



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 262 OF 2017**

**(formerly Machakos HCCC No. 218 of 2012)**

**STEPHEN KIRUMBA GICHURU.....PLAINTIFF**

**VERSUS**

**PARSITAU OLE SAYO.....1<sup>ST</sup> DEFENDANT**

**JAMES KINTALEL SAYO.....2<sup>ND</sup> DEFENDANT**

**NOAH MURE SAYO.....3<sup>RD</sup> DEFENDANT**

**JOSEPH TAOTA SAYO.....4<sup>TH</sup> DEFENDANT**

**WILLIAM MARATTEI SAYO.....5<sup>TH</sup> DEFENDANT**

**KOONA SAYO.....6<sup>TH</sup> DEFENDANT**

**SIMON SANJA SAYO.....7<sup>TH</sup> DEFENDANT**

**MARY MORIPET SAYO.....8<sup>TH</sup> DEFENDANT**

**MARIAMU LANKWENWA SAYO.....9<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

By an amended Plaintiff filed on 23<sup>rd</sup> November, 2012, the Plaintiff prays for judgement against the Defendant for:-

- i. A declaration that the Plaintiff together with Pauline Wanjiru Gitau (deceased) are the absolute owners of ALL THAT property being L.R No. Kajiado/ Ntashart/ 597.
- ii. An order that the temporary structure constructed by the Defendant and/or any other person in LR. No. Kajiado/ Ntashart/ 597 be demolished.
- iii. An order that the Defendant be forcefully evicted from LR. No. Kajiado/ Ntashart/ 597.
- iv. Cost and interest of this suit.
- v. Any other relief that this Honourable Court may deem fit and just to grant.

The 1<sup>st</sup> Defendant filed his statement of Defence dated the 26<sup>th</sup> September, 2013 and denied all the averments in the Plaintiff except for the descriptive of the parties. He contended that if Joseph Muigai Wanene ever held the original title deed for Kajiado/ Ntashart/ 597 hereinafter referred to as the 'suit land', then the same was as a result of a mistake, error or misunderstanding. Further, that the said error or mistake was corrected and the 1<sup>st</sup> Defendant registered as owner of suit land. He insists Joseph Muigai Wanene could not have given a title which he did not have. He denied selling the suit land to any one and that he is a trespasser on his land. He explains that he has been in exclusive and quiet possession of the suit land and has never offered it for sale. Further, that there is no justification why he should be evicted from the suit land. He claims if there was a purported transfer or registration of any party's interest in the suit land other than his own, such transfer or

registration was obtained by misrepresentation, deception and fraud. Further, that there was no consideration; transfer was done without the consent of the land control board as well as requisite documents and without complying with the laid down procedures.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants filed their statement of Defence wherein they denied the contents of the amended plaint except for the descriptive of the parties and jurisdiction of the Court. They aver that for the last several decades and prior to them, their forefathers including ancestors have been in active, peaceable, uninterrupted possession and occupation of the suit land. They contend that the 1<sup>st</sup> Defendant held the suit land in trust for them and were not aware of any transaction involving sale of the said land but if at all the 1<sup>st</sup> Defendant sold it to the Plaintiff, then the same was null and void. Further, that they have reared livestock and practised farming on the suit land. They insist the suit land has not been sold or transferred to anyone. They reiterate that the Plaintiff is not suffering any loss as he is not the owner of the suit land. They state that the Plaintiff is not entitled to the orders sought in the Plaint since their occupation and possession of the land defeats any rights and interests which he may claim over the land.

The Plaintiff filed a reply to Defence where he reiterated his claim and insists the 1<sup>st</sup> Defendant confirmed having sold suit land to Joseph Muigai Wanene and hence was no longer owner thereof.

The matter proceeded for hearing where the Plaintiff called one witness while the Defendants had three witnesses.

### **Evidence of the Plaintiff**

The Plaintiff as PW1 claims that together with one Pauline Wanjiru (deceased) they purchased the suit land from one Joseph Muigai Wanene in 1988. PW1 testified that they were not able to occupy the suit land nor develop it as they all had work commitments. Further, that when they last visited suit land they saw temporary structures thereon which belonged to the Defendants. PW1 explained that he only met the 1<sup>st</sup> Defendant once in 2009 when they visited suit land together with the children of the deceased and he confirmed selling it but told them he had a dispute with Joseph Muigai Wanene over unpaid dues. He insisted when they purchased suit land it was vacant but on the said date there were two new 'mabati' structures on around quarter an acre of the land. He insisted that the suit land was not trust land as claimed by the Defendants. He averred that they obtained consent of the land control board and was allowed to transfer land to their names. In cross examination he confirmed Joseph Muigai Wanene purchased suit land from the 1<sup>st</sup> Defendant. Further that Joseph Muigai Wanene told him they were involved in law suit with the 1<sup>st</sup> Defendant. He contended that Joseph Muigai Wanene showed them a title deed in his name and they confirmed the position with the Land Registry. He explained that after purchasing the suit land in 1988, he annually visited the said land and apart from the structures he saw in 2009, he never met any person residing on it. He confirmed that they never developed the land. He produced the Letter of Consent to Transfer; Executed Transfer of Land Forms; Application for registration of Transfer; Certificate of official Search; Copy of Title for Kajiado/ Ntashart/ 597; Certificate of Death for Pauline Wanjiru Gitau and Certificate for Confirmation of Grant for Pauline Wanjiru Gitau as his exhibits.

### **Evidence of Defendants**

The 1<sup>st</sup> Defendant as DW1 testified in court that when he was selling land to Joseph Muigai Wanene they went to the Land Control Board to obtain consent to subdivide land parcel number Kajiado/ Ntashart/ 48. He explained that the purchase price was KShs. 5,000 per acre. Further, that after subdivision of Kajiado/ Ntashart/ 48 which was done by Joseph Muigai Wanene as title deed was at the Agricultural Finance Corporation, the resultant subdivisions were all registered in Wanene's names. He confirmed that at the time the title deeds were issued, Joseph Muigai Wanene had only paid him KShs. 38,000/=. He denied going to the Land Control Board to obtain consent to transfer until he saw in the newspaper advertisement that his land containing the two subdivisions of Kajiado/ Ntashart/ 48 were being auctioned. It was his testimony that he sued Joseph Muigai Wanene in 1989 but could not recall the judgement of the court. He insists Joseph Muigai Wanene only paid him KShs. 38,000/=. He stated that he sold half of his land to the late Prof. George Saitoti. He claimed to have sold another parcel of land to repay the loan Joseph Muigai Wanene took. Further, that the land he sold to Prof. Saitoti is the one he intended to sell to Joseph Muigai Wanene. He testified that Joseph Muigai Wanene never reverted the title of Kajiado/ Ntashart/ 597 back to his name. He averred that he got his land from Ntashart Group Ranch and has resided thereon with his family. In cross examination, he stated that he did not have documents to prove the subdivision of Kajiado/ Ntashart/ 48 and neither could he recall the resultant subdivision therefrom. He did not know the portion he resided on and could not recall when he sold land to Joseph Muigai Wanene. He insisted that they did not enter into a Sale Agreement but he sold him 100 acres for KShs. 5000 per acre. He confirmed that he took a loan for KShs. 60,000 at AFC. Further, that after Wanene had paid him KShs. 38, 000 , he proceed to AFC and took the title deed therefrom. In re-examination, he insisted he obtained consent to subdivide and not for transfer. Further, that after the subdivision, he was never shown which portion is Kajiado/ Ntashart/ 597 or Kajiado/ Ntashart /598. He contended that he repaid a loan at Kenya Commercial Bank. Further, that he did not have a claim against Joseph Muigai Wanene.

DW2 who is the wife to the 1<sup>st</sup> Defendant and mother to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> Defendants testified that she had resided on the suit land with her family. She explained that the husband inherited the land from his parents and was holding the same for the family. It was her testimony that all her children who are married reside on the suit land. Further, that they rear livestock and undertake farming thereon. She insisted that ever since she has resided on the suit land, no one has ever come to claim it. She did not know the suit land had been sold as her husband never told her. In cross examination she said she had resided on suit land since she was married which was around 50 years. She contended that suit land was big and she did not know the boundaries. Further, that she had never seen title to the suit land. She did not know Joseph Muigai Wanene but knew her husband sold a portion of suit land to Prof. George Saitoti. She did not know suit land was used to secure a loan at AFC.

DW3 stated that he was 28 years old and had resided on suit land since he was born and no one ever had come to claim it. He was not aware the land was sold. In cross examination he contended that he never witnessed transaction in respect to suit land as he had not been born. He knew the land was subdivided and only Kajiado/ Ntashart /598 was sold to the brother of Prof. Saitoti but Kajiado/ Ntashart /597 was not sold. He did not know if the Plaintiff had a title to the suit land. He did not know Joseph Muigai Wanene and if his father sold suit land. He clarified that the suit land was not community land but family land. Further, that the same was his father's land.

All parties filed their respective submissions which I have considered.

## Analysis and Determination

Upon consideration of the Plaintiff, Defences, Witnesses testimonies, exhibits and submissions, the following are the issues for determination :

- Whether the Plaintiff acquired a good title in respect to the suit land.
- Whether there exists a customary trust in favour of the 2<sup>nd</sup> to 9<sup>th</sup> Defendants.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

As to whether the Plaintiff acquired a good title in respect to the suit land.

The Plaintiff claims to have acquired the suit in 1988 and together with Pauline Gitau (deceased) from Joseph Muigai Wanene. The Plaintiff produced Letter of Consent to Transfer; Executed Transfer of Land Forms; Application for registration of Transfer; Certificate of official Search; and Copy of Title for Kajiado/ Ntashart/ 597. From the said documents, it is evident that Joseph Muigai Wanene was the vendor. The 1<sup>st</sup> Defendant confirmed in his testimony that he was selling 100 acres of land to Joseph Muigai Wanene who paid him Kshs. 38,000/=. Further, that he had taken a loan of Kshs. 60,000 with AFC and that it is Joseph Muigai Wanene who proceeded to pick the title deed from AFC after paying him part of the purchase price. He insisted that Joseph Muigai Wanene never paid the full purchase price. He confirmed that he only went to the Land Control Board for subdivision but after that the two title deeds were issued in Joseph Muigai Wanene's name. He further confirmed that he sold Kajiado/ Ntashart /598 to Prof. Saitoti. All the Defendants' witnesses did not know if the 1<sup>st</sup> Defendant sold land. In the 1<sup>st</sup> Defendant's testimony he did not say if he refunded Joseph Mungai Wanene Wanene the Ksh. 38,000/= he claimed he was paid as purchase price. Further, he could not recall the outcome of the suit he had instituted against Joseph Mungai Wanene. The Plaintiff in his submissions insist he is a bona fide purchase for value and relied on the case of *Katende Haridar & Company Limited (2008) 2 EA 173 cited in Weston Gitonga & 10 Others V Peter Rugu Gikanga & Another (2017) eKLR* to buttress their argument. The 1<sup>st</sup> Defendant submitted that the Plaintiff did not acquire a good title as there was no Sale Agreement produced as an exhibit. He relied on section 3 of the Law of Contract Act and the cases of *Daudi Ledama Morintat V Mary Christine Kiarie & 2 others (2017) eKLR and Daudi Kiptugen v Commissioner of Lands & 4 others (2015) eKLR* to support his averments. I note Joseph Muigai Wanene has not challenged the Plaintiff's title. The 1<sup>st</sup> Defendant further insists Joseph Muigai Wanene did not acquire a good title to transmit to the Plaintiff. He has relied on the case of *Daudi Kitugen V Commissioner of Lands & 4 Others (2015) eKLR* where the Court had held that the Certificate of Title as an end result is not enough and process of acquisition was material. I however note that DW1 in his own admission admitted he was selling 100 acres to Joseph Muigai Wanene who only paid him Kshs. 38,000/=. Further, that Joseph Muigai Wanene is the one who picked the title from AFC but he had applied for consent to subdivide and not for transfer. He could not recall the facts of the suit he had instituted against Joseph Muigai Wanene and neither did he produce the proceedings therefrom. From his evidence, I find that he is not being candid. If indeed the title was at AFC and it was picked by Joseph Muigai Wanene, someone must have paid for the loan for the said title to be released. He has claimed he did not know the numbers to the resultant subdivisions but how else did he proceed to sell Kajiado/ Ntashart/598 to Saitoti.... He admitted that when the title deeds were released in Joseph Muigai Wanene's names, he was shocked. If indeed that was the position why did he not proceed to challenge the titles. PW1 stated that DW1 told them he sold the land to Joseph Muigai Wanene but had an issue with him as he had not finalized paying the purchase price. On a keen perusal of the documents presented by the Plaintiff which included Letter of Consent to Transfer; Executed Transfer of Land Forms; Application for registration of Transfer; Certificate of official Search and Copy of Title for Kajiado/ Ntashart/ 597, to me it is clear they adhered to the legal process to obtain the title from Joseph Muigai Wanene who never lodged a claim against them.

Section 27 and 28 of the repealed Registered Land Act which was the law in place when the Plaintiff acquired his title stipulates that a person is the absolute proprietor of land once he acquires a title to it.

Further section 26(1) of the Land Registration Act holds that a Certificate of title is conclusive proof of proprietorship.

Section 24 (a) of the Land Registration Act further stipulates as follows: '**subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'**

**Section 26 of the Land Registration Act provides that a Certificate of Title is a prima facie evidence of ownership.**

In the case of *WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR* where the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**'

In associating myself with this decision as well as the legal provisions I have cited above and based on the evidence me, I find that the Plaintiff and the deceased estate are indeed the absolute proprietors of land parcel number Kajiado/ Ntashart / 597 and hence entitled to protection of the land in accordance with the provisions of section 24, 25 and 26 of the Land Registration Act.

As to whether there exists a customary trust in favour of the 2<sup>nd</sup> to 9<sup>th</sup> Defendants. The 2<sup>nd</sup> to 9<sup>th</sup> Defendants claim that having resided on the suit land for many years which land was owned by the 1<sup>st</sup> Defendant who inherited the same from his parents, there existed a customary trust over it. Further, that they never gave consent to the 1<sup>st</sup> Defendant to dispose of the same. The 1<sup>st</sup> Defendant as DW1 stated in court that he obtained the suit land from the Group Ranch. Further, that he had charged the same at AFC, subdivided the mother title and sold Kajiado/ Ntashart/598 to Prof. Saitoti. PW1 stated that when he purchased the said land in 1988 it was vacant but when he visited the land in 2009,

there existed some new 'mabati' structures thereon. DW2 and DW3 insisted that their ancestors and forefathers resided on the suit land which had been held in trust for them by the 1<sup>st</sup> Defendant. If indeed they resided thereon, how come there were just new structures on it. They submitted that at the time of purchase there was an overriding interest on the land. I note they did not raise the same in their pleadings. In the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR**, the Supreme Court held thus: -

***“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”***

In relying on this decision, I find that the 2<sup>nd</sup> to 9<sup>th</sup> Defendants cannot deviate from the averments in their Defense and hold that they are bound by their pleadings.

I note DW3 was not sure which portion of land they were residing on. DW2 even confirmed that the land was huge. Further, I note DW1 already sold a resultant subdivision to Prof. Saitoti after he had sold the same land to Joseph Muigai Wanene. They relied on the case of **Grace Mwakaria Mugambi V Philip Kimani (2018) eKLR and Isaac Minanga Kieba V Isaaya Theuri Miintanri & Another (2018) eKLR** to support these arguments. From the evidence by the 1<sup>st</sup> Defendant he acquired the land through the group ranch and it was not an ancestral land. The 2<sup>nd</sup> to 9<sup>th</sup> Defendant submitted that an overriding interest was created over the suit land at the time of transfer to Joseph Muigai Wanene and it is currently subject to the said overriding interest. They have also claimed customary trust over the land. I note the 2<sup>nd</sup> to 9<sup>th</sup> Defendant did not sue the 1<sup>st</sup> Defendant in respect to the customary trust and are only raising it now. To my mind, the issue of customary trust ought to have been canvassed by the 2<sup>nd</sup> to 9<sup>th</sup> Defendants before the 1<sup>st</sup> Defendant subdivided parcel Kajiado/ Ntashart/48 and disposed of the same. I note the 2<sup>nd</sup> to 9<sup>th</sup> Defendants seem to be comfortable with the sale of Kajiado/ Ntashart/598 to Prof. Saitoti but want to claim the Plaintiff's land. In the circumstance, I find that the Plaintiff did not hold a customary trust over the suit land in favour of the 2<sup>nd</sup> to 9<sup>th</sup> Defendants and this claim must hence fail.

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

- i. A declaration be and is hereby issued that the Plaintiff together with Pauline Wanjiru Gitau (deceased) are the absolute owners of ALL THAT property being L.R No. Kajiado/ Ntashart/ 597.
- ii. An order be and is hereby issued that the temporary structure constructed by the Defendants and/or any other person in LR. No. Kajiado/ Ntashart/ 597 be demolished after 90 days from the date hereof.
- iii. An order be and is hereby issued that the Defendants be forcefully evicted from LR. No. Kajiado/ Ntashart/ 597 after 90 days from the date hereof.
- iv. Cost of the suit are awarded to the Plaintiff

**Dated signed and delivered in open court at Kajiado this 4<sup>th</sup> March, 2020**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Muchiri holding brief for Ocharo for 1<sup>st</sup> defendant

M/S. Sawe for 2<sup>nd</sup> – 9<sup>th</sup> defendants

Court assistant- Mpoye