



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 667 OF 2017

(Formerly Narok ELC No. 35 of 2017; Nakuru HCCC No. 107 of 2009 and Nairobi HCCC No. 485 of 2007)

NOKORET OLE MEIRAG & 3 OTHERS.....1ST PLAINTIFF

TOIMAS OLE SURUPAY.....2ND PLAINTIFF

DAITAN OLE RISA.....3RD PLAINTIFF

JEREMIAH OLE RISA NAKAYA.....4TH PLAINTIFF

VERSUS

NKAMA GROUP RANCH & 5 OTHERS.....1ST DEFENDANT

KEREMPU OLE KAATA.....2ND DEFENDANT

WILLIAM NOONKILETI OLE KAYIAA.....3RD DEFENDANT

TURERE OLE KAATA.....4TH DEFENDANT

EAST AFRICA PORTLAND CEMENT CO. LTD.....5TH DEFENDANT

HOWARD L WOYELO T/A MAKOS SURVEY SERVICES.....6TH DEFENDANT

JUDGEMENT

By a Plaint dated the 31st July, 2007 and amended on 26th September, 2013, the Plaintiffs pray for Judgement against the Defendants for:-

- a) A declaration that the subdivision of the said plot numbers 93 and 94 which was done disproportionately and without agreement of the general meeting of the registered members of the 1st Defendant is null and void.
- b) An injunction to restrain the Defendant from committing any act aimed at transferring plot No. 93 and 94 or the subdivisions thereof to any of its members and or to the 5th Defendant until the said plots are equitably subdivided and allocated in line with a resolution of the members of the 1st Defendant in a general meeting as per the consent order in HCCC 447 of 1994.
- c) A mandatory injunction to compel 1st, 2nd, 3rd and 4th Defendants to register the 4th Plaintiff as a member of the 1st Defendant and to be given land like any other member.
- d) A revocation and cancellation of all Transfers and consequently all Titles issued out of original plots No. 93 and 94 that were made before the equitable subdivision and allocation as per the resolution of the members.
- e) Costs of the suit.

The 5th Defendant filed its statement of Defence dated the 1st October, 2007, where it denied the allegations in the Plaint and contended that it is for all purposes an innocent purchaser for value. Further, there is no reasonable cause of action against it. It avers that if any payments were made then it had a right to purchase within the Law. It insists that it is not a proper party and has been wrongfully enjoined in this suit.

It denies receipt of any demand and notice of intention to sue.

Evidence of the Plaintiff

The 4th Plaintiff as PW1 testified that he was born in Nkama but the officials to the 1st Defendant had declined to register him as a member and instead coopted him as an Orphan. It was his testimony that his father and four brothers were all registered as members of the 1st Defendant and each allocated a share of land. Further, that he had gone abroad for further studies but when he returned in 1983, he found when his name had not been included in the 1st Defendant's register. He explained that he had initially lodged a caution in respect of the land belonging to the 1st Defendant and was prevailed upon by his children and elders from the 1st Defendant with a promise that they would allocate him land and they even showed him the said land. Further, once he lifted the caution the officials of the 1st Defendant proceeded to subdivide and distribute land but declined to give him the promised share. It was his contention that vide a Court Order in Nairobi HCCC No. 447 of 1994, dated the 1st October, 2003, the officials of the 1st Defendant had been directed to register him and others as members but they declined to do so. He stated that the 1st to 3rd Plaintiffs were however registered as members and allocated land and that is the reason they withdrew the claim herein against the Defendants. He reiterates that since he questioned certain actions of the officials to the 1st Defendant, to punish him, they declined to register him as a member. PW2, PW3 and PW4 all confirmed that the 4th Plaintiff was born in Nkama and that his father including his brothers had all been allocated a share of the land under Nkama Group Ranch. Further, that he should be registered a full member of the Nkama Group Ranch. The 4th Plaintiff produced various documents including Nkama Group Ranch Member's Register dated 13th August, 1981; Nkama Group Ranch Register GR1/14; Letter dated 24th January, 1996; Consent dated 1st October, 2003; Court Order dated 28th October, 2003; Demand Letter dated 7th December, 2006; Letter dated 12th March, 2007 addressed to Nkama Group Ranch; Letter dated 31st January, 2017 addressed to the Land Adjudication Officer, Kajiado and Letter dated 31st July, 2018 to the National Land Commission as his exhibits.

Evidence of the Defendants

The 1st to 5th Defendants called one witness DW1 William Ole Kayiaa the 3rd Defendant herein who confirmed that he was the secretary to the 1st Defendant. Further, that 1st Defendant was registered as the owner of plot numbers 93 and 94 measuring 190.1 and 39,562.3 hectares respectively. It was his testimony that on 25th June, 2003, the 1st Defendant met and decided on how its land would be subdivided to its members. Further, that 22 orphans including the 4th Plaintiff would each be allocated 50 acres of land. He testified that thereafter the 1st Defendant signed a consent dated 1st October, 2003 in Nairobi HCCC No. 447 of 1994. He confirmed that the 1st Defendant had indeed entered into a transaction with the 5th Defendant where members had agreed that the proceeds of sale of the 250 acres of land to it, would be utilized for surveying land, obtaining titles, paying legal fees and on community projects. He further confirmed that the 1st Defendant further entered into a Survey Agreement with the 6th Defendant which was executed on 18th August, 2003. It was his testimony that the subdivision of the 1st Defendant's land was complete. He insisted the officials of the 1st Defendant adhered to the proper legal process and all members have always been invited for meetings. He confirmed that he knew the father and the brothers to the 4th Plaintiff who were all members of the 1st Defendant. He could not explain why the 4th Plaintiff was categorized as an orphan member instead of a full member. He further explained that some of the members who had earlier on been deleted from the 1st Defendant's register including himself had been returned back into the Register. He further testified that the 1st Defendant had already issued 510 titles to its members. He further testified that the Group Ranch still had other parcels of land which he claimed were meant for utility. The Defendants proceeded to produce various documents including Group Register; Letter by Director Land Adjudication dated 21st November, 1990; Minutes of the Nkama Group Ranch meeting dated 25th June, 2003; Land Control Board Consent dated the 3rd October, 2007; Extract of Emboloi Group Register (Ref GR/ 1/17) and Nkama Group Ranch Members Register as exhibits.

The 4th Plaintiff filed his submissions but the 1st to 5th Defendants failed to file their submissions despite the Court granting them leave to do so.

Analysis and Determination

Upon consideration of the Plaintiff and 5th Defendant's Defence; Witnesses Testimonies, Annexures and Submissions, the following are the issues for determination:

- Whether the 4th Plaintiff is entitled to be registered as a full member of the 1st Defendant and be allocated land.
- Whether the Plaintiff is entitled to the Orders sought in the Plaintiff
- Who should bear the costs of the suit.

Before I proceed to deal with the issues herein, I note the 1st, 2nd and 3rd Plaintiffs withdrew their claim wholly as against the Defendants on the 4th February, 2019 during the pendency of this suit and it is only the 4th Plaintiff who still has a claim against them.

As to whether the 4th Plaintiff is entitled to be registered as a full member of the 1st Defendant and be allocated land. The 4th Plaintiff in his submissions reiterated his claim and contended that he is entitled to be registered as a full member of the 1st Defendant. The 4th Plaintiff as PW1 testified that his father and all his brothers were registered as full members of the 1st Defendant and allocated land. He identified the membership numbers of his brothers in the first register of 1968 as 1, 3 and 4 while their father was No. 45. He did not understand why he was categorized as an orphan member which fact he disputed in court and contended that this was based on discrimination. Further, that the 1st, 2nd and 3rd Plaintiffs were made full members and later given land. He explained that in 1993 he had filed a caution to stop the

subdivision of the suit lands and the same subsisted until 2007, but he withdrew it after being convinced by two elders that he would be given land. Further, the said elders from the 1st Defendant even showed him the land. It was his testimony that the Court had ordered him to be given land but he is yet to receive it. PW2 Joseph Naira Karei testified that he did not understand why the Plaintiff was categorized as an orphan member yet his father and brothers were full members. He explained that the issue of orphan members came up when the 1st Defendant was considering members who had been deregistered and later offered 50 acres of land. He knew the 4th Plaintiff since childhood as a neighbour who belonged to the Risa Nakaya family. Further his five brothers were members of the 1st Defendant. PW3 Ntasi Lekameri who was a former secretary of the 1st Defendant confirmed registering the 4th Plaintiff's father as member in 1967. PW4 Stephen Saigilo Risa who is the son to the 4th Plaintiff confirmed having been present in the meeting in 2007 with his father and elders from the 1st Defendant where the said elders convinced the father to lift the caution in respect to the Group Ranch land. He claimed the 4th Plaintiff was not registered as member of the 1st Defendant as he belonged to Emboliol Group Ranch but did not furnish a witness from the said Group Ranch to confirm this position. He confirmed that the 4th Plaintiff's parents were residing within Nkama. It was his testimony that the 4th Plaintiff was included as an orphan member and allocated 50 acres. He stated that the average share a full member is given is about 79.70 hectares which is approximately 198 acres. He further confirmed that there are several parcels of land which have not been allocated which he explained are for public utility. He denied that there are 1500 acres left as claimed by PW2 but I note in a letter dated the 13th December, 2019 from the Chairman Nkama Group Ranch to the District Land Adjudication Officer, the said Chairman confirmed the existence of land and stated as follows: **'We attach herewith a copy of parcels for onward subdivision and distribution to relevant beneficiaries like water points, hospitals, schools, churches and individual members.'**

Further, in the County Land Adjudication and Settlement Officer in his letter dated the 19th December, 2019 addressed to the County Land Registrar stated that: **'the committee deliberated on the matter as advised by this office and unanimously agreed to subdivide the parcels for all member.'**

DW1 further testified that the 4th Plaintiff's brothers namely Moita Ole Risa; Late Kalua Ole Risa; Daitan Ole Risa; and Paul Ole Risa were members of the 1st Defendant including their father. It was his testimony that he was first registered as the 1st Defendant's member in 1967 but in 1970 his name was removed from the register but later returned in the 1976 and now he is member number 324. He was unable to explain why the 4th Plaintiff was not registered as a full member of the 1st Defendant. He confirmed the existence of the Consent Order in HCCC No. 447 of 1994 and explained that it concerned registering members whose names had been deleted from the register in a general meeting as they had double registration in another group ranch within Kaputiei and their names were reinstated in the Register. He insisted that 4th Plaintiff had never been a member.

Article 63 (1) and (2) (a) of the Constitution provides as follows:

“(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

In the case of **John Lemarpe Tamei & 416 Others v Maimpi Kaiyie & 10 Others [2013] eKLR**, the Judge while dealing with an issue of membership to a Group Ranch stated that: **'It is not disputed that the parcel of land known as Kajiado/Torosei/11 is registered in the name of Torosei Group Ranch under the Land (Group Representatives) Act. It is therefore community land. The Respondents' counsel in his submissions also gave a detailed account of how entitlement to a group ranch is determined under Maasai customary law. The Land (Group Representatives) Act on the other hand provides on the issue of membership of a Group Ranch under section 28 as follows:**

“Where a question arises whether a particular person is a member of a group, a certificate signed by a majority of the group representatives shall be conclusive of the question: Provided that a person who is aggrieved by the issue of such a certificate may apply to a District Magistrate's Court having jurisdiction in the area to determine the question, and in such a case the determination of the court shall be conclusive.”

In addition, the Second Schedule to the Act, which contains provisions that are deemed to be in the constitution of every group ranch, provides as follows with regard to applications for membership: “All persons who are recorded in the said adjudication register as having an interest in the group land shall be entitled to become members of the group. If he is not recorded in the said adjudication register as a member of the group, no person shall be admitted to membership of the group unless— (a) that person has inherited an interest from a person who was recorded on that register; or (b) (i) the group representatives all agree; and

(ii) the representatives' decision is confirmed at an annual general meeting of the group; or (c) a court so orders.”

I do find that to the extent that the Torosei Group ranch is community land and the Appellants have stated that they reside thereon, a legal basis exists for their application for membership'

It is against the foregoing and in associating myself with the decision cited above, I find that the 1st Defendant has failed to explain why it had declined to register the 4th Plaintiff as a full member since he qualified to be one as per Article 63 of the Constitution. To my mind, it appears discriminatory as his father and both older and younger brothers got registered as full member but he was denied registration. I note there was already existence of the aforementioned Consent Order in HCCC No. 447 of 1994 directing the registration of the Plaintiff which

to date the 1st Defendant has failed to effect. In the circumstance, I find that the Plaintiff's claim is merited and will direct the 1st Defendant to register him as its full member and give him an equal share of land.

As to whether the Plaintiff is entitled to the Orders sought in the Plaint. The Plaintiff sought various orders including a declaration that the subdivision of the plots numbers 93 and 94 which was done disproportionately is null and void; an injunction to restrain the Defendant from committing any act aimed at transferring plot No. 93 and 94 or the subdivisions thereof; a mandatory injunction to compel 1st, 2nd, 3rd and 4th Defendants to register him as a member of the 1st Defendant and to be given land like any other member; revocation and cancellation of all Transfers and consequently all Titles issued out of original plots No. 93 and 94 as well as costs of the suit. Based on the evidence before me, I find that certain prayers including injunction, revocation of subdivision, cancellation of all transfers and declaration that the subdivisions should be declared null and void have all been overtaken by events and I will not grant any order to that effect. I will further exonerate the 5th and 6th Defendants from this suit as the Plaintiff did not demonstrate any reasonable cause of action against them. I will however award costs to the 5th Defendant.

On the issue of costs, I find that since the 1st Defendant including the 2nd 3rd and 4th Defendants who were its officials were responsible for the dispute herein, they should cater for the costs of this suit.

It is against the foregoing that I proceed to enter judgement for the 4th Plaintiff as against the 1st to 4th Defendants in the following terms:

- a) A mandatory injunction be and is hereby issued compelling the 1st, 2nd, 3rd and 4th Defendants to register the 4th Plaintiff as a member of the 1st Defendant and to be given land like any other members within 120 days from the date hereof.
- b) The costs of this suit is awarded to the Plaintiff and 5th Defendant which should be borne by the 1st, 2nd, 3rd and 4th Defendants.

Dated, Signed and Delivered via email this 29th Day of May, 2020

CHRISTINE OCHIENG

JUDGE