



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL CASE No. 10 of 2019**

**MARY ENOLE NKOLIA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**NAISIMAYIE TOGOM DIKIRR.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**KARSIS ENOLE YENGO.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**SUING IN THEIR CAPACITY AS THE PERSONAL REPRESENTATIVES OF  
PARMUAT Ole TOGOM (DECEASED)**

**VERSUS**

**ALLAN MUSANKA TOGOMO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DISTRICT LAND REGISTRAR NAROK.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**(FORMERLY ELC NO. 19 OF 2019 AT NAROK HIGH COURT REGISTRY)**

**RULING**

1. The applicants have applied under certificate of urgency in their notice of motion for the following orders. An order that pending the hearing and determination of this application, the court grants an order of inhibition, inhibiting the transfer and charge or any other dealings in respect of land parcel No. LR NO. Cis-Mara/Ilmashariani/morijo/408 forming part of the estate of the late Parmuat Ole Togom (deceased). An order that pending the hearing and determination of this application, this court makes a declaration as to maintenance of the status quo in respect of LR. NO. Cis-Mara/Ilmashariani/morijo/408. That this court makes an order of a declaration that the transfer of the said subject land, without the confirmation of the grant of letters of administration from the names of the late Parmuat Ole Togom is null and void. An order to revoke and annul the transfer and registration of the said subject land in the name of Allan Musanga Togomo in lieu and/or in place of the deceased. An order to issue directing rectification of the register in respect of the said subject land by deleting the name of Allan Musanga Togomo and to restore the name of the deceased as the legally registered owner of the subject land pending the petition of letters of administration to the estate of the deceased and issuance of a certificate of confirmation of grant. An order be granted to make provision for costs.

2. The application is supported by the following major grounds. The fraudulent transfer and registration of the suit land into the names of the respondent was done after the demise of the deceased. No distribution of the estate of the deceased can be undertaken prior to confirmation of the grant of letters of

administration. The fraudulent transfer and registration of the suit land in the names of the 1<sup>st</sup> respondent denied and/or deprived the applicants of their lawful entitlements and therefore the said registration ought to be revoked in terms of section 26 of the Land Registration Act.

3. The application is supported by a 17 paragraphs supporting affidavit of the 1<sup>st</sup> applicant. The major averment are as follows. She has averred that she is a personal representative of the estate of the deceased, having obtained a grant ad litem and has sworn the affidavit on behalf of the co-applicants. She has deposed that their late father was the original allottee of land reference No. LR. Cis-Mara/Ilmashariani-Moriyo/408 as per the copy of the group ranch register annexed to the affidavit and marked as annex "MEN 03". The deceased died on 4<sup>th</sup> May 2005 leaving behind seven children namely Rimoine Togom, Naisimayie Ene Dikir, Karsis Enole Yengo, Mary Enole Nkolia, Johnson Tumukia Togom, Allan Musake Togom, and Natari Everlyne Saitoti as shown in the chief's letter. She also has deposed that on 13<sup>th</sup> February 2019, she carried a search in the lands office. As a result, she found the suit land was registered in the name of the 1<sup>st</sup> respondent. She has further deposed that the acts of the 1<sup>st</sup> respondent were fraudulently as no succession process had been done.

4. She has also deposed that the 1<sup>st</sup> respondent has refused to remedy the position despite numerous efforts urging him to do so. The other matters deposed to are a replica of what is stated in the grounds in support of the notice of motion.

### **Submissions of the applicants**

5. Ms. Nkurrurah, counsel for the applicants submitted that the suit land emanated from the shares held by the deceased, who died on 4<sup>th</sup> March 2005. She also submitted that the deceased was the first registered owner of the suit land. She further submitted that on 4<sup>th</sup> September 2018, the first respondent fraudulently caused the suit land to be registered in his name. It was also her submission that no grant of representation had been applied for and obtained in respect of the estate of the deceased. She therefore submitted that under sections 55 and 82 of the Law of Succession Act (Cap 160) Laws of Kenya, no immovable property of the deceased shall be transferred or sold before a certificate of a confirmed grant has been issued. She also submitted that the gift *intervivos*, which is claimed by the respondent was an incomplete gift in law for the suit land was never registered in the name of the deceased at the time of his death. In support thereof she has cited Halsbury's Laws of England 4<sup>th</sup> Edition Volume 20 (1), paragraph 7

### **The case for the 1<sup>st</sup> respondent.**

6. The 1<sup>st</sup> respondent has filed a 15 paragraphs replying affidavit in opposition to the application. He has deposed to the following major matters. In response to paragraph 7 of the supporting affidavit, the respondent has deposed that their father only had shares in Ilmashariani Group Ranch and had not been allocated any parcel of land. He also deposed that he was the 1<sup>st</sup> registered owner of the suit land, which parcel of land was allocated to him by officials of the group ranch, which his brothers consented to. That on 7<sup>th</sup> September 2018 their father's name was substituted with his name with the consent of his brothers namely Johnson Tumuka Togom and David Rimoine Togom. In response to paragraph 10 of the supporting affidavit, the respondent has deposed that his brothers inherited land from the deceased, during his life time. He has further deposed that three of his sisters are all married and are happily residing on their husbands parcels of land and his fourth sister (Mary) has her own parcel of land.

7. He has further deposed that he did not inherit his father's land, but that his father directed his brothers to ensure that he is given land. As result, following the death of his father his brothers did what they had been told to do, that is, they consented to the name of their father being removed from the Ilmashariani Group Ranch register and be replaced with that of the 1<sup>st</sup> respondent. As a result, the 1<sup>st</sup> respondent acquired the suit land. He further deposed that none of his sisters and brothers objected to the 1<sup>st</sup> respondent being issued with the title deed in respect of the suit land. The 1<sup>st</sup> respondent has also deposed that he has not disinherited any of his sisters and brothers and the deceased's property was distributed

equally among all the children. The 1<sup>st</sup> respondent has deposed that the Land Registrar carried out his investigations and found that the 1<sup>st</sup> respondent lawfully acquired the suit land, after which he proceeded to remove the caution. Finally, the 1<sup>st</sup> respondent has deposed that if the orders sought are granted, he stands to lose a share of his rightfully acquired land.

### **Submissions of the 1<sup>st</sup> respondent**

8. Mr. Lemein, counsel for the respondent has submitted that the orders sought are final orders that may only be granted after hearing the entire suit on the merits. He cited ***Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola, Civil Application No 146 of 2008 (Ur 93/08) (2009) eKLR*** in which it was held that “...an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.....” Furthermore, counsel submitted that the applicants have not met the threshold for the grant of the orders sought, citing ***Giella v Cassman Brown [1973] EA 358*** in support of his submission. Finally, counsel submitted that the suit land does not belong to the estate of the deceased, since the suit land was transferred by the officials of Ilmashariani Group Ranch to the respondent, with the latter becoming the first registered owner.

### **Issues for determination.**

9. I have considered the affidavit evidence of the parties, the rival submissions of both counsel including the authorities that they cited in the light of the applicable law. As a result, I find the following to be the issues for determination.

1. Whether or not the applicants have made out a case for the grant of the orders sought.
2. Who bears the costs of this application?

### **ISSUE 1.**

10. This is an interlocutory application. What is sought are in essence final orders, which may only be granted after a full hearing of the substantive suit on the merits. I find that all the orders sought by the applicants if granted as prayed will amount to making final orders. This will render the substantive suit academic or moot. The applicants should have sought temporary orders pending the hearing and determination of the suit. Counsel for the applicants does not seem to have appreciated that she was seeking final orders, when what she intended to seek were temporary orders. By virtue of article 159 (2) (b) of the 2010 Constitution, I find this to be a technicality that is curable by the affidavit evidence of the parties. The said evidence has clearly brought out the issues in dispute. The major authorities cited by counsel for 1<sup>st</sup> respondent were decided before the 2010 Constitution. This Constitution directs the courts to promote substantive justice, without ignoring rules of procedure.

11. I now turn to the evidence tendered by the parties. The version of the applicants is that the estate of the deceased was not subjected to succession as required by law. The version of the 1<sup>st</sup> respondent is that he did not inherit the suit land from their deceased father. The suit land was transferred to him by Ilmashariani Group Ranch, with the consent of his two brothers and without objection by the sisters, now the applicants. Their deceased father was a member of that ranch. After the deletion of the name of their deceased father from the register of that ranch, the name of the 1<sup>st</sup> respondent was substituted in its place.

12. After considering all the circumstances and the evidence in the light of the applicable law, I find that the applicants have made out a case for the grant of temporary orders sought, pending the hearing and determination of the instant application. A temporary order of inhibition will therefore issue to preserve the status quo, pending the hearing and determination of the instant application. I therefore grant prayer No. 1 as modified. Prayer No. 2 is a duplication of prayer No. 1, in its unmodified form, notwithstanding its wording. I will therefore not grant it. Prayer numbers 3, 4 and 5 may only be granted after hearing and making determinations on the merits of the substantive application. They are therefore not grantable and I hereby decline to grant them.

## **ISSUE 2**

13. As regards the issue of costs, it is hereby ordered that costs of this application will be costs in cause.

Ruling signed, dated and delivered in open court this 15th day of October, 2019 in the presence of Ms. Nkurrenah for the applicants and in the absence of the 1<sup>st</sup> respondent.

**J. M. Bwonwong'a**

**Judge**

**15/10/2019**