be and is hereby declared to be entitled to four acres which he occupies in land parcel number NGONG/ NGONG/ 506 and its resultant subdivisions.
- c. The 1st Defendant be and is hereby directed to transfer four acres of land within land parcel number NGONG/ NGONG/ 506 and its resultant subdivisions to the 1st Plaintiff within ninety (90) days from the date hereof, failure of which the Deputy Registrar, Kajiado Environment and Land Court will be at liberty to execute the transfer forms.
- d. Since the Plaintiff and 1st Defendant are family members, I direct each party to bear their own costs.

Dated Signed and Delivered Virtually at Kajiado this 7th Day of June, 2021

CHRISTINE OCHIENG

JUDGE