



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 443 OF 2017**

SUNTE NENKALASH LESIRE.....1<sup>st</sup> PLAINTIFF

MIROIK NENKALASH LESIRE.....2<sup>nd</sup> PLAINTIFF

SERENOI NENKALASH LESIRE.....3<sup>RD</sup> PLAINTIFF

LERIONKA SUNTE NENKALASH.....4<sup>TH</sup> PLAINTIFF

**VERSUS**

**MBOI LEMARON.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Sunte Nenkash Lesire, Miroik Nenkash Lesire, Serenoi Nenkash Lesire and Lerionka Sunte Nenkash referred to in this judgment as the first, second, third and fourth plaintiffs seek the following orders against the defendant Mboi Lemaron and anybody claiming through him.

- (a) Eviction and demolition of structures on L.R Kajiado/Kaputei South/838 referred to as the suit land.
- (b) A permanent injunction restraining trespass, alienation, disposal or any interference with the suit land.
- (c) Costs.

**Plaintiffs' Case**

2. The plaintiffs' case is as follows. On 10<sup>th</sup> April 2014 they were jointly registered as the proprietors of the suit land which measures 145.70 hectares. They were duly issued with a title deed.

3. The defendant together with his mother were allowed to occupy the suit land as they waited to be allocated their own land. The defendant's mother was allocated her own land and voluntarily vacated the suit land.

4. The defendant has refused to vacate the land rendering the filing of this suit necessary.

5. An award in favour of the defendant was made by the Kajiado Land Disputes Tribunal but it was later quashed in HCC Miscellaneous Application No. 46 of 2012.

6. In support of their case, the plaintiffs filed the following documents

- (a) Title deed for the suit land
- (b) A copy of an undated letter by the Chairman, Secretary and Treasurer of the Kajiado District Land Disputes Tribunal

(c) Copy of part of the proceedings before Land Disputes Tribunal dated 18/8/2011

(d) Copy of judgment in Civil Miscellaneous Application No. 46/2012

(e) A demand letter dated 22<sup>nd</sup> October 2014 issued by the plaintiffs' advocate seeking the defendant to give vacant possession of the suit land within 30 days.

### **Defendant's Case**

7. The defendant's case is as follows. He is the son of the late Nenkash Serina Lesire who is the original owner of the suit land. His father had four wives namely Mpeon Nenkash, Nyamalo Nenkash, Merdick Nenkash and Sinkiyian Nenkash. His mother is Mpeon Nenkash.

The defendant's father who is also the father to the first, third and fourth plaintiffs and husband to the second plaintiff was a member of Imbuko Group Ranch.

8. The late Nenkash Lesire was actually member number 62 of the said Group Ranch and serial number 118 and he was awarded 145.7 Hectares.

9. The second plaintiff who was assisting her aged, illiterate and sickly husband got registered as the proprietor of the suit land without the knowledge of her husband.

10. When the late Nenkash discovered the irregular registration of the second plaintiff as the proprietor of the suit land, he complained to the Land Registrar who caused a restriction to be entered against the land on 7<sup>th</sup> February 1996.

11. In the meanwhile, the defendant and his mother were occupying the suit land. When the defendant's mother died, she was buried on the land at the location where the defendant resides. The defendant's father was in the meantime in the process of solving the dispute traditionally. By bad luck, he died before the title could be registered in his name. This was on 28<sup>th</sup> September 1998. He was aged 92.

12. When the second plaintiff refused to have the land revert to the estate of her husband Justus Nenkash filed a case before the Kajiado Land Disputes Tribunal. The said tribunal heard the dispute and decided that the suit land be shared equally between the four wives of the deceased.

13. The award of the Tribunal was adopted as the judgement of the court in **Kajiado Resident Magistrate's Court Land Case No. 3 of 2012.**

14. The decree of the Kajiado Magistrate's Court has never been set aside because **Machakos High Court Miscellaneous Application No. 46 of 2012** was dismissed. The High Court case had sought to quash the award and decree of the lower court.

15. The second plaintiff caused the restrictions on the suit land to be lifted secretly and had her children the co-plaintiffs registered as joint owners.

16. In support of his case, the defendant filed the following documents:

(a) Copy of certificate of death for the late Nenkash Serina Lesire

(b) Copy of list of membership and shares in Imbuko Group Ranch

(c) Copy of records showing the restriction of 7<sup>th</sup> February 1996.

(d) Copy of award, decree and proceedings in Kajiado Land Case No. 3 of 2012.

(e) Copy of Ruling in Machakos High Court Miscellaneous Application No. 46 of 2012

(f) Copy of register of the suit land showing removal of restriction of 10<sup>th</sup> October 2013

(g) Copy of register showing registration of title to the first, third and fourth defendants.

(h) Copy of register showing reinstatement of restriction of 2<sup>nd</sup> February 2015

(i) Copy of letter of 16<sup>th</sup> February 2015 from the Directorate of Criminal Investigations.

### **Trial**

17. At the trial, the third plaintiff testified on behalf of himself and other plaintiffs while the defendant testified for the defence.

## **Issues for Determination**

18. In their written submissions filed on 19<sup>th</sup> April and 2<sup>nd</sup> June 2021 respectively, counsel for the plaintiffs and the defendants raised the following issues:

(a) Is the defendant the son of Lemaron Nenkash member number 66 who was given 171 hectares at Imbuko Group Ranch?

(b) What is the effect of the decree in Kajiado Land Case No. 3 of 2012 in this case?

(c) Is the title deed issued to the plaintiffs void for having been issued contrary to the decree in Kajiado Resident Magistrate's Land Case No. 3 of 2012?

## **19. Determination**

I have carefully considered all the evidence adduced in this case by both sides bearing in mind the burden on the plaintiffs to prove their claim against the defendant on a balance of probabilities.

I also find that the three issues raised above by the counsel for the parties will determine the dispute. I make the following findings:

20. On the first issue, I find that the plaintiffs have failed to prove that the plaintiff is not the son of the original land owner.

In their witness statements filed as evidence in court and dated 29/1/2015, none of the plaintiffs has said that the defendant is not the son of the deceased owner of the suit land. They have also not filed any evidence to that effect.

The issue of the defendant's paternity has been raised abruptly in the plaintiffs' submissions. It did not feature anywhere in the pleadings or the evidence filed. It should have been raised at the earliest possible opportunity in order to give the defendant ample opportunity to respond to it.

The plaintiffs are precluded from raising the issue of the defendant's paternity at a stage whereby he can say nothing in rebuttal thereof.

21. On the second issue of the effect of the decree in Kajiado Magistrate's Court Case Number 3 of 2012, I find that it stands. After the Environment and Land Court Act (Act No. 19 of 2011) commenced on 30<sup>th</sup> August 2011, the Hon. The Chief Justice issued practice directions on proceedings relating to the Environment and the use and occupation of, and title to land on 9<sup>th</sup> February 2012 vide gazette notice number 1617 of 17<sup>th</sup> February, 2012.

Direction number 3 provided as follows:

***“All proceedings which were pending before the Provincial Land Appeals Committees as at the date of enactment of the Environment and Land Court Act, 2011, shall be moved to the nearest High Court for hearing and determination.”***

22. Going by the above practice directions, it was not open to the plaintiffs to file a fresh suit in the High Court or the Environment and Land Court. The only option open to them was to appeal. The Judicial Review at the High Court having failed, the plaintiffs could have appealed but they chose not to.

23. On the third and final issue, I find that the title deed issued to the plaintiffs for the suit land is void for having been issued to the decree in Kajiado Resident Magistrate's Land Case No. 3 of 2012.

24. For the above stated reasons, I dismiss the plaintiffs suit with costs and order that the award of the tribunal and the decree in Kajiado Resident Magistrate's Land Case No. 3 of 2012 be implemented in full.

**Dated, signed and delivered virtually at Kajiado on this this 7<sup>th</sup> day of October, 2021.**

**M. N. GICHERU**

**JUDGE**