



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 440 OF 2017

(Formerly Machakos ELC Case No. 146 of 2015 – OS)

IN THE MATTER OF AN APPLICATION BY KAAKAI ENE NANKOO MOSIANY

UNDER ORDER 37 RULE 1 (g) OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

KAAKAI ENE NANKOO MOSIANY.....APPLICANT

AND

KATETO OLE KIRONKI MIISIA.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, KAJIADO.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

By an Originating Summons dated the 14th May, 2015, brought pursuant to Order 37 Rule 1 (g) of the Civil Procedure Rules, Sections 26(1) (a) & (b), 30 (2) (a), 70 (d), 80 (1) & (2) and 101 of the Land Registration Act, the Applicant seeks for the following orders:

1. That it be declared that the property known as KAJIADO/ DALALEKUTUK/ 3134 which is illegally, irregularly, wrongfully and/or erroneously registered in duplicate in the names of two persons; the Applicant herein on one part and one Kironki Ole Misiia on the other, lawfully and indefeasibly belongs exclusively only to the Applicant herein as the bona fide registered proprietor which parcel of land devolved to her upon the death of her parents (being the only child of the late Lengatu Ole Raurau) and upon successful petitioning for Grant of Letters of Administration vide SRM Kajiado Succession No. 14 of 2006.
2. That the register at the Kajiado Lands Registry be rectified by deleting, expunging and/or cancelling the registration of one Kironki Ole Misiia as the alleged proprietor of all that parcel of land known as KAJIADO/ DALALEKUTUK/ 3134 and the resultant Certificate of Title to the said parcel of land in the name of Kironki Ole Misiia be cancelled.
3. That the inhibition placed on all that parcel of land known as KAJIADO/ DALALEKUTUK/ 3134 registered in the name of the Applicant herein be cancelled.
4. That the Respondent be condemned to pay the costs of this suit.

The 1st Respondent KATETO OLE KIRIONGI MIISIA opposed the Originating Summons by filing a replying affidavit where he deposes that this is an old matter that has been severally resolved by the different Land Adjudication Officers, Administration Officers being the local area Chief, Sajiloni Group Ranch among other offices. He provided the genesis of the dispute herein where he explained that deceased Lengetu Raurau who was a member of Sajiloni Group Ranch and owner of land parcel number KAJIADO/ DALALEKUTUK/ 3134, hereinafter referred to as the suit land', died on the 24th June, 1985. He confirms that the deceased only had the Applicant as the biological child who got married in the 1940s. Further, that he is a son to the deceased younger brother and moved to his uncle's land when the Applicant was long married. He contends that the Applicant has never resided on the suit land and in 1994, at the Sajiloni Group Ranch Annual General Meeting, he appeared as the deceased beneficiary. He explains that in 2000 the Sajiloni Chief's office wrote a letter dated the 27th April, 2000 to the Land Adjudication Officer confirming that he is the legal heir of the deceased. Further, the said Chief also wrote a

letter dated the 31st December, 1998 to the District Land Adjudication office and Settlement officer that he was the deceased legal heir. He avers that vide a letter dated 4th November, 1998, he wrote to the District Land Adjudication Officer, confirming that the late Lengetu Ole Raurau family had appointed him as the heir of the suit land. Further, on 26th February, 2000 he wrote to the District Land Adjudication Officer reiterating this position. He claims when Sajiloni Group Ranch finally subdivided the land and forwarded the names for processing of title, his name was forwarded and that is how he obtained the title deed dated the 9th April, 2010 for the suit land. Further, that a search dated 20th March, 2014 confirmed that his title deed was issued on 9th April, 2010. He did not know under what circumstances the Applicant was issued with a title deed dated the 14th July, 2011. He denies engaging in fraud and claims it is the Applicant who has engaged in fraud. He reiterates that the Applicant has never resided on suit land and the Application for revocation of Grant in Machakos Succession Cause No. 61 of 2009 was dismissed for non attendance and not on merit.

The former Chairman of the Sajiloni Group Ranch one RIMOINE OLE TERTA filed a replying affidavit where he deposes that he was aware of the dispute over the land belonging to Lengetu Ole Raurau who was a member of Sajiloni Group Ranch. He explains that vide a letter dated the 2nd October, 1985, the late Lengetu Ole Raurau was awarded Land at Sajiloni Group Ranch. Further, that upon issuance of a letter to that effect, he learnt that the said Lengetu Ole Raurau had passed on and therefore his share had to be given to a nominee decided by the family. He contends that the dispute began at the family level with the family of the late Lengetu Ole Raurau concurring that the heir of the suit land initially allocated to the deceased should be awarded to Kateto Ole Kiriongi Miisia, the 1st Respondent herein. Further, that the dispute involved provincial administration and several meetings were held where the local area Chiefs who were in attendance confirmed that Kateto Ole Kiriongi Miisia was the rightful heir to the portion of Lengetu Ole Raurau and this culminated in his being registered as a member of Sajiloni Group Ranch Land No. 174 ILIOKO ORARAIT Minute No. 218. He confirms that when the land was adjudicated on, as a group they forwarded the name of Kateto Ole Kiriongi Miisia as the one to be issued with the Title Deed. He did not understand how the Applicant obtained her title. Further, that she is a member of Nkorika Group Ranch where she lives to date. He reiterates that the Applicant has never lived at Sajiloni since she got married.

The Principal Land Registrar NYANDORO DAVID NYAMBASO filed a replying affidavit where he deposes that according to the records at their offices, there was duplication of register in respect to the suit land, wherein one title was as a result of transfer from the Group Ranch while another title was issued as a result of the succession cause. He explains that one Green Card was opened on 8th April, 2010 while another one was opened on 9th April, 2010. Further, that for the one opened on 9th April, 2010, Sajiloni Group Ranch was registered as the first owner on the same date and the land was transferred to the 1st Respondent on the same date but a restriction was placed on 20th June, 2016 to prevent further dealings. He further explains that as for the Green Card opened on 8th April, 2010, it also indicated the Sajiloni Group Ranch was the first owner on the same date, with a restriction registered on 23rd April, 2010 but the same was removed pursuant to a Court Order in Kajiado SRM Succession Cause No. 14 of 2006. He confirms that following the removal of the restriction, the suit land was transferred to the Applicant on 14th July, 2011 and a title deed issued on 23rd December, 2010. Further, a restriction was placed on the land on 20th June, 2016 to prevent further dealings.

The matter proceeded for hearing where the Applicant had three witnesses while the Respondents also called three witnesses.

Evidence of the Applicant

The Applicant as PW1 testified that she was the only daughter of Lengetu Ole Raurau and Tumpes Lengetu. Both Lengetu and Tumpes died. Prior to his death Lengetu Raurau was member no. 174 of Sajiloni Group Ranch and in the Area List he was number 218. He was allocated land by the group ranch but by the time he died, the said land had not been registered in his name. The land is parcel number Kajiado/Dalalekutuk/ KAJIADO/ DALALEKUTUK/ 3134 hereinafter referred to as the suit land'. The Applicant claimed that she applied for letters of administration intestate vide SRM Kajiado Succession No. 14 of 2006 and obtained Grant of Letters of Administration Intestate in respect to her late father's estate which enable her acquire the title to the suit land through transfer by transmission. She contended that the 1st Respondent who is her cousin had also obtained a title deed in respect to the suit land. She produced various documents including the Certificate for Confirmation of Grant; Death Certificates for Lengetu Ole Raurau and Tumpes Ene Lengetu; Certificate of title; Area List and Members Register for Sajiloni Group Ranch, Objection proceedings in the Succession Cause; Certificate of Official Search and Various Correspondence as her exhibits.

Evidence of the Respondents

The 1st Respondent as DW1 claimed to have been legally registered as the first proprietor of the suit land. He testified that he was adopted by Lengetu Raurau through Maasai Customary Law. Further, that Lengetu Raurau had been allocated the suit land by Sajiloni Group Ranch. It was his testimony that the Raurau family had selected him as the heir to Lengetu Raurau as the deceased did not have a son. Further, that the Applicant who was the daughter to Lengetu Raurau was married and moved elsewhere. DW1 admitted that he was also allocated a different portion of land by the Sajiloni Group Ranch which neighbours the suit land. DW2 who was an official of the Sajiloni Group Ranch confirmed that they had sent the name of the 1st Respondent to replace Lengetu Raurau who was deceased to enable him inherit the suit land. The 1st Respondent produced the Death Certificate for Lengetu Raurau; Certificate of Title; Area List, Members Register; Minutes of Sajiloni Group Ranch Meeting of 20th May, 1994; Various Correspondence and Certificate of Official Search as his exhibits.

DW3 who was the Land Registrar, Kajiado confirmed that there were two title deeds issued in respect to the suit land. It was his testimony that there were no documents to support the registration of the 1st Respondent as owner of the suit land. He explained that the Applicant had been registered as owner of the suit land after the succession cause. It was his testimony that the Green Card for the title held by the Applicant was opened on 8th April, 2010 while the one held by the 1st Respondent was opened on 9th April, 2010. He further explained that the Applicant's Green Card was backed by the Area List, Members Register from the Adjudication Section and the Certificate for Confirmation of Grant. He contended that the Area List and Members Register emanated from the adjudication department.

All the parties filed their respective submissions.

Analysis and Determination

Upon consideration of the Originating Summons, replying affidavit, witnesses' testimonies, exhibits and rivalling submissions, the following are the issues for determination:

- Who is the rightful proprietor of the suit land.
- Who should bear the costs of the suit.

As to who is the rightful proprietor of the suit land.

Before I proceed to make a finding on who should be the rightful proprietor of the suit land, I will first analyse who between the Applicant and the 1st Respondent is entitled to be a beneficiary to the estate of Lengetu Ole Raurau.

The Applicant submitted that she is the rightful proprietor of the suit land having acquired the same after successfully petitioning for Grant of Letters of Administration Intestate and obtaining a Grant in respect to the estate of Lengetu Ole Raurau. She contended that she was issued with a title deed dated the 14th July, 2011. She disputed the 1st Respondent's title to the suit land and denied that he successfully satisfied the conditions for adoption under Maasai Customs. She submitted that the duplicate registration by the 1st Respondent is irregular. She relied on the following cases: **Republic V Chief Land Registrar & 3 Others (2014) eKLR and Godfrey N. Nyaga V Margaret W. Theuri & 3 Others (2015) eKLR** to buttress her arguments. The 1st Respondent in his submissions stated that section 32 of the Law of Succession Act applied in respect to his acquisition of the suit land. He stated that he was adopted by the deceased Lengetu Ole Raurau in accordance with the Maasai Customs and was appointed his heir by the family members. He insisted that since the Applicant was married to the Nankoo's family, she belonged there and could not inherit the suit land. Further, according to Kimaasai tradition, the family of Nankoo had no legal right to inherit the suit land as they were not part and parcel of the Raurau family. He further submitted that his title was issued on 9th April, 2010 earlier than the Applicant's title which is dated 14th July, 2011. He relied on the cases of **Norah Auma Asola & Another Vs Attorney General (2014) eKLR and Gitwany Investment Ltd V Tajmall Ltd & 3 Others (2006) eKLR** to support these averments.

The 2nd and 3rd Respondents submitted that the Applicant is the registered proprietor of the suit land as there were documents to support her registration. She was also a beneficiary to the estate of Lengetu Raurau. They relied on the case of **Peter Rianga Makori V Ronald Oino Angwenyi (2019) eKLR** to support their arguments.

It is not in dispute that the suit land was allocated to the deceased Lengetu Ole Raurau who was a member of the Sajiloni Group Ranch prior to his demise. It is further not in dispute that the deceased was the father to the Applicant and an uncle to the 1st Respondent. What is in dispute is that there are two title deeds held by Applicant and 1st Respondent in respect to the suit land. The Applicant acquired her title after she had undertaken a succession cause and obtained a Grant in respect to the deceased estate. As per the Certificate for Confirmation of Grant issued in the Kajiado SRM Succession Cause No. 14 of 2006, the Applicant was named as the beneficiary of the deceased estate and awarded the suit land. The 1st Respondent contended that he was adopted by Lengetu Ole Raurau, appointed his heir by the Raurau family and confirmed as heir by the Group Ranch that replaced him with the deceased. The Applicant and her witnesses were categorical that the 1st Respondent was not adopted by the deceased as no rites as per Maasai customs were observed hence he could not be the heir. The 1st Respondent was still using the name of the father, despite claiming he was adopted as a young child. He even confirmed that it is the deceased who took him to get his identity card. What is baffling is that if indeed the 1st Respondent had been adopted by the deceased, then how come he still retained his biological father's name. I opine that the burden of proof was upon him to prove that he was indeed adopted by Lengetu Raurau but he failed to discharge it. Further, in the meeting dated the 20th May, 1994 which was referred to by the 1st Respondent, the wife to the late Lengetu who was still alive as well as the Applicant herein did not participate therein. The 1st Respondent insists that acquisition of the deceased land was in accordance with the customary law and not the Law of Succession Act. The 1st Respondent provided letters dated the 27th April, 2000 and 31st December, 1998 by the Chief Sajiloni all confirming that he was the heir to the estate of Lengetu Ole Raurau. However, this seems ironical that as for livestock the said Raurau family allowed the Applicant to inherit but for land they invoked the Maasai customs. As per the letter dated the 4th November, 1998 written by the 1st Respondent, he indeed confirms therein that the people who decided he was to be the heir of the deceased estate were actually his immediate family members excluding the deceased family. Further, as per his letter dated the 26th February, 2000 to the District Land Adjudication Officer, he indicates therein that the Chief and various members allowed him to be the heir to the deceased estate. I note there was still no inclusion therein of the Applicant who was the daughter to the deceased. The 1st Respondent relied on section 32 of the Law of Succession Act to support his argument that he was indeed entitled to the deceased estate as it was not subject to succession. Section 32 of the Law of Succession Act provides that:

The provisions of this Part shall not apply to— (a) agricultural land and crops thereon; or (b) livestock, in various Districts set out in the ScheduleKajiado. The Law applicable to the distribution on intestacy on the categories of property specified in section 32 shall be the Law of Custom applicable to the deceased's community or tribe, as the case may be.'

I opine that the same cannot be read in exclusion to other provisions within the Succession Act which defines dependants as including the deceased children. From the repealed Land Group Representatives, Act, there is no indication that a married daughter ceases to have a right over the land allocated to her father, in the event of his death. It is my considered view that since the Group Ranch was dissolved and the deceased allocated land as per the Area List which land was later registered, it ceased to be communally or customarily owned land as claimed by the 1st Respondent but should have been subject to succession. Further, on the issue of the Maasai customary law taking precedence over the Law of Succession in respect to inheritance of the suit land. This Court notes that both the pre and post 2010 Constitutions spoke directly to issues of equality between men and women when it came to ownership of property and outlawed discrimination on the basis of customs. Article 27 (1) and (2) of the current Constitution provides that:

(1) Every persons is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.’

While, Article 2 (4) of the said Constitution further stipulates that:’

Any law including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.’

Since the Constitution is the paramount law of the land, I opine that these provisions are more superior than customary law and the provisions of section 32 of the Law of Succession Act. It is against the foregoing that I find that the 1st Respondent’s averments that a married daughter does not have a right to inherit the deceased father’s estate is not only repugnant to justice but contrary to the provisions of the Constitution and section 29 (a) of the Law of Succession Act which makes her a dependant. Based on my analysis above, I find that the Applicant was indeed entitled to inherit her late father’s land within Sajiloni Group Ranch.

On the issue of who is the legal proprietor of the land, DW3 who was the Land Registrar stated that there were no documents to support the registration of the 1st Respondent as the proprietor of the suit land. The 1st Respondent in his submissions has urged Court to disregard the evidence of Land Registrar claiming he disregarded the records from the Group Ranch. The Land Registrar in his evidence was categorical that the Green Card in respect to the Applicant’s title was opened on 8th April, 2010 while the one for the 1st Respondent was opened on 9th April, 2010. I note in the objection proceedings lodged in Machakos HCCC Succession Cause No. 61 of 2009 by the 1st Respondent, the application is dated 17th November, 2008 which was before the suit land was registered in his name. Further, on perusal of the Ruling of the Judge dated the 15th October, 2012, I find that the 1st Respondent was well aware that the Applicant had already been made a beneficiary of the deceased estate prior to his proceeding to obtain title to the suit land in his name in April, 2010. DW3 explained that before a Green Card is opened on land derived from a Group Ranch, an Area List and Members Register of the Group Ranch from the Land Adjudication Office have to be presented to them. It was DW3’s testimony that the Land Registrar relied on Area List, Sajiloni Group Ranch Members Register and the Grant from the Succession Cause to register the Applicant as the proprietor of the suit land. In the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

Further, in the case of **Peter Rianga Makori V Ronald Oino Angwenyi (2019) eKLR** the Learned Judge held as follows:’

There was absolutely no evidence to support the transfer and it is no wonder the land registrar took the unusual step of cancelling the entry in the green card. It is usual for all documents supporting a transaction to be held and retained in the parcel file at the lands office where the transaction relates to land registered under the previous (repealed) Land Registered Act, Cap 300 Laws of Kenya and now the Land Registration Act, 2012. There were no documents held by the Lands office to support the transfer to the defendant and when called upon by the land registrar to avail any documents in support of the transaction, the defendant failed to do so.’

The 1st Respondent submitted that his title was issued first and should hence supersede the Applicant’s title. He relied on the case of **Gitwany Investment Ltd V Tajmall Ltd & 3 Others (2006) eKLR** to support this averment. I note from the evidence of DW3, the 1st Respondent’s title was devoid of any support documents. It is trite law that registration of a person as a proprietor of land is a process and the document of title alone is not enough to prove ownership where the same is contested. I hence beg to differ with the 1st Respondent’s averments since the register to the Applicant’s title was the first one to be opened after which she was issued with a title later on once she had presented a Certificate for Confirmation of Grant to the Lands Office. Further, he never presented in court any documents of transfer to prove he indeed legally obtained his registration. Since I have already held that the suit land was subject to succession and noting that the Applicant indeed adhered to the legal process to obtain a Grant of Letters of Administration Intestate before being registered as owner of the suit land, I find that she is indeed the rightful registered proprietor and the title held by the 1st Respondent is unlawful. I further wish to make reference to section 143 of the Registered Land Act (repealed) that was the regime in place at the time of registration of the Applicant’s and 1st Respondent’s titles, which stipulated thus:’ .

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.’ These provisions are replicated in section 80 of the Land Registration Act which provides that:

‘(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act,

neglect or default.’

It is against the foregoing and in associating myself with the legal provisions including authorities cited above, I will proceed to direct the 2nd Respondent to rectify the register to the suit land and cancel the title held by the 1st Respondent.

In the circumstances, I find that the Applicant’s Originating Summons dated the 14th May, 2015 merited and will proceed to make the following final orders:

i. That a declaration be and is hereby issued that the property known as KAJIADO/ DALALEKUTUK/ 3134 lawfully and indefeasibly belongs exclusively to the Applicant **KAAKAI ENE NANKOO MOSIANY** herein as the bona fide registered proprietor.

ii. That the Land Registrar, Kajiado be and is hereby directed to rectify by deleting, expunging and/or cancelling the registration of one Kironki Ole Misiia as the alleged proprietor of all that parcel of land known as KAJIADO/ DALALEKUTUK/ 3134 and the resultant Certificate of Title issued to that effect be cancelled forthwith.

iii. That the inhibition placed on all that parcel of land known as KAJIADO/ DALALEKUTUK/ 3134 registered in the name of the Applicant herein be cancelled forthwith.

iv. Costs of the suit is awarded to the Applicant and should be borne by the 1st Respondent.

Dated signed and Delivered via email this 29th Day of April 2020.

CHRISTINE OCHIENG

JUDGE