



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC. CASE NO. 915 OF 2017**

**ELIZABETH KISIPAN LETURA.....PLAINTIFF**

**VERSUS**

**CHRISPUS KISPAN.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KAJIADO DISTRICT.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 9<sup>th</sup> November, 2017, the Plaintiff prays for judgement against the Defendants for:

- i. A declaration that the Defendants' actions amount to fraud.
- ii. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the parcel of land known as LR. No. Kajiado/ Lorngusua/1585.
- iii. An order directing the 2<sup>nd</sup> Defendant to cancel and declare null and void title deed for LR No. Kajiado/Lorngusua/1585 and to cancel the entries in the green card and thereafter to register it in the name of the Plaintiff.
- iv. An order of Permanent injunction restraining the 1<sup>st</sup> Defendant either by himself, his employees, servants and/or agents from occupying, trespassing, purporting to sell, subdividing, erecting structures and/or in any other manner interfering with the Plaintiff's quiet enjoyment and possession of land parcel known as LR No. Kajiado/ Lorngusua/1585.
- v. Costs of the suit and interest.
- vi. Any other relief this Honourable Court may deem fit and just to grant.

The 1<sup>st</sup> Defendant who was duly served on 23<sup>rd</sup> November, 2017 as evident in the affidavit of service sworn by Bernard Munyasia Mwanzia, entered an appearance by filing a Notice of Appointment dated the 7<sup>th</sup> February, 2018. The 2<sup>nd</sup> Defendant was also duly served on 2<sup>nd</sup> February, 2018 while the Hon. Attorney General was served on 26<sup>th</sup> January, 2018 and the Hon. Attorney General filed a Memorandum of Appearance on 12<sup>th</sup> March, 2018. Both Defendants failed to file their respective Defences within the requisite time culminating in an interlocutory judgement entered against them on 17<sup>th</sup> October, 2018.

The matter proceeded for hearing and the Plaintiff called one witness.

**Evidence of the Plaintiff**

The Plaintiff as PW1 adopted her witness statement dated the 9<sup>th</sup> November, 2017 and testified that she was the 4<sup>th</sup> wife of the late David Kisipan Letura having been married in 1970s. She confirmed that the late David Kisipan Letura was the owner of the land parcel number Kajiado/ Lorngusua/27 which was later subdivided into various portions of land including LR. No. Kajiado/Lorngusua/1585, hereinafter referred to as the 'suit land'. She explained that the deceased other wives were Phyllis Naimute Kisipan, Priscilla Saimo Kisipan and Mary Seth Kisipan. Further, that from 2005 the deceased was taken ill and remained of unsound mind until 30<sup>th</sup> November, 2011 when he died. She contends that she was the legal proprietor of the suit land having been allocated the same by her husband and she enjoyed peaceful undisturbed occupation thereon until 2010 when the 1<sup>st</sup> Defendant including his brothers threatened to evict her therefrom. Further, she was surprised by the 1<sup>st</sup> Defendant's claim and avers that her late husband never transferred the suit land to anybody as he was not in a position to sign any transfer forms as he was terminally ill. She reported the matter to the Chief of Il Bissil Location who dismissed the 1<sup>st</sup> Defendant's claim. She claimed the 1<sup>st</sup> wife Phyllis Naimutie Kisipan only bore one child Daniel Kisil Kisipan with the deceased and the 1<sup>st</sup> Defendant is

not a biological child of the deceased as his mother deserted the matrimonial home in the 1970s. It was her testimony that the Transfer documents were a forgery. She further explained that during the family meetings convened on 29<sup>th</sup> November, 2006 and 8<sup>th</sup> December, 2006, which she did not attend, the family members agreed to subdivide Kajiado/Lorngusua/27 into 16 parcels of land out of which 14 were allocated to the deceased children, one set aside for a town area while the remaining one parcel was to be co owned by the deceased and his four wives. Further, the said minutes did not recognize the 1<sup>st</sup> Defendant including his two brothers Lekula Letura and Melita Letura as biological children of the deceased. It was her further testimony that in 2010 she realized the 1<sup>st</sup> Defendant wanted to transfer the suit land to himself compelling her to lodge a complaint with the Kajiado Central Land Disputes Tribunal being Kajiado Land Dispute Tribunal Case No. 6 of 2011 which dismissed her claim on 17<sup>th</sup> March, 2011 and directed that the suit land be subdivided between Chrispus Letura, Lekula Letura and Melita Letura who were not the deceased biological children. Further, she appealed to the Rift Valley Provincial Land Dispute Appeals Committee being Land Dispute Appeal No. 22 of 2011 and on 15<sup>th</sup> June, 2011, they granted a verdict in her favour and directed that Kajiado/Lorngusua/27 be subdivided among the deceased four wives. However, the said decision was quashed vide Machakos Civil Application No. 181 of 2011 on 24<sup>th</sup> March, 2017. She reiterates that the suit land is now registered in the name of Chrispus Kispan and the actions of the Defendants are meant to dispossess her of the said suit land wherein she has resided for over 40 years and constructed a permanent house thereon.

The Plaintiff produced the following documents as her exhibits: Mutation Form for Kajiado/ Lorngusua/27; Death Certificate for David Letura Kisipan; Minutes of the Family Meeting held on 29<sup>th</sup> November, 2006; Minutes of the Family held on 29<sup>th</sup> November, 2006; Minutes of the family meeting held on 8<sup>th</sup> December, 2006; Complaint letter dated 18<sup>th</sup> November, 2010 to the Kajiado Central Land Dispute Tribunal; Kajiado Central Land Disputes Tribunal Ruling delivered on 17<sup>th</sup> March, 2011; Rift Valley Provincial Disputes Appeals Committee Ruling delivered on 15<sup>th</sup> June, 2011; Judicial Review Misc. Civil Application No. 181 of 2011 Application dated 15<sup>th</sup> July, 2011; Replying Affidavit sworn on 19<sup>th</sup> September, 2011 by Elizabeth Letura; The Environment and Land Court's Judgement delivered on 24<sup>th</sup> March, 2017; Certificate of Official Search for Kajiado/Lorngusua/1585 dated 18<sup>th</sup> September, 2017 and Image of the Plaintiff's home.

### **Analysis and Determination**

Upon consideration of the Plaintiff's Testimony of the Witness including exhibits and submissions, the following are the issues for determination:

- Whether the 1<sup>st</sup> Defendant legally acquired the suit land.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff's Petition.
- Who should bear the costs of the suit.

I will deal with these issues jointly.

The Plaintiff in her submissions reiterated her claim and avers that the 1<sup>st</sup> Defendant colluded with the 2<sup>nd</sup> Defendant to take away the suit land from her. Further, the 1<sup>st</sup> Defendant irregularly acquired the title as the suit land which was initially allocated to her by the deceased. To buttress her averments, she relied on the following decisions: **Felix Mathenge V Kenya Power & Lighting Co. Ltd (2008) eKLR; Joseph Segirinya Vs Attorney General Kampala High Court Civil Suit No. 708 of 1992 (1195) 1V KALR and M A Koinange V Joyce Ganchuku & 2 Others (2015) eKLR.**

The Plaintiff contends that she was the 4<sup>th</sup> wife of the late David Kisipan Letura having been married in 1970s. Further, that the deceased was the owner of land parcel number Kajiado/ Lorngusua/27 which was later subdivided into various portions of land including the suit land. It was her testimony that from 2005 the deceased was taken ill and remained of unsound mind until 30<sup>th</sup> November, 2011 when he died. Further, the deceased had allocated her the suit land wherein she built a permanent house. She claims in 2010 the 1<sup>st</sup> Defendant and his brothers sought to evict her from the suit land claiming her late husband had transferred it to him but she insists he was not in a position to sign any transfer forms as he was terminally ill. She further explained that during the family meetings convened on 29<sup>th</sup> November, 2006 and 8<sup>th</sup> December, 2006 respectively, the family members agreed to subdivide Kajiado/ Lorngusua/27 into 16 parcels of land out of which 14 were allocated to the deceased children, one set aside for a town area while the remaining one parcel was to be co owned by the deceased and his four wives. Further, the said minutes did not recognize the 1<sup>st</sup> Defendant including his two brothers Lekula Letura and Melita Letura as biological children of the deceased. She claimed the 1<sup>st</sup> wife Phyllis Naimutie Kisipan only bore one child Daniel Kisil Kisipan with the deceased and the 1<sup>st</sup> Defendant is not a biological child of the deceased as his mother deserted the matrimonial home in the 1970s. She avers that the Transfer documents were a forgery. She reiterates that the suit land is now registered in the name of Chrispus Kispan and the actions of the Defendants are meant to dispossess her of the said suit land wherein she has resided for over 40 years and constructed a permanent house thereon. I have had a chance to peruse the documents produced as exhibits and noting that this suit is uncontroverted, I have no reason to doubt the evidence of the Plaintiff. I note in the minutes of the aforementioned family meetings, there is no indication that the suit land was allocated to the 1<sup>st</sup> Defendant nor was there any land allocated to him. I note the Plaintiff has resided on the suit land for over 40 years, constructed a permanent house thereon which photograph she produced as an exhibit. I opine that the existence of the Plaintiff on the suit land ought to have been a key consideration before any person should have been registered as the owner of the said land. I note at the point the 1<sup>st</sup> Defendant got registered as owner of the suit land the Registered Land Act was still in place and I will proceed to highlight various relevant legal provisions therein.

Section 27(a) of the Registered Land Act (now repealed) provides that: **"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto"**

While Section 28 of the said Act provides that: **"The rights of a proprietor, whether acquired on first registration or whether acquired**

subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register; Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Further, Section 30 stipulates thus: “Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”

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;’

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 Laspas 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. 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.’

Further, in the case of **Muny Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that:- **“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”**

From the pleadings and evidence before court while relying on the legal provisions cited above and associating myself with the quoted decisions, I find that there is an element of implied customary trust in this instance since the Plaintiff’s husband was the owner of the land where the suit land emanated from. Further, the Plaintiff’s husband allocated her the suit land but the 1<sup>st</sup> Defendant only got registered as its proprietor when the Plaintiff who was his stepmother was already residing thereon. The 1<sup>st</sup> Defendant did not controvert the Plaintiff’s averments that the suit land had been allocated to her by her deceased husband. I note from the documents presented, it indeed confirms the Plaintiff was the wife to the deceased and she was entitled to a share of the deceased land. It is not clear at what point the 1<sup>st</sup> Defendant proceeded to register himself as the owner of the suit land without considering the plight of the Plaintiff who was already residing thereon and I find the same was not only irregular but fraudulent. I opine that by the time the 1<sup>st</sup> Defendant got registered as its owner, there is no indication that he obtained consent from the deceased who was ill and not of sound mind to sign any transfer documents. Further, it is evident that the Plaintiff was not involved in the said registration. I must say this is unfortunate, as this was contrary to the deceased’s intentions as the land in question was family land. It is against the foregoing that I hold, there was an element of implied customary trust as the 1<sup>st</sup> Defendant was merely holding the suit land in trust for the Plaintiff who had been residing thereon for over 40 years. It is my considered view that the registration of the 1<sup>st</sup> Defendant as owner of the suit land was in bad faith as it is the deceased wife who was entitled to the same and had protested in several fora when attempts were made to dispossess her.

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 1<sup>st</sup> Defendant never controverted any of the Plaintiff’s averments nor challenged the fact that in the family meetings, he was never recognized as a beneficiary over the suit land. Based on my findings above, I find that she is entitled to the orders sought in the Plaintiff.

On the issue of costs, since this is a family issue, I direct that each party bears its own costs.

It is against the foregoing that I find the Plaintiff has proved her case on a balance of probability and will proceed to enter judgement in her favour and make the following final orders:

- a) A declaration be and is hereby issued that the Defendants' actions of registering the 1<sup>st</sup> Defendant as owner of LR No. Kajiado/Lorngusua/1585 amounts to fraud.
- b) A declaration be and is hereby issued that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the parcel of land known as LR. No. Kajiado/Lorngusua/1585.
- c) An order of Permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant either by himself, his employees, servants and/ or agents from occupying, trespassing, purporting to sell, subdividing, erecting structures and/or in any other manner interfering with the Plaintiff's quiet enjoyment and possession of land parcel known as LR No. Kajiado/Lorngusua/1585.
- d) The 1<sup>st</sup> Defendant be and is hereby directed to transfer LR No. Kajiado/Lorngusua/ 1585 to the 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.
- e) The 2<sup>nd</sup> Defendant be and is hereby directed to cancel and declare null and void title deed for LR No. Kajiado/Lorngusua/1585 in the name of the 1<sup>st</sup> Defendant and to cancel any further entries in the green card and thereafter to register the said land in the name of the Plaintiff.
- f) Since the Plaintiff and 1<sup>st</sup> Defendant are family members, I direct each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12<sup>TH</sup> DAY OF OCTOBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**