



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF JUDICATURE OF KENYA AT KAJIADO**

**SUCCESSION CAUSE NO. 58 OF 2016**

**FORMERLY SUCCESSION CAUSE NO. 2395 OF 2003 AT NAIROBI**

**IN THE MATTER OF: THE ESTATE OF SIAMETO OLE MUNGUTI (DECEASED)**

**BETWEEN**

**RESIATO MUNGUTI.....1<sup>ST</sup> ADMINISTRATOR**

**NOONGIPA MUNGUTI.....2<sup>ND</sup> ADMINISTRATOR**

**AND**

**SIMON OLE MUNGUTI.....3<sup>RD</sup> ADMINISTRATOR**

**ATHMAN SALIM MOHAMMED & 49 OTHERS...INTERESTED PARTIES**

**JUDGMENT**

**Historical background**

The genesis of this matter began in the year 1980 when the deceased third wife, **Nepruko Munguti** commenced succession proceedings in respect to the estate of **Siameto Munguti** (hereinafter referred to as the deceased) who was the registered proprietor of **LR Ngong /Ngong/27**. On 9<sup>th</sup> December, 1980, the High Court at Nairobi issued to the third wife grant of letters of administration intestate in respect to the estate of the deceased known as **LR Ngong /Ngong/27**. After issuance of the aforesaid grant the deceased third wife, **Nepruko Munguti** assumed ownership and transferred the suit property to her name. Thereafter she subdivided the suit land to **Ngong /Ngong/20319, 20320, 20321, 20322, 20323** and transferred the properties to interested parties for valuable considerations. Subsequently, the letters of administration granted to **Nepruko Munguti**, deceased third wife on 9<sup>th</sup> December, 1980 was revoked. On 21<sup>st</sup> December 2001, **Hon. Justice Kalpana Rawal** granted orders that:

- 1). That the grant of letters of administration issued to Nepruko Munguti Siameto (whose name was unceremoniously changed to Tekla Nyambururu Munguti) be and is hereby revoked.**
- 2). That a fresh petition be filed with the three widows under the provisions of the Law of Succession Act.**
- 3). That the administrators to pay the cost of the proceedings.**

In respect to the aforementioned orders; on 21<sup>st</sup> July, 2004, fresh grant of letters of administration intestate were issued to the estate of the deceased **to Resiato Munguti, Noongipa Munguti and Nepruko Munguti**. Consequently, the grant was confirmed on 26<sup>th</sup> September 2005. The 1<sup>st</sup> and 2<sup>nd</sup> administrators moved the court vide their applications dated 28<sup>th</sup>/11/2005 where they sought the following orders;

- 1. That the land registrar, Kajiado do cancel the transmission of NGONG/NGONG/27 to Nepruko Munguti Siameto and all the mentioned as well affected resulting subdivisions of Ngong/Ngong/27 deponed in the replying affidavit of the land registrar Panuel Nyamweya sworn on 1<sup>st</sup> November 2010 and filed on 2<sup>nd</sup> November 2010 and be reverted back to parcel number Ngong/Ngong/27 and into the names of Siameto Ole Munguti.**
- 2. That the OCS Ngong Hills police station do provide security during and supervise the subdivision of Ngong/Ngong/27 and settlement thereon by the beneficiaries as per the certificate of confirmation of grant issued by this court.**

3. That upon reversal of title into the original title number Ngong/Ngong/27 in the name of deceased, the resulted reverted title to be distributed in accordance with the distribution shown on the confirmed grant.

4. That thereafter the parties to proceed according to law.

5. That there will general liberty to apply for enforcement orders if need be.

In his ruling delivered on 31<sup>st</sup> July 2015, Justice W. Musyoka, on paragraph 54 stated as follows:

*“I am persuaded that there was no fairness in distributing the estate before there was full disclosure of the entire estates. I am moved to review the orders of confirmation of grant founded on the said orders. This should pave way for a full disclosure of the estate, especially of the Narok property and a fresh distribution thereof. The setting aside of the order of 26<sup>th</sup> September 2005 would have the effect of stopping the distribution of Ngong/Ngong/27 in the terms of order 5 of the ruling delivered by Justice Nambuye J. on February 2017.”*

Consequently the following orders were issued:

- a) That the orders made on 26<sup>th</sup> September 2005 confirming the grant made to Resiato Munguti and Noongipa Munguti are hereby set aside;
- b) That the certificate of confirmation of grant dated the 26<sup>th</sup> September 2005 as amended on diverse dates, is hereby cancelled;
- c) That the 1<sup>st</sup> and 2<sup>nd</sup> administrator shall render an account in respect of the property situated at Narok that the deceased died possessed of in the terms mentioned at paragraph 48 of this rulings;
- d) That the account in (c) above shall be in affidavit form, and shall be filed in court within 45 days of the date of this ruling.
- e) That the administrators are to maintain status quo on Ngong/Ngong/27 pending fresh distribution of the estate;
- f) That the application dated 7<sup>th</sup> June 2014 is allowed to the extent of joining the applicants to this case as interested parties;
- g) That the matter shall be mentioned after 45 days for compliance; and
- h) That this being a family matter there shall be no order as to costs.

On 3<sup>rd</sup> November 2015 Hon. Justice W. Musyoka gave the following directions;

(a). That Noongipa Munguti and Resiato Munguti shall file a further affidavit to disclose the matter referred to in paragraph 4 above that is on:-

- I. Where the two lived with the deceased at Narok prior to his relocation to Ngong;
- II. Whose land was it that they resided on then;
- III. What happened to that land after the deceased left for Ngong and/or after he died;
- IV. Where they live now;
- V. Whose land is it that they are residing on currently?

(b). That Simon Munguti to swear an affidavit disclosing all that he knows about the estate of the deceased situated at Narok; and

(c). That the affidavits are to be filed within 14 days of the date of this order.

#### **1<sup>st</sup> and 2<sup>nd</sup> Administrator's case**

**Resiato Munguti** is the 1<sup>st</sup> administrator herein and the first wife of the deceased, she deponed an affidavit sworn on 16<sup>th</sup> November, 2017 and gave evidence where she affirms that she is the first wife of the deceased, married in 1956. At around 1957-58 they relocated to Ngong and lived in the homestead of an old man called Wakaba. Around that time, the deceased was allocated the land at Ngong/Ngong 27. In 1958, the deceased married the second administrator with whom they relocated to Ngong/Ngong 27. Thereafter, the deceased married **Nepruko** they lived in **Senteu Ole Kerore** in veterinary farm at Ngong and sired a child called **Sialo (deceased)**. She currently resides at Masiro on Ololoturot Group Ranch which is communal land and not private land; it never belonged to the deceased.

On cross examination by **Mr. Omwebu** for the third administrator, she testified that she was married to the deceased during the Maumau period. Their home was at Ngong, in Bulbul. The land was subdivided and the deceased went on to marry the second administrator, Noongipa Munguti. She was transferred to Mosero, Kajiado. The deceased ancestry hailed from the Purko Clan. The deceased was born where she currently lives and he was a businessman.

She went on to testify, that in her custom men do not say how they acquired property. Nonetheless, she stated that she had no idea how the deceased acquired land at Kibiko, his sister was living there. The land was subdivided and they were all given the land.

With regard to the land in Mosero, she testified that it is not yet divided to allocate rights, it is a group ranch. She uses the group ranch number. The aforesaid land is allotted and resides with her three sons. She does not know where the deceased was buried.

On cross examination by Mr. Awele for the interested parties, she testified that the deceased was born and lived in Mosero. She knew the deceased brother and sister. She used to take care of her mother in law who lived in Mosero and nowhere else. The land is still communal land and is undivided. Her children were born at Kibiko and the rest at Mosero. She got the first born in the other land. She stayed in Bulbul later to Kibiko-Ngong. Her children were only two when they came to Ngong. In regard to the 2<sup>nd</sup> administrator she states that she came to the homestead already married and came back after the deceased death.

She moved to and from Mosero to take care of the deceased family. She could not have her family and the third administrator's mother could not question the deceased why she was brought to the land. The house she lived in was temporary by virtue of being pastoralists.

On re-examination she testified that the house she resides in is a temporary structure which is require whenever she goes. The house she used to live was taken by Simon, the third administrator herein.

### **Submissions**

**Mr. Wati**, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> administrators', advanced his arguments vide his written submissions dated 24<sup>th</sup> January 2019 and filed on the same day. Counsel called to relevance the 1<sup>st</sup> and 2<sup>nd</sup> administrators' affidavits sworn on 16<sup>th</sup> November 2017 and their oral testimonies which established the origins of deceased at Mosiro in Narok; where he married the 1<sup>st</sup> administrator, **Resiatio Munguti** and when the 2<sup>nd</sup> administrators was married she came directly to Ngong. Deceased relocated to Ngong/Ngong/27 where he established a home for the 1<sup>st</sup> and 2<sup>nd</sup> administrators.

He submitted that the third administrator's mother was married in Ngong. The land at Mosiro as deponed is communal land up to date. In present times, 1<sup>st</sup> administrator is still at Mosiro whereas the 2<sup>nd</sup> administrator is at Nairognkare in Subukia area, where she relocated after death of the deceased. 1<sup>st</sup> administrators is in the same communal land, whereas the 2<sup>nd</sup> administrator house is on lease basis by her in laws.

Neither the 3<sup>rd</sup> administrator nor any other witness has produced title to the said places and more so, any registration of the properties as belonging to the deceased.

Counsel refutes the 3<sup>rd</sup> administrators assertions that the parcel of land no. 54, 56, 57 and 114 in ongoing Sintankara adjudication section belonging to Simiren Mungutu, Samuel Kuseyo Munguti and Michael Munguti are properties inherited from the deceased. It is the 1<sup>st</sup> and 2<sup>nd</sup> administrators' submissions that there are no titles produced evidencing ownership.

Counsel attacked chief's testimony wherein he testified that Santankara and Olotrot were adjudication sections are group ranches in which the deceased was a member whose share was then inherited by the sons which is a legal impossibility when Patrick M. Munyula testified that adjudication means the land is communal and nor a ranch.

A Group ranch is land that is surveyed, registered and with coordinates, it can only be subdivided among members and not adjudicated. Two adjudication areas were gazette in meaning they were previously communal and not private to the deceased as at 1974. The chief's were not born at the time of the deceased demise but chose to testify on stories they were given in regard to the deceased and his property.

Counsel's assertion that the land was communal and not a group ranch was further buttressed by the 2<sup>nd</sup> administrator's sons (Josphat and Samwel) affidavits sworn on 16<sup>th</sup> November, 2017 and respective testimonies who further testified that they are not aware the deceased possessed land in Narok. The land was communal land held in trust by the county council.

He continued to submit that the 3<sup>rd</sup> administrator incompetently placed the deceased in the ongoing adjudicated plots. The plot came into existence in 2009 and was not owned by the deceased hence could not be bequeathed.

In conclusion, the court has the mandate to identify properties possessed by the deceased in 1974 but left out of the revoked distribution.

**Noongipa Munguti** is the 2<sup>nd</sup> administrator herein, on examination in chief, she testified that she is one of the administrators of the deceased estate and second wife to the deceased; the deceased had properties in Kibiku. With regard to the deceased property, she testified that she has lived in Ngong throughout and not aware of any other parcel of land. The 1<sup>st</sup> administrator stayed at Mosero. She built the shop and at the time the third administrator's mother was not married. She has never lived in Narok as alleged by the 3<sup>rd</sup> administrator, Simon. She adopted her three affidavits as evidence in support of her case.

During the subsistence of her marriage to the deceased they were blessed with 7 (seven) children. Upon his demise, she sired 5 other

children, making a total of 12 children. The deceased had no other land except in Ngong. When the deceased died she had gone to visit her mother owing to the fact she was her only daughter. She currently lives in rented premises at Eno Supukia-Narok.

On cross examination by Mr. Omwebu for the third administrator, she testified that her name is Noongipa Munguti. She was named Anna during baptism in the Catholic Church. She cannot recall when she was born and produced her identity card. She is not aware of the suit properties. She had 7 children with the deceased namely; **Siameto, Lucy, Saruni, Kennedy, Lemerian, Munguti, Benson**. The deceased hailed from Mosero, sub clan of the Parko. She referred to her joint affidavit with the 1<sup>st</sup> administrator.

With regard to the deceased property at Ngong, she testified that the deceased was allocated land by the clan elders at Ngong. She left the deceased at Ngong with her young children at the time. She learnt of the deceased death much later after his demise. He was buried in Ngong. She came back to perform Maasai rituals. It was after the deceased burial that his property was distributed. She sold the cows at Ngong.

Reference was made to paragraph 8 of the affidavit sworn on 16<sup>th</sup> November, 2015. She lives with her in laws in Kimidi Narok. Her 7 children accompanied her to Mosero and they are at Narok. The property in Ngong should be distributed. There has been an objection proceeding since. She does not live in Narok.

On cross examination by **Mr. Awele** for the interested parties she testified that, she does not recall whether she thumb printed the affidavit, the date of her marriage or how many years she lived with the deceased. During Uhuru, she lived at Ngong where she begot a son and a daughter. She sired 5 other children after the deceased death. She was with the deceased at Kibiko Ngong and built a house. She lived with the deceased at Wakaba and later moved to Kibiku, they were three of them in that place. She does not know the cause of death of the deceased. She came to perform the maasai rituals. She resides in Kimindi East.

She stayed for a short time at Kibiku Ngong and left her children at Kimindi Narok who were staying with others. The land belonged to her in laws. There is no other area except the two. Her sons have land at Sintankara area. They do not have titles. They are three of them the children who own land are **Siameto, Saruni, Lemerian** and **Benson**. She is not aware whether **Michael, Samuel** have lived at Sintankara, but they were allocated land as individuals.

The 1<sup>st</sup> and 2<sup>nd</sup> administrators' witnesses were **Josphat Saruni Munguti** and **Samwel Kuseyo Munguti**.

**Josephat Saruni Munguti** is a resident of Santankara Narok. On examination in chief he adopted his affidavit sworn on 16<sup>th</sup> November 2017 as evidence. The affidavit is in regard to the dispute over the estate. Reference was made to paragraph no 13 of the affidavit that he was allocated land after lodging a claim with Narok committee. He appeared before the committee four times, they are at Nakenya and Sankara. The land was referred as Enosupukia. Mzee Ntimama allowed squatters to apply. He was landless before being allocated two and a half acres of land. The land was never occupied by his father. He used to live in Kirindo area.

On cross examination by Mr. Omwebu for the third administrator; he testified that he is 42 years old and was born in the year 1976. The deceased had died by the time he was born, exactly two years after his demise. The deceased died in 1974, his father is still the deceased. The land in Santakara was allocated to him by his brother Samwel.

His mother is the 2<sup>nd</sup> administrator, Noongipa Munguti and she stays where he was married from. They are 11 children; 5 daughters and 6 sons. They lived in a forest in Enosupukia for 12 years before they parted ways during the clashes. He is the third child counting from the last born and currently 42 years old. He was allocated land at Sintankara together with his brother Samwel. His mother asked to be accorded an acre of land. She moved with some of his sisters and brothers. The land is that of his in laws, she stays with his other siblings.

In 1993 they were chased from the area and migrated to EnoSianya. He rented a house from Mzee Ole Kunyi. He has never gone to school as he was over 18 years old.

In 2012, he was allocated land by Santankara Land Committee. He heard about the allocation from Mzee Ntimama. He heard about it and went to inquire whether he can benefit. People were to claim land at Santakara committee. The six brothers filed a claim with the land committee. They were deposited money for survey and for use during adjudication. He paid Kshs.12,000/= to the land committee. He was not issued with a receipt. Those who were present benefited from the allocation. Reference is made to paragraph 7 of the affidavit.

He continued to testify that he lived in rented house up to 2012. He went to Enkare and found himself at Kimindi area. The area was forested; the land is within county council Nairobi. He went to his land and thereafter adjudication process took place in 2012.

On cross examination by Mr. Awele for the interested parties, he testified that he was born in 1976 at Narok. The deceased died in 1974 and he was his father as told by his mother. He grew up and lived at Sintankara. His identity card indicates his year of birth at 1977. He lived at Enosubukia forest. He left Kimindi in 1993. He did not say so in his affidavit. His mother stayed with the in laws. He stayed at Enosubukia for 12 years and he has not gone to Kimindi. His mother went to stay with the in laws. He recorded a statement with his lawyer. He identifies his signature. He did not state when he left Kimindi, he stayed there for 12 years. There is confusion on the dates. When he was chased in 2005, he had to carry forward a small load of my luggage. He left EnoSinya in 2012 and moved to Enosubukia.

Samuel stayed with mother they know each other well as sons. From the other house he is the 6<sup>th</sup> born. He searched for land to undertake cultivation. He explained himself to the committee as landless and paid Kshs.12,000/=, the land was trust land. The land was not acquired by virtue of the deceased but from Mzee Ntimama. The brothers to the deceased came from Mosero.

On re-examination, he testified that he was chased out of Enosubukia in 1993 and later in 2005.

**Samwel Kuseyo Munguti** is a resident of Kimindi, ID No. 22967625. He adopted his affidavit sworn on 16<sup>th</sup> November 2017 as his sworn evidence in chief. He lives at Sintankara. He went before the adjudication committee; he applied and obtained the land in 2012. The land does not belong to the deceased as alleged by Simon. He lived at Enosubukia and during the 1993 clashes he was landless, which prompted him to look for a solution. He was accorded Sintankara Adjudication Section.

On cross examination by Mr. Omwebu for the 3<sup>rd</sup> administrator he testified that he was born in 1981 at Enosubukia, his mother is Noongipa Munguti. He stayed with his mother for 5 years and went on to stay with his sister. He is the 10<sup>th</sup> born. He swore an affidavit supporting his brother's affidavit. He lived at Kimindi area with his family including his mother. They sought for land from his maternal grandfather. Joseph moved to Sintankara.

Around 1987-88 he moved around with his mother. He went to Enosubukia from 1990 to attend to school and moved in 1991 to Nankara area. He stayed up to 1993. There were clashes which affected their stay. He left with his sister Josephine at the same time. He refers to paragraph 7 of his affidavit. The parcel of land was donated by the government to resettle the squatters. He states that the parcel of land was donated by the government to resettle the squatters. Members of parliament purchased this reserve with the community. He points out that he applied for land, they were considered squatters. The land was owned by Narok County Council. The land was initially trust land. He has five brothers. The youngest acquired land at Sintankara, there was land given by the adjudication committee. The committee was at Sintankara. He lived at Kimindi up to now. There is upper and lower Enosubukia.

The deceased was born and died in Mosero Area. The objection has been there since 2012. He understands maasai customs and was born in 1981; my late father died and was born in Mosero area. His mother lived in Ngong since marriage, she was married in 1965.

On cross examination by **Mr. Awele** for the interested parties, he testified that the dispute is that they occupy land parcel belonging to the deceased. He is a son to the deceased. His mother is a wife to the deceased. He was born in 1981, deceased died in 1974. His mother lived at the deceased land at Ngong/Ngong 27. He approximates the stay lasted about 20 years. His mother is called Noongipa the affidavit states it was 1958 when she was brought to Ngong.

He goes ahead to testify that mother did not go to Mosero as she had gone to search for welfare. He states there was a family agreement that the land be subdivided and distributed to the family. He was not brought to Ngong by his mother, they explained to him where the deceased lived. His mother never said she lived in Ngong. He stayed in the forest up to 1993. He moved to Kimindi together with his brother. Sintankara settlement center came into being in 2012.

### **3<sup>rd</sup> Administrator's case**

Simon Ole Munguti is the 3<sup>rd</sup> administrator to the estate of the deceased, he deposed an affidavit sworn on 29<sup>th</sup> January 2016 in response to the 1<sup>st</sup> and 2<sup>nd</sup> administrators' joint affidavit dated 9<sup>th</sup> September 2015 and their further affidavit dated 16<sup>th</sup> November, 2015. He averred that the deceased was born in Mosiro Narok and hailed from the Purko clan of the maasai community whose ancestral home is in Narok County and not Ngong in Kajiado County hence he was entitled to claim any rights or interest in the land. The deceased moved to Ngong when he was 50 years old, therein he met and stayed with his late mother until his demise.

He contests that the 1<sup>st</sup> and 2<sup>nd</sup> administrators never lived in Ngong as alleged; they failed to attend the deceased burial but reappeared years later to claim the Ngong estate. He further refutes that the deceased ancestral home is at Ngong as alleged by the 1<sup>st</sup> and 2<sup>nd</sup> administrators but hailed from Narok. His late mother was not aware of the existence of the 1<sup>st</sup> and 2<sup>nd</sup> administrators or their children in Narok.

He avers that his father resided in the present Sintankara Adjudication section and the 2<sup>nd</sup> administrator together with her sons have claimed rights and interests over adjudication process. The deponent annexed a letter dated 10<sup>th</sup> December 2014 marked as **"SOM4"** from the assistant chief who confirms that the 2<sup>nd</sup> administrator and her five sons live in parcel no 114, 113, 54, 56 and 57 respectively in Keekonyoike sub location wherein they inherited his late father's share of land in the subdivided Sintankara adjudication section. Moreover, the 1<sup>st</sup> administrator and her sons inherited the deceased estate in Mosiro Location.

He also annexed a copy of the chief's letter dated 2<sup>nd</sup> March 2015 which states the deceased was resident in Mosiro location and left the first administrators together with her sons (Lemeria, Moonga and Lemunguti) to inherit the piece of land at Oloturot adjudication section, Mosiro location, Mau division. The assistant chief letter dated 10<sup>th</sup> August 2015 and an addendum from the Ministry of Lands stating that the sons of the second administrators are the owners of the parcels of land described as plots no. 114, 113, 54, 56 and 57 of Sintankara adjudication section.

He further deposed vide a letter dated 28<sup>th</sup> October 2015 by the Narok District Land Adjudication and Settlement office stated that plots number 54, 56, 57, 113 and 114 at Sintankara Adjudication section belongs to Simire, Josephat, Kennedy, Michael who were adjudicated 5 acres approximately. He states that the 1<sup>st</sup> and 2<sup>nd</sup> administrators have benefitted from the farm in Narok through farming and they never shared the proceeds with his family in Ngong.

The 3<sup>rd</sup> administrator swore a further affidavit on 5<sup>th</sup> December 2017 in response to the affidavits sworn on 16<sup>th</sup> November 2017 by the 1<sup>st</sup> and 2<sup>nd</sup> administrators and the affidavits of Josphat Saruni Munguti and Samwel Munguti. The deponent averred that the 1<sup>st</sup> and 2<sup>nd</sup> administrators have never lived in Ngong contrary to what they claim in their affidavits dated 16<sup>th</sup> November 2017. In addition, he deposed that it is inconceivable that the 1<sup>st</sup> and 2<sup>nd</sup> administrators claim to have lived in Ngong yet they failed to demonstrate their absence at the time of the deceased death and burial, they reappeared in 1997 to claim over the Ngong part of the estate.

It was his averment that the deceased lived in Sintankara in the 1960's and acquired rights of the group ranch by virtue of maasai customary.

The bulk of the deceased estate is in Mosiro wherein he lived with Resiatio Munguti and their children. Reference is made to exhibit marked as “**SOM1**” which is a letter dated 6<sup>th</sup> September 1968 from the clerk of the defunct county council. Therein the application by the deceased for a shamba at Oloolurot has been approved by the Mosiro local council in the meeting held on 22<sup>nd</sup> May 1968.

**Jackson O. Nkamasiai** is an assistant chief of Keekonyoike sub-location Mau division in Narok County; he swore an affidavit on 5<sup>th</sup> February 2018. Therein he deponed that he was seized of this matter by the 3<sup>rd</sup> administrator who sought advice from him vide the letter dated 10/12/2014 on whether the deceased hailed from his location. He came up with the following findings: the deceased left three wives; Noongipa Munguti, Resiatio Munguti and Nepruko Munguti. Noongipa and the deceased had 5 sons between them and were resident in his location and they inherited the deceased portions of land in the Sintankara’s adjudication section, the sons inherited the following plots:

*a). Michael Slronka Munguti Plot No. 114*

*b). Kennedy Parsimei Munguti Plot No. 113*

*c). Simiren Munguti Plot No. 54*

*d). Josphat Munguti Plot No. 56*

*e). Samuel Kuseyo Munguti Plot No. 57*

The above was further established in the letter dated 10<sup>th</sup> August 2015 marked as exhibit “**JON 3**”, which confirms the sons to Noongipa Munguti were indeed recorded as the owners of the parcels of land identified by parcel No. 114, 113, 54, 56 and 57 at Sintankara Adjudication Section.

He deponed that the report dated 29<sup>th</sup> March 2017 filed by the registrar of land for Kajiado North District aligned with contents of the letter dated 10/1/2014 regarding parcels of land allocated to the sons of Noongipa Munguti.

He averred that **Resiatio Munguti** and her sons inherited the deceased land in Mosiro location at Narok and Nepruko Munguti was left with the deceased land in Ngong County. Deceased died possessed of land in Narok as well as Ngong and every of the three houses of the deceased had been left out on the respective parcels that the deceased died possessed of.

**Samson Satoi** is the chief at Mosero location in Narok County; he swore an affidavit dated 5<sup>th</sup> February 2018. The deponent was invited to this suit by the 3<sup>rd</sup> administrator vide a letter dated 2<sup>nd</sup> March 2015 marked as exhibit “**SS1**”, wherein the latter sought information to confirm or deny that the families he left behind in his location were fully settled at the point his father was leaving for Ngong.

He replied through a letter dated 2<sup>nd</sup> March 2015 he advised the third administrator as follows; his late father hailed from his location and he left behind his wife **Resiatio Munguti** and three sons namely; **Benson Lemeria Munguti, Moonga Ole Munguti and Lemunguti Ole Naisenea** who jointly inherited the deceased’s land at Olutorot Adjudication in Mosiro Location, Mau Division. He averred that Resiatio Munguti and her sons inherited the deceased land at Mosiro location and the late Nepruko was left with the deceased land in Ngong County. He deponed with certainty that the deceased died possessed of land in Narok as well as Ngong and every house has been left on the respective parcels that the deceased died possessed of.

**Jackson Ole Nkamasiai** is an assistant chief of Kapenyeki Sub location Narok East Sub-County on examination in chief he adopted his affidavit dated 5<sup>th</sup> February 2018 as his own dispensation and produced it as evidence.

On cross examination by Mr. Wati for the 1<sup>st</sup> and 2<sup>nd</sup> administrators he testified that he authored the letter dated 10<sup>th</sup> December 2014. He was born in 1980 and the deceased died in 1974. He admits not to have seen the deceased in person but he has records of the deceased family in the office. He mentions a man named as **Ole Ngunyi** who is an elder in his office and is conversant with the deceased family. Referring from the information in the adjudication office and adjudication committee, he testified as follows in respect to the land in Sintankara; the land in Sintankara is not under Eno Supukia scheme and it was never a forest before adjudication. The deceased had land and family in Sintankara and was a member of the Sintankara Group Ranch. He died before adjudication came to be. He was a not a registered owner but his sons inherited and land registered in their names.

In regards to the group ranch; there is no specific year the group ranch was created, it was in the period of 1962-1970. There is a register for the group ranch and the people who live therein qualify to be members, it is not any male who qualifies to be registered as a member of the group ranch. The deceased name remains in the register until his sons take over. The homestead of the deceased can be seen upto now. The deceased herein left family at Sintankara and the sons did not have any chance to inherit any parcel of land. The deceased moved where there were parcels of land, they were 5 acres each. They could not be registered as members. There is no dispute from the county government as to the ownership of Sintankara Group Ranch, moreover the 1992 clashes did not affect Sintankara Group Ranch but Eno Supukia.

On cross examination by Mr. Awele for the 60 interested parties he testified that his duties are to maintain law and order passing information from the government to the public. He lives in his area of jurisdiction. There are enough interactions with people on a daily basis. As an officer he puts in place mechanisms with village elders. The village elders report to him directly, they are elected by the community and names forwarded to the District Commissioner; the deceased **Ole Nganya** is a village elder. The deceased family are his neighbours. His mandate is to act on succession. The land belonged to the deceased it is always necessary to know people who apply for letters for administration. He confirms that some of the deceased children are before court. The children were born in the said land and **Siameto** Family lived there; they are bonafide members of his jurisdiction.

He went on to testify that historically there is a way someone becomes an owner of the property. The children must cultivate the land and make water pans in the area. When the adjudication is done the members are identified. The land was subdivided for the benefit of the sons. The deceased was polygamous, he moved in search of pasture. The deceased left one house at the Sintankara, the other family at Ngong. The gentlemen live in Sankara. He afterwards acquired land. The deceased had land at Narok. He has the history of where people lived.

On cross examination by **Mr. Omwebu** he testified that the matter was brought to his attention by the 3<sup>rd</sup> administrator who sought information on Sintankara group ranch. The area was declared Sintankara adjudication. The area is under his jurisdiction. He can positively identify the parcel of land. Reference is made to the letter of 10.12.2014, which concurs with the law registrar on the details. He confirms the land exists. He is a chief and an elder of the area hence knowledgeable about Maasai culture. Land is owned by virtue of patrilineal heritage. They only have those who bought from the members. He obtained information from the lands office and his boss is the area chief. He confirms that he is versed with the matter.

**Patrick Masila Munyalo** is in charge of the land adjudication and settlement office at Narok North, Narok East sub counties.

On examination in chief he states that the land adjudication office deals with land matters in respect to fresh land, they adjudicate on based on records. They have rights to the same land. He works with land adjudication committees who are elected by residents of the adjudication section and officially appointed as per the law. He is in charge of a station his duties are coordinating and directing the adjudication process.

He works in conjunction with the adjudication board and committee concerning the issues this court wanted him to comment about. He authored and prepared the report dated 27<sup>th</sup> April 2018; it is addressed to the deputy registrar Kajiado, and he indicated the parcels of land No. 113, 114, 54, 56 and 57 to be within Sintakara. Registration section can have their status correctly given by the land registrar. Sintakara adjudication has its work completed as per the Land Adjudication Act, Cap 284 Laws of Kenya.

The land adjudication department has submitted the registration documents and demarcation map. Adjudication records for registration of titles. The certification of finality was issued by the director land adjudication department.

Commencing **Ololturot** adjudication section was established on 7<sup>th</sup> September 2012 in accordance with Section 5 of the Land Adjudication Act. There is a copy of the notice establishing the adjudication section. There were adjudication and demarcation officers, they are the ones to receive claims for those claiming ownership. The Ololturot section is at the very early stages of demarcation. The claimant must indicate the area he or she is claiming. In respect of the earmarked parcels of land, they are owned as follows:

- **593 – Parkesela Ole Munguti;**
- **584 – Lemonguti Ole Nasena;**
- **585 – Monga Ole Munkuti**
- **586 – Sekee nto Ene Munkuti**
- **591 – Lemuntat Ole Munkuti**
- **666 – Koyani Ole Siameto Munguti**
- **667 – Timanoi Ene Koyan Munguti**

He further indicated that the adjudication parcels have not been completed, this status can be challenged especially where the adjudication register shall be published in accordance with Section 25 and 26 of the Land Adjudication Act and the objections heard and determined. Appeals are made to the minister in respect to ownership and it would become final pursuant to Section 29 of the Land Adjudication Act, the validation of rights in this section is still ongoing. He produced the report dated 27<sup>th</sup> April 2018 as exhibit.

On cross examination by Mr. Wati for the 1<sup>st</sup> and 2<sup>nd</sup> administrators he explained that paragraph 4 of the letter dated 27<sup>th</sup> April, 2018 means that the people submitted their claims and are living persons in adjudication. That land is trust land held by the community. The county government is the one which owns the land. The interest is not ascertained, they have ancestral claims which have not been determined. Ololturot was trust land before declared. Trust land is very different from a group ranch. Adjudication for trust land has not started. A group ranch is just a parcel number owned by several people who have agreed to own property, it is after adjudication we alienate rights for people. The finality of interest or rights depends on the outcome of adjudication.

On cross examination by Mr. Omwebu for the 3<sup>rd</sup> administrator he testified that the area of adjudication has not been dealt with. He obtained the report and has expertise on adjudication. The maasai live at this Oloolturot area. The process of laying claims comprise of notice to the residents through the declaration. The communities who are living there may have established homes. It is mainly through their parents or ancestors. He has not heard of a claim over land being purchased. The ancestral land is acquired through cultivating, grazing or occupancy and that is how group ranches came into being. The claims are based on parental heritage. The rights are communal in the first instance but to the extent of adjudication. We have Oloolturot adjudication section.

On cross examination by Mr. Awele for the interested parties he testified that he has worked for 29 years, beginning 3<sup>rd</sup> January, 1989. He is

versed with land adjudication matters in our land. There is a specific law governing trust land; there is also the Land Adjudication Act. For those interests which can be ascertained, his role is to come in and formalize them. The occupants will be on the ground. It is possible to purchase the interest over land. There is a recognizable interest. Trust land is held in trust of the community for that area. His role is complimented by other officer, it starts when he establishes the adjudication section, the land adjudication committee and adjudication officer are appointed to deal with claims they made with the people claiming interest.

The general rule of claims arises from parental heritage. I am not aware of any exception in respect to the claim by the Ole Munguti family. My role ends when the director of land adjudication and settlement issues a certificate of finality. The land we adjudicated falls under the Trust Land Act Cap 288 Laws of Kenya, adjudication is under Cap 284 Laws of Kenya. The speed of processing is not the same; it depends on community's cooperation. He is not aware whether the people he listed on his report purchased any interest over land as he received list of names identified as having satisfied the interest over land.

**Samson Sitoi** is the chief at Mosero Location. In his examination in chief he adopted his affidavit dated 5<sup>th</sup> February 2018 as his own dispensation.

On cross examination by Mr. Wati for the 1<sup>st</sup> and 2<sup>nd</sup> administrators he testified as follows; the deceased **Siameto Ole Munguti** owned land in Mosero location, he resided in his area of location, and is a member of the Ole Lataro sub location. He has the parcel number of the person. The number can be found with the lands office. The deceased died a long time ago and many years have passed, and he never met him personally. He was born in 1973 and the deceased was not well known to him. The information he is giving this court was extracted from the counsel of 3 elders. The land is individual as per now but in 1974 it was communal land. After adjudication, the titles were subdivided into individual titles in 2014. They did not participate because they are automatic members. A dead person cannot be given land. Reference was made to paragraph 2 of the affidavit. The deceased left for Ngong a long time ago. The piece of land is located at Mosero. The land was under adjudication; the dependents from Munguti Heritage belonged to the county council Narok. It was community land, the deceased had no land.

On cross examination by **Mr. Awele** for the interested parties he referred to paragraph 3 of the affidavit. He gave testimony in relation to the deceased based on the office information, as he was not familiar with him. He does not have copies of the titles in his office that he refers to; he found information from the land's office. Reference is made to the letter written in 2015. He listed some people as dependents of the estate; **Resiatio Munguti** is a wife to **Simeto Munguti**, **Benson Munguti** is a son to the deceased, he derived information from the council of elders. The land was communal you must be known by the community and have a family, upbringing of children. The 1<sup>st</sup> administrator and the deceased were from Mosero; she came from somewhere that is where she was married and stays on the land by virtue of her marriage. The deceased can get land depending on his status. He is aware of other children besides the ones listed in my letter and the children can claim an interest at Mosero but none of them have claimed an interest at Mosero.

On cross examination by **Mr. Omwebu** for the 3<sup>rd</sup> administrator he narrated that the deceased lived in his location and there is no dispute. The deceased was subject at the location, and left a family at Mosero, whom he identified them in his letter. He is a maasai elder and also chief of the location by virtue of his ethnicity. One must have a family and long period of stay to claim an interest in the land, our clan is Parko, the land belonged to the community which had not been subdivided into individual titles.

He went on to explain that adjudication is still ongoing with a small portion remaining. He participates in the adjudication process as a key stakeholder, the deceased's dependents benefitted from his share. One cannot lose interest to land due to his or her demise. The interest can be passed to his wife or children. The deceased family live at Mosero land, where they engage in livestock farming and crop farming. The titles to the deceased land are with the land's office.

**Simon Ole Munguti** is the third administrator. On examination in chief he adopted and relied on his affidavit dated 20<sup>th</sup> December, 2015 as evidence.

On cross examination by Mr. Wati for the 1<sup>st</sup> and 2<sup>nd</sup> administrator he testified as follows: The deceased passed away in 1974. He died and left land known as Ngong/Ngong/27, the piece of land was in his names and he owned a shop in the land. He came to hear that we had property at Mosero.

He did not produce any titles but letters from the chiefs acknowledging ownership. He used the chief's letters to lay claim over other properties. The properties have no titles. He left some people to follow up the titles. He knows the first and second administrators; none of them occupy Ngong/Ngong 27. He stays in the suit land and sold some parts of it to 3<sup>rd</sup> parties, who have their respective titles. The purchasers are not beneficiaries or his children to the deceased estate. He went on to narrate that he only knew about Ngong/Ngong 27, and his stepmothers have respective portions of land on which they reside. His mother was the deceased third wife and an administrator from whom he took over as the administrator. He has information about the Narok properties. His mother passed away in 2009 and she did not come up with the information of any other properties owned by the deceased, it is him who discovered evidence of such existence. The confirmation of grant was in 2006. His mother sold the parcels of land. The grant was subsequently cancelled; my stepmothers were not allocated any parcels of Ngong/Ngong/27. They had migrated to other areas leaving the deceased with his mother.

On cross examination by Mr. Awele for the interested parties; he testified that, he was born in 1960, in Kibiku Ngong. He has one brother, and his mother Nepruko Munguti was married to his father. His father died in 1974, when he was 14 years old. He did not see Resiatio Munguti or Noongipa Munguti. He knew their names at Mosero. He affirmed that his mother obtained grant of letters of administration in 1980 and the 1<sup>st</sup> and 2<sup>nd</sup> administrators never claimed a share until 1997 when they were included as beneficiaries to the estate. There was no other person from his family who claimed entitlement. The parcels of land were sold by his mother. The land was subdivided to his sister, self, mother and the other brothers. He sold the said land to third parties. The first wife was staying at Mosero while the second at Enkare all located at Narok.

On re-examination in chief he testified that he received a report to establish the status of parcels of land No. 54, 56, 57, 113 and 114 located

in **Sintankara** and **Oloolturot** adjudication section, Narok County. He went to Narok county visited the land registry with help of the parties and land registrar; He ascertained the status of the land and filed a report dated 29<sup>th</sup> March, 2017 which is produced as exhibit in court.

On cross examination by **Mr. Wati** for the 1<sup>st</sup> and 2<sup>nd</sup> administrators, he testified that he listed the registered allottees and the name **Siameto Ole Munguti** does not appear anywhere. He went on to state that there is a section adjudication done, the land is a product of adjudication. He has attached copies relating to 2010. He does not know the tenure before adjudication.

On cross examination by Mr. Awele for the interested parties he testified that the land has not been allotted to them as purchasers, it came from the adjudication process. He does not know the circumstances they came to own land, there are many ways one owns land and the people in Narok land office know how the people were allotted land.

### **Submissions**

**Mr. Omwebu** learned counsel for the third administrator presented his written submissions dated 18<sup>th</sup> December 2018 and filed on 19<sup>th</sup> December 2018. The court record in HCSC 227 of 1980 states that the deceased of original home is in Narok where he was born and raised, he also married the 1<sup>st</sup> and 2<sup>nd</sup> administrators. Reference is made to paragraph 14 of the Ruling by **Justice Musyoka** dated 31<sup>st</sup> July, 2015 it shows that the deceased had homes in Narok and Ngong.

The 3<sup>rd</sup> administrator took issue with the 1<sup>st</sup> and 2<sup>nd</sup> administrator joint affidavit dated 16/11/2016, specifically paragraph 8, and paragraph 12 of the affidavit and also their joint further affidavit where they averred that they are residents of Narok and occupying communal land which is not free for all whose occupancy is predicated upon clan membership as a pre condition.

Counsel for the 3<sup>rd</sup> administrators attacked the testimony of both Josphat and Samuel that they have no locus to stake any claim in the deceased estate. He submitted that the credibility of their testimonies in relation to the deceased estate is unreliable as they were born in 1976 and 1981 respectively, whereas the deceased died in 1974 hence they cannot claim to be his sons. Counsel calls upon this court to disregard their affidavit and testimonies in entirety as they are not worthy of considerations in respect to Justice Musyoka's order.

The deceased ancestral home is in Narok county and he came to Ngong at the age of 50 years old therefore it is not possible for Ngong to be his ancestral home as alleged by the 1<sup>st</sup> and 2<sup>nd</sup> administrators. This assertion is supported by evidence of letters from the chiefs of Narok through his letter and testimony which proved that the 1<sup>st</sup> and 2<sup>nd</sup> administrator live on deceased land in Ngong and Narok. This further supported by the Land adjudicator's officer's report dated 27<sup>th</sup> April 2018 wherein it states that the parcels of land owned by sons of the 1<sup>st</sup> administrator under Olotrot Adjudication Section.

The 1<sup>st</sup> administrator resides in Olotrot Adjudication section in Mosiro location with her three sons whereas the 2<sup>nd</sup> administrator resides in Sintankara adjudication section on account of the deceased. Ownership of land in Maasai culture is patrilineal and it is on account of the deceased's lineage and membership to the Maasai community that the sons of the 1<sup>st</sup> and 2<sup>nd</sup> administrators are registered as owners of individual parcels of land in adjudication sections.

He further points out that his case is supported by **Billow Ibrahim** through his testimony that sons of the 2<sup>nd</sup> administrator had been listed as owners of the parcels of land in Sintankara adjudication section which lists the 1<sup>st</sup> administrator as persons owning parcels of land 593, 584, 585, 586, 591, 666 and 667 in Oloitorot Adjudication section.

Counsel submits that bulk of the deceased estate is in Narok. The 1<sup>st</sup> and 2<sup>nd</sup> administrators have essentially committed acts of fraud, misrepresentation and material non-disclosure to court clothed with deceit and illegality with the sole purpose of hoodwinking the honourable court. The true extent of Narok property has not been disclosed by the 1<sup>st</sup> and 2<sup>nd</sup> administrators.

He relied on Rule 64 of the probate and administration rules states that where during the hearing of any case or matter any parties desires to provide evidences to the applicant or effect of African Customary Law he may do so by the production of oral evidence. The 3<sup>rd</sup> administrator, the two chiefs from Narok and sub county, land adjudication and settlement officer for Narok North East Sub County and **Mr. Patrick Munyalo** have rendered such evidence.

1<sup>st</sup> and 2<sup>nd</sup> administrators have deliberately failed to comply with the orders of the court dated 31<sup>st</sup> July 2015 and from the evidence before the court, the 1<sup>st</sup> and 2<sup>nd</sup> administrator and their children live in Narok on what is the deceased's ancestral land which land is held under customary law.

In conclusion, the 3<sup>rd</sup> administrator prays that the court declines to interfere with the Ngong part of the estate as it would be unjust to disregard the estate in Mosiro and Sintankara which is greater in size compared to the one in Ngong. The court should find that the deceased had left sufficient provision to every house hence there is no need to redistribute the estate.

### **Interested parties case**

**Athman Salim Mohammed** is an interested party in this suit and on behalf of other 60 interested parties he swore a supporting affidavit on 5<sup>th</sup> December 2017. He deponed that he is a registered proprietor of the piece of land known as Ngong/Ngong/23747 which arose from the subdivisions of the property known as Ngong/Ngong/27. He acknowledged the deceased as the registered proprietor of the suit land and after his death in 1974, his third wife **Nepruko Munguti (deceased)** was granted letters of administration intestate in 1980. The suit land

was transferred to the third wife's name and assumed absolute ownership over the same to the exclusion of other and an indefeasible title in accordance to the Registered Land Act Cap 300 Laws of Kenya (repealed). The administrator, Nepruko Munguti, subdivided the suit land, Ngong/Ngong/27 into 6 parcels of land namely;

- a). *Ngong/Ngong/20319*
- b). *Ngong/Ngong/20320*
- c). *Ngong/Ngong/20321*
- d). *Ngong/Ngong/20322*
- e). *Ngong/Ngong/20323*
- f). *Ngong/Ngong/20324*

The aforementioned parcels were transferred voluntarily by the administrator, Nepruko Munguti for valuable consideration to third parties. The third parties further subdivided the properties and transferred the properties for valuable consideration to the deponent and the interested parties herein. The interested parties made the purchases in good faith and without any encumbrances, fetters or interests whatsoever and after conducting official searches and due diligence over the titles.

The interested parties aver that the cancellation of the original grant issued in 1980 to Nepruko Munguti by **Justice Kalpan Rawal** by dint of Section 93 of the Law of Succession Act did not nullify or interfere with dispositions of property made pursuant to the revoked grant. The 1<sup>st</sup> and 2<sup>nd</sup> administrators made an application to the High Court seeking to have all the subdivisions resulting from Ngong/Ngong/27 revoked and redistributed. On 7<sup>th</sup> August 2009, **Lady Justice Jean Gacheche**, ruled that the orders sought by the applicants' could not be granted because the suit land, Ngong/Ngong/27 had already been subdivided and passed to third parties who were not parties to the cause. On 17<sup>th</sup> February 2012 **Hon. Lady Justice Nambuye** allowed the application and ruled that all the subdivisions from the suit land Ngong/Ngong/27 be collapsed and reverted to the suit land as originally registered for redistribution. On 31<sup>st</sup> July 2015 **Hon. Justice Musyoka** ruled that the orders made on 26<sup>th</sup> September 2005 confirming the grant made to 1<sup>st</sup> and 2<sup>nd</sup> administrators be set aside.

With regards to the 1<sup>st</sup> and 2<sup>nd</sup> administrators, he depones that they are guilty of material non disclosure and misrepresentation of material facts in these proceedings hence they are not worthy of the equitable remedies sought in this court. They are only entitled to limited to the free or net intestate estate of the deceased that is the remainder of the suit land that has not as the date of the said finding been transferred to 3<sup>rd</sup> parties pursuant to the confirmed grant originally issued by the 3<sup>rd</sup> administrators mother in 1980.

Concerning the 3<sup>rd</sup> administrator he avers that he is entitled to the full benefit of the deceased estate in Ngong and transfer effected were lawful and fair. If any remedy should lie in favor of the 1<sup>st</sup> and 2<sup>nd</sup> administrator should be against the 3<sup>rd</sup> administrator as surety or guarantor in accordance to P & a – 57, ***“any petition for grant of representation that proposed administrators execute deeds of guarantee and surety to indemnify the estate and third parties from any loss which any person interested in the administration of the estate of the deceased may suffer in accordance of a breach by the administrator of the duty to administer in accordance to the law.”***

He avers that the deceased estate is sufficient to equitable provide for all his dependents without affecting the already distributed portion that is the suit land. Court should safeguard their right to protection of property under Article 40 of the Constitution and not distribute property that has already been transferred to third parties. Confirmation of grant in favour of the three administrators should limited to the deceased's estate without the portions of the suit land that have already passed onto the interested parties.

#### **Interested parties submissions**

**Mr. Jackson Awele** learned counsel for the Interested parties entered his written submissions dated 28<sup>th</sup> January 2019 and filed on the same day. He raised two issues for determination:

- a). ***Whether the ruling of the Hon. Justice Nambuye dated 17<sup>th</sup> February 2012 ought to be set aside and/or whether the interested parties' properties are available for distribution as part of the estate of the deceased, Siameto Ole Munguti; and***
- b). ***Whether the 1<sup>st</sup> and 2<sup>nd</sup> administrators' have discharged their burden of disproving the Hon. W. Musyoka J's prima facie findings that they have benefitted from alternative property belonging to the deceased Siameto Ole Mungutia to entitle them to benefit from the residue of all that property formerly known as Ngong/Ngong/27.***

On the first issue counsel invoked Section 93 of the Law of Succession Act Cap 160 Laws of Kenya which states as follows, ***“all transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”***

The interested parties are of the view that honourable lady Justice R. N. Nambuye's ruling dated 17<sup>th</sup> February 2012 was made in absolute disregard of the provisions of Section 93 of the Law of Succession Act. The decision made was per incuriam and the same should be set aside ex dibitio justitiae. This point was bolstered by the case of ***Jasbir Singh Rai and three others vs The estate of Tarlochan Singh Rai and four others***, Supreme Court Petition No. 4 of 2012 wherein the court held that it (the Supreme Court and by extension other courts are

not bound by decisions made per incuriam and that the same may be set aside and/or ignored in subsequent proceedings on the same issue. The case of Morelle Ltd vs Wakeling (1955) 2QB379

*“Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decisions on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms as a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.”*

## Determination

From the above lengthy evidential material, it is my considered view that the following issues arise for determination:

(a). *Whether the deceased had a beneficial and registrable interest in unregistered land in Mosiro or Sintakara.*

## Issue No. 1

### The standard of proof

The legal test on the burden of proof to be applied in cases of this nature is settled and it is on a balance of probabilities. In asserting the legal position Section 107 (1) of the Evidence Act provides that:

*“whoever desires any court to grant Judgment as to any legal right or liability dependent on existence of facts which he asserts must be prove these facts exist.”*

Further, in Section 109 of the Act states to the effect that

*“the burden of proof as to any particular fact lies on the person who wishes the court to believe in, its existence, unless it is provided by any Law that the proof of that fact shall lie on any particular person.”*

In *Chege Gitahi v Maboko Distributors Ltd & another Civil Appeal No. 65 of 2004 {2005} 1 EA* the court stated inter alia as follows:

*“That a trial court has to decide the case before it on the evidence before it and on the Law a court of Law will determine the case on the issues that flow from the pleadings or from the issues for the court’s determination by the parties.”*

*Golaty Paints Company v Falcon Guards Ltd {2000} EA 385,*

*“parties are generally confirmed to their pleadings unless pleadings are amended during the hearing of the case.”*

It follows therefore also the applicants have the duty to prove existence of intestate parcel of land in Narok. In the words of **Black’s Law Dictionary 9<sup>th</sup> Edition**: *“Estate means the amount, degree, nature and quality of a person’s interest in land or other property, especially a real estate interest that may become possessing, the ownership being measured in terms of duration.”*

The second definition is all that *“a person or entity owns including both real and personal property.”*

The third definition *“is the property that one leaves after death, the collective assets and liabilities of a dead person.”*

Under Section 3 of the Law of Succession outlines Free Property in relation to a deceased person means

*“The property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.”*

The question in this case is whether the applicant **Simon Munguti** has demonstrated that the deceased owned land in Narok prior to his demise capable of being a subject of distribution to the beneficiaries.

The scale of this position as received and admitted in evidence from **Resiatio Munguti** shows that the land in Mosero – Narok was community land not yet registered in the name of the deceased.

Reference was made to the letter of **Mr. Mutiso**, the District Land Registrar obtained pursuant to a court order for purposes of appraisal of the Land register and entries contributed therein with regard to ownership or registrable interest for the benefit of the deceased. The full report provided to the court established that Sintakara adjudication section has been completed. As at the time of adjudication, the application to be considered as an allottee was lodged by the sons of the deceased. Based on the evidence from the Land Registrar and Land adjudication officer, it follows that the deceased had beneficial or registrable interest over any parcel of land in Sintakara adjudication section in Narok which upon his demise should be included in the estate.

A person is deemed to die intestate in respect of all his free property of which a grant of representation in respect of the estate can be issued for purposes of administration. In determining the beneficial interest in the subject property at Sintakara several questions arise which demanded answers to this court for the claim to succeed. In all the sequential steps on the claims being alleged by the applicants both the provisions of the replaced Group Ranch Act and the recently enacted Community Land Act 2016 is of paramount effect to the rights being asserted in this cause.

Section 30 (1) of the Community Land Act provides as follows:

***“Every registered member of the community has the right to equal benefit from the Community Land, including full and equal enjoyment of right of use and access.”***

Under Section 2 of the Act, community land register means the community land register established under Section 8 of the **Land Registration Act No. 3 of 2012**.

Further, this Section states as follows that:

***“Pursuant to Article 63 of the Constitution, there shall be maintained in each registration over, a community land register in which shall be kept***

***(a). a cadastral map showing the extent of the community land and identifiable areas of common interest.***

***(b). The name the community identified in accordance with Article 63 (1) of the Constitution and any other Law relating to community land.***

***(c). A register of members of the community.***

***(d). The user of the land.***

***(e). The names and identity of the numbers of the group.”***

The statute which was enacted in 2016 in Section 52, and 37 does recognize customary rights of occupancy to community members on the basis of custom.

Section 28 provides that:

***“The customs and practices of pastoral communities are specifically to be taken into account whether or not the land is unregistered or held in trust by the County Government.”***

Appropriately, are their components of land in Sintakara both in form and real which belonged to the deceased. I have noted however that the deceased was a resident of Keekunyoike Sub-Location Mau division in Narok as confirmed by **Jackson Nkamasigi**. The current Assistant Chief of the area. It is clear from his evidence that most of the evidential material relied on was on the historical heritage of the community of the location where the deceased once settled.

According to the witness although, the Land in questing was yet to be registered as group ranch, substantively it was occupied by members of the clan as tenants in common to use for purposes of pastoralist occupation. Such rights stated the witness flow from what one calls decedent estate.

Is this tenable? My understanding is that though the deceased lived in Sintakara, the effect of Land rights had not been extinguished not to bring interest to land out of the definition of Section 3 of the Succession Act. The resemblance of what the applicants are agitating to advance and promote may be in my opinion implied from the following statement by **Max Rheinstein** cases on decedent estate an extract from **Njenga F. X. Law of Succession in East Africa Faculty of Law, the University of Dar es Salaam 1966**, where he observed as follows:

***“man is mortal, but the objects of his property do not disappear with him. They are left behind by him in this world and the community must see to it that they are allotted to new owner. Such a definite allotment is indispensable lest society be shaken by quarrel, fight or scuffle whenever one of its members departs from life leaving property behind him.”***

The indisputable but by no means sole evidence of a legal nature is the admission that the deceased was at one time a resident of Sintakara – before morning to Ngong – Kibiko area. It is worthy pointing out at this juncture to state that pursuant to the death of the deceased. The property in Sintakara was unregistered hence the need for alienation to distribute in to verifiable applicants.

Relying on this Section can the deceased be said to be in possession of a beneficial interest in an unadjudicated and in unregistered land. Suffice it to say that the answer is in the affirmative this very important principle was well articulated in the case of **James N. Kiame v Geoffrey Kinuthia & another {2012} eKLR**. Where the court observed that:

***“While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not, a***

***necessary ingredient for a trust to be established.”***

In this case the deceased share or interest as a sole proprietor of the subject property and such entitled to direct with the Land as he pleased or hold in trust for the family during his lifetime arises of the fact that he had settled the family at Sintakara before migrating to Ngong. It cannot be said that even in absence of legal registrations, the deceased was prohibited to occupy the portion of land he settled the family.

Whether the propriety interest was to pass to the deceased after the Land adjudication process in view of the detailed adjudication regulatory mechanisms would be a legitimate expectation.

In the instant case, **Michael Sinruka, Kennedy Munguti, Siameto Munguti, Josephat Munguti and Samuel Munguti**, found themselves within the property initially occupied by the deceased.

Broadly, founded upon the rights of a person in possession or actual occupation of land as presupposed by the doctrine of equity in the case of **Alan Kiama v Mathunya & others CA 42/1978 Madan J. A.** Stated:

***“they (meaning the rights in possession or actual occupation) are not subject to interference or disturbance such as by anchor save where inquiry is made and they are not disclosed. In this case, no respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the appellant. He made inquiry, any inquiry would have been superfluous, he had himself hired on the land together with the respondents for a time and knew that they cultivated it.”***

In my view, the evidence by the Assistant Chief demonstrated that the records held in their office on long familial stay at Sintakara created a certain beneficial intended and right of possession of land is of significance and prima facie granted the proprietary right to his family. The status of land as confirmed by the land adjudication officer and Land Registrar – Ngong gives the court a true account on the process of registration leading to the root of title. The people who might show a better title are the identified sons of the deceased in exclusion of anyone else laying claim on the property. Their occupation and possession is traceable to the initial entry by the deceased.

The court in the case of **Kiarie v Kimutai** laid down the essentials of what may be determined as a customary trust.

***(1). That the land in question was before registration, family, clan or group land.***

***(2). The claimant belongs to such family, clan or group.***

***(3). 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.***

***(4). The claimant could have been entitled to be registered as an owner of the beneficiary of the land but for some intervening circumstances.***

***(5). The claim is directed against the registered proprietor who is a member of the family, clan or group.***

In this succession cause, the controversial property at Sintakara has its origins in the inheritance character by the deceased who first settled the family in this location. The land in question falls under the nomenclature of the community land tenure derived from the land use from the operations of the traditions and customs of the Maasai. The most important element of Maasai Customary Law tenure is the predominance of community land mainly due to their pastoral practices and activities. As later would happen, individual title allotment was embraced to improve proper land use.

The evidence so far shows that the deceased settled the first family in accordance with the Maasai traditions and customs at Sintakara adjudication section. It is not disputed that the alienation or allocation of the grant of the land rights to the community involved conversion of Trust land in terms of the Law to have in set aside for adjudication to create individual titles. The applicants are subjected to a verification and selling process of eligibility.

As pointed in evidence by the land adjudication officer, it required of them to keep a register of the trust land converted to private land as decreed and gazette by the government.

According, to his evidence the Land Adjudication Act is clear on the procedure to be followed in disposition of such tenured land. For that in so far as Sintakara adjudication section is concerned. The criteria and process of allocation had been completed as a substantial step to issuing titles to each individual or legal entity or allottee.

In this respect I am of the view that the consequences of the registration of the sons as bonafide owners of the specific parcels of land was meant to preserve the rights and interests of the deceased family under customary law. On this proposition I am guided by the principle in the case of **Samwel v Priscilla Wambui HCC 1400** the court held that:

***“The purpose of registration must in all cases be understood to be preservation of the family land and not to disenfranchise other members of the family who may not have gotten their names registered.”***

The causality of this registration by the sons of the deceased was based on right of eligibility that existed before his demise that could have entitled him to fit within persons to benefit from rights related to land in Sintakara adjudication section. Such were the rights that it poses a challenge for one to treat his sons rights as standalone without reference that, for all intents and purposes this was ancestral land for the

deceased.

Another important aspect of this case is the factor, that the family access to occupation of the disputed land was by a social obligation of the deceased to make provisions for his family in particular possession of land to carry on the socio-economic activities.

The hall mark of this occupation vested them with Land rights even in absence of formal registration, subjecting it to distribution as intestate property of the deceased. It is important that possession of Sintakara land be addressed to serve the initial objective that the deceased was to settle the other family at Narok, and not Ngong. By doing so, being a polygamous man he must have thought of fair equality of opportunities sharing of resources for his large family by virtue of the marriage.

It is important also to point out at this juncture that the other contested suit land falls within the provisions of Land Adjudication Act. Section 30 of the Land Adjudication Act establishes the institutional framework for the implementation of the Land declared as an adjudication section. It provides as follows: As ancestral land in the instant case is a question of fact to be determined by evidence on a balance of probabilities. During this process the act subject to obtaining consent of the adjudication officer does limit the jurisdiction, of the court as expressly provided for under Section 30 which states as follows:

***30 (1). Except with consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29 (3) of this Act.***

***(2). Where any such proceedings were begun before the publication of the notice under Section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached otherwise directs.***

***(3). Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.***

***(4). The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.***

***(5). A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.***

***(6). Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.***

These provisions address matters to do with adjudication and a pathway for engaging the various mechanisms of adjudication including an appeal process.

The principles which should guide the court on the yet to be completed land under adjudication are to be found in the case of **Benjamin Okwaro Estika –v- Christopher Anthony Ouko & Another {2013} eKLR**

***“That being so, the mandatory requirements of Section 30 (a) had to be complied with i.e. consent of the land adjudication officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it. From what we have discussed above, it will be clear that we are in full agreement with the learned Judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”***

This court is now faced with a situation whereby there are competing interests of the deceased surviving family in respect of **Ololturot** adjudication section. Some portions of land have already been earmarked for issuance of Titles for the benefit of:

- **Parkesela Ole Munguti;**
- **Lemonguti Ole Nasena;**
- **Monga Ole Munkuti**
- **Sekee nto Ene Munkuti**
- **Lemuntat Ole Munkuti**
- **Koyani Ole Siameto Munguti**
- **Timanoi Ene Koyan Munguti**

This matter is made even more complicated in view of the fact that the third family who have remained in occupation in Ngong/Ngong 27 pursuant to the Grant of Letters of Administration did convey that of the interest in the suit land to the interested parties in this proceedings.

It has now transpired that both families in terms of Section 29 and 30 of the Land Adjudication Act have to wait a little bit longer for the process of adjudication to be fully completed to advance a case whether the suit property falls within the estate of the deceased.

Section 30 significantly mandates a party who seeks the court to be seized of jurisdiction on the parcel of land under jurisdiction prior consent be obtained as stipulated in the aforesaid Section.

There is no such consent obtained from the adjudication officer to pursue a claim against the pending adjudication process in Ololurot and Sintakara.

It seems to me properly speaking the deceased initially settled in Sintakara in Narok before moving to establish another home in Ngong/Ngong/27.

Before the court can admit additional evidence, the whole process of adjudication ought to be completed as set out in the Land Adjudication Act.

I accordingly hold, that there is prima facie evidence of existence of ancestral land where the 1<sup>st</sup> family settled from since the first occupation by the deceased either in his personal capacity, in his capacity as a member of the clan or community.

In the sense of equity there is need in marshalling of all the assets in such an arrangement notwithstanding any intervening interest, liens or other claims of particular beneficiaries to modify the distribution to prevent it from being made an instrument of caprice, injustice or unconscionable advantage.

In regard to the new mode of distribution and to give effect to this long outstanding dispute, the matrix does observe the letter and spirit of initial impugned and set aside confirmed grant dated 26.9.2005 which had incorporated the element of the three houses concept of the deceased.

It is therefore necessary given the peculiar circumstances of this estate some equitable principles do apply in solving the controversy. Upon this principle I see no real difficulty in the family coming up with a proposed mode of distribution under the court oversight in view of the pending identifiable parcels of land occupied by some of the beneficiaries to the estate still under adjudication in terms of Section 29 & 30 of the Act.

The upshot of all these and on the arguments advanced by counsels to this litigation, I make the following orders:

***(1). A declaration of beneficial interest that the distribution of the exercise of the deceased shared on conditions that each beneficiary is entitled to an equitable interest to the estate.***

***(2). The beneficiaries who have been in occupation to the subject property identified and proposed to be alienated for the benefit for the 1<sup>st</sup> and 2<sup>nd</sup> family as particularized in this Judgment be estopped from claiming to be the sole beneficiaries entitled to the suit land.***

***(3). In that respect the administrators are entitled to incorporate the defined ancestral land in Sintakara as free property of the intestate estate of the deceased.***

***(4). That upon the effect of land adjudication is indorsed and by virtue of the Act, the right, title, interest passes to the dependants of the deceased, herein, the 1<sup>st</sup> and 2<sup>nd</sup> family, the property so conveyed be deemed from thereon to be the estate property pursuant to Section 3 of the Law of Succession Act.***

***(5). The scheduled mode in the certificate of confirmation of grant first be prepared under the leadership of the earlier appointed administrators to execute the distribution in consonance but not in exclusion of Section 40 of the Law of Succession which embolds African Customary Law.***

***(6). As indicated in this Judgment and in concurrence with Justice Musyoka decision, the distribution table be subject to the residual estate which falls under Section 93 of the Law of Succession Act. This means the third family formally recognized as sole beneficiaries of Ngong/Ngong/27 their disentitlement fortified by the revoked grant had clearly conveyed titles to bonafide purchasers for value. That portion of land had been placed out of the hands of the estate 'rightfully' or 'wrongfully' on a fault not of their own making.***

***(7). In my estimation, if any purchasers interest or title to land is to be adversely affected by new mode of distribution, the estate be at liberty to compensate the portion of land equivalent to the current market value and improvement thereon for them to obtain alternative portion of land.***

***(8). In my opinion and at the fullness of time, equal share formula would be escapable unless the court can declare the whole of the sold out parcels of land alienated, conveyed and transferred by way of sale in terms of a "legal instrument of the court" properly applied without notice to the innocent and bonafide purchasers.***

I hope with this, I have acquitted myself in terms of **Judge Musyoka** Ruling in respect of Narok property. Costs of this litigation be in the cause.

It is so ordered.

**Judgment, written, signed by me on this 27<sup>th</sup> day of February 2020**

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**R NYAKUNDI**

**JUDGE**

**DELIVERED BY IN OPEN COURT AT KAJIADO THIS 8<sup>th</sup> DAY OF July, 2020**

.....

**CHACHA MWITA**

**JUDGE**