



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CASE NO. 457 OF 2006**

**SHADRACK OLTETIA OLE TOME.....1<sup>ST</sup> PLAINTIFF**

**TABITHA MATEYIAN TOME .....DEFENDANT**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL .....1<sup>ST</sup> DEFENDANT**

**FREDRICK OLONANA TOME.....2<sup>ND</sup> DEFENDANT**

**MRS. GERISHOM OLE TOME.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs are legal representatives of the estate of the late Meshack Ole Tome vide grant of letters of administration ad litem issued on 4<sup>th</sup> June 2004 and further by grant of letters of administration issued on 8th September 2005. The plaintiffs via an amended plaint dated 31<sup>st</sup> May 2006 claim the late Meshack ole Tome was the original allottee and registered owner of Plot No.24 in ***Enabelibel/Enengetia Adjudication Section*** while Joram Ole Tome and Gerishon Ole Tome were his brothers and licensees. The plaintiffs aver that appeal no. 214 of 1980 was allowed on 5th October 1998 and it was ordered that parcel no. 24 should be subdivided such that Joram Ole Tome and Gerishon Ole Tome get 10 acres each with the remaining portion going to Meshack Ole Tome. That despite the appeal being filed and allowed the Chief Land Registrar, the Director of Survey, the Districts Lands Registrar Narok and the District Surveyor Narok and the Director of Lands Adjudication and Settlement arbitrarily and fraudulently went ahead and subdivided the plaintiff's plot no. 24 into three giving rise to ***Enabelibel/Enengetia/24, 392 and 393*** measuring 97.5 Hectares and 74 Hectares respectively leaving the plaintiffs 83 Hectares. That Joram Ole Tome and Gerishon Ole Tome appealed the Minister's decision in HCCC No. 5961 of 1993 and the same was determined on 13<sup>th</sup> October, 1999 with the orders that; "It is ordered by consent that:-
  - i. ***That another 100 acres be exercised from the land parcel ENABELIBEL/ENENGETIA/24 adjudication section, this being additional to the 20 acres awarded to the two Plaintiffs by the Minister implemented in Land Appeal Case No. 214 of 1980 decided on the 8th day of October 1981.***
  - ii. ***That the Districts Surveyors accompanied by the parties advocates will visit the site of the excisions and excise the said 120 acres to be divided equally and registered in the names of the names of Mrs. Nanyikae Gerishon Tome and the Legal Representatives of the deceased Joram Ole Tome.***
  - iii. ***That the suit herein be marked as withdrawn with no orders as to costs."***

2. The plaintiffs claim that the Director of Lands Adjudication and Settlement, the Chief Land Registrar, the Director of Survey and the District Lands Registrar Narok and the District Surveyor Narok have been unable to implement the said Court order owing to the erroneous registration of parcels No ***Enabelibel/Enengetia/392*** and ***393*** with 97.5 and 74.0 Hectares instead of 10 Acres each respectively and that they require the Court order to enable them implement the said orders.
3. The plaintiffs claim against the defendants is for an order canceling the erroneous and fraudulent registration of ***Enabelibel/Enengetia/392*** and ***393*** with 97.5 and 74.0 Hectares respectively instead of 60 acres each.
4. The plaintiffs particularized fraud as against the defendants as follows;
  - i. The defendants fraudulently and erroneously registered ***Enabelibel/Enengetia/392*** and ***393*** with 97.5 and 74.0 acres instead of 10 acres each.
  - ii. Continuing with the registration dealing with parcel no. ***Enabelibel/Enengetia/24*** adjudication section after Meshack Ole Tome lodged his appeal in time.
  - iii. The defendants' i.e. The Chief Land registrar, the Director of Survey, Director of Lands Adjudication and settlement, the Director of Survey Narok and the Districts Lands Registrar Narok have refused and failed to cancel the titles ***Enabelibel/Enengetia/392*** and ***393*** with 97.5 and 74.0 acres respectively and register the two parcels with 60 acres each.
  - iv. The defendants refused and/or failed to register the rest of the land in the names of Meshack Ole Tome with 511.3 acres.
  - v. The defendants have failed and/or neglected to excise the said 120 acres only to be divided into 60 acres each for the defendants.
5. The plaintiffs aver and seek orders as follows;
  - i. That the said plot ***Enabelibel/Enengetia/24*** adjudication section to be subdivided as follows;

<b><i>Parcel No.</i></b>	<b><i>Hectares</i></b>	<b><i>Acres</i></b>
24	206.94	511.3
392	24.28	60.0
393	24.28	60.0

The plaintiffs seek judgment against the defendants as follows that; an order cancelling ***Enabelibel/Enengetia/392*** and ***Enabelibel/Enengetia/393*** with **97.5 acres** and **74.0 acres** respectively and a fresh registration done to Mrs. Nanyikae Gerishon Tome and the legal representative of the deceased Joram Ole Tome each getting 60 acres and that the remaining 511.3 acres or 206 hectares to be registered in the name of Meshack Ole Tome as per the High Court order issued on 13<sup>th</sup> October 1999 in Civil Case no. 5961 of 1993 and this order be implemented by the Chief Land Registrar, the Director of Survey, Director of Lands Adjudication and settlement, the Director of Survey Narok and the District Lands Registrar Narok both on ground and on R.I.M.

6. The 1st defendant in its defense dated 27<sup>th</sup> November 2007 denied the allegations raised by the plaintiffs and put them to strict proof thereof. It also stated that the suit as drawn did not disclose any cause of action and as such the same is bad in law and that it offends the Government Proceedings and Public Authorities Limitation Act and it sought a dismissal of the plaintiffs' suit.
7. The 2nd and 3rd defendants in their amended defense dated 4th May 2010 denied there having been an order for subdivision of parcel No. 24 as the purported decision of 5th October 1981 by the Minister did not amount to a decision as the same was made without jurisdiction and was therefore a nullity. The defendants further denied the allegations of fraud raised by the plaintiffs adding that the parcel of land that was to be subdivided was ***Enabelibel/Enengetia/24*** and this did not interfere with parcel no. ***Enabelibel/Enengetia/392*** and ***393***. The defendants also denied that

they had been given 10 acres each by the Minister adding that the order of 13th October 1999 had marked the suit as withdrawn and as such the same could not give any orders capable of being enforced. They further denied that that the registration of **Enabelibel/Enenetia/393** and **392** were erroneous adding that the plaintiffs have been misusing the orders purportedly given on 13th October, 1999 to harass them. In conclusion they denied being served with an intention to sue and jurisdiction of this court to hear this matter. They sought to raise a preliminary objection to the effect that the suit does not lie since it is for enforcement of orders purportedly given in HCCC 5961 of 1993 and the same offends Section 34 of the Civil procedure Act.

8. Subsequently the plaintiffs filed a reply to the 2nd and 3rd defendant's defense and reiterated the contents of their plaint adding that parcels no. **Enabelibel/Enenetia/392** and **393** arose from the objection proceedings No. 60 which was determined on 15th January 1979 and further added that the reading of the consent order made on 13th October 1999 clearly stipulated that the 2nd and 3rd defendants were only entitled to 120 acres and after adding them 1010 acres to the ministers decision implemented in land case no. 214 of 1980 and that the same affected parcels No. **Enabelibel/Enenetia/392** and **393** with the registration of 97.5 and 74.0 hectares respectively were erroneous as no basis of the said registration exists. They further denied the defendant's claim that the suit was res judicata.

### **PLAINTIFF'S EVIDENCE**

9. The plaintiff called 4 witnesses. **Luka Kirrinkai Ngotiek**, testified that the said land was opened for settlement by the government in 1957 whereby people from different districts ventured to acquire shambas for themselves. He claims to have known Meshack Tome as he was the 1<sup>st</sup> person to settle in Enabelibel in 1957 and he acquired plot number 24 and that he had been his immediate neighbor since 1961 when he moved to Enabelibel area and acquired plot number 28 which was opposite Meshack Tome's.
10. He testified that Gerishon Tome and Joram Tome both got plots at Kisiriri which were later allocated to needy settlers as they did not go to occupy the same. In 1974, 22 elders were appointed by the land adjudication to be members of the Land Adjudication Committee for the Land Adjudication section that dealt with boundary disputes. The said team was headed by Meshack Tome. He testified that neither Joram nor Gerishon raised an objection to Meshack Tome's parcel nor filed an objection either at the Land Adjudication Committee or at the District Arbitration Board stages, instead they filed their complaint directly with the Land Adjudication officer from there the case moved to the Minister and finally to the High Court of Kenya.
11. **Tom Marara Nyangau** a legal officer working in the Ministry of Land and Registrar of titles testified that at the time he made a statement in respect of this case he was in the department of land adjudication. He testified that he was aware that the appeal to the ministry No. 214 of 1980 was determined. That the same was in respect of **Enabelibel/Enemata/24**. That the appeal arose from the objection proceedings case No. 60 on parcel No. 24. The objectors were Timothy Tinkoi Tome, Freddy Olanana Tome and Joram Wantai Tome. The respondent was Meshack Kisangani Tome. The objection proceedings were concluded on the 15/1/79 and the appeal no. 214 of 1980 arose out of the objection 60. The findings were that the surveyor was to plot each portion or demarcate each portion as developed by the three brothers. The parties in the objection were to be awarded a specific number as a result of the sub-divisions and this was done on the 23<sup>rd</sup> March 1979. The appeal was filed by Meshack Tome. It was heard and determined and Mr. Oburu gave a decision that the defendant be awarded the portion they were developing in parcel no. 24 and survey sketches were to be done on what was to be implemented. Upon sub-division two new parcel numbers 392 and 393 and were awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. 392 was awarded to Joram and was indicated as portion 'b, c and d' 393 was awarded to Gerishon and it was marked 'a, c and d' in the sketch. The acreage was not indicated in the award. This made it tricky to implement. Later, Mr. Oburu was summoned by the Director of Land Adjudication and Settlement and requested to liaise with the surveyor to go and survey the portion on the ground to facilitate the implementation of the decision and clarify the acreage. The D.C went to the ground with the

- surveyors and confirmed the portions being developed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as approximately 10.0 Acres each. This was communicated by the D.C through his letter dated 19<sup>th</sup> August 1993 to the Adjudication and Settlement Officer. Thereafter the District Surveyor was again requested to go and plot 10.0 acres from the two parcels 392 and 393 and it was done. This was to be reflected in the R.I.M. The remainder was to be plot no. 24 which created 392 and 393. The parties went to court and they received the order of 13<sup>th</sup> of October 1999 and through a letter dated 12<sup>th</sup> April 2006, the surveyor was instructed to implement the said order.
12. From the court order the parties were awarded 10 acres from the mother parcel no. 24. There was to be an additional 100 acres from the court order and in total they were 120 acres. There was no appeal from the said decision and the decision is to be implemented by the surveyor and the same forwarded to the Registrar to reflect what is on the ground. Parcels no. 392 and 393 were created from the objection proceedings and the rest was to remain in parcel no. 24.
13. He testified that he was summoned to appear in court in his official capacity as a legal officer in the defendant of land adjudication and settlement. He testified that they have many registries and the files are kept there under the general direction of their Director. The officers to hear objections and adjudication operate under the director. Once they get a case the directors assigns duties. There is the legal office that handles court issues on behalf of the director. The duties are delegated by the Director. The Director is the custodian of all the documents on behalf of the Ministry. That the then Rent Act provided that the officers conducted the cases on behalf of the Minister. Mr. Oburu was not the one to produce the documents since they had custody of the documents the director produces them in an official capacity as he did. Most of the documents marked confidential are from other persons. That once the letter is put in the open file it is not a confidential letter. He stated that the adjudication process could have begun in 1974 or 1975 and was determined in 1979. It is not practical possible to get the officers who handled the objection proceedings as some cannot be found while some have passed on.
14. He testified further that the proceedings for the appeal no. 214 are with time in this file and that the appeal was filed on the 23<sup>rd</sup> March 1979 and that it was filed on time. That when the objection decision is delivered parties are given 60 days within which to appeal. That the Minister's decision was given on the 5<sup>th</sup> October 1981 and clarification on the acreages was done in 1993. As per the map which was part of the proceedings and it indicated the portions. That from the main proceedings the acreages were indicated when the District Commissioner was recalled to go to the ground with the surveyor and that the report in 1993 under his letter dated 19/8/93 indicated the 2 portions to be approximately 10 acres each. That since the orders had not been implemented on the ground by 12/4/06, the Director gave instructions to the District Surveyor to go and have it implemented on the ground. That after the objections have been heard there is a period of 60 day within which any aggrieved party can appeal to the Minister. That once the 60 days expire the adjudicator registers are published complete and the PID's forwarded to the director of surveyor with all list of persons will pending appeal cases to enable her produce the RM1. The fair prints are the ones from which they get the final prints. That they facilitated the registration of each case and 392 and 393 were generated. That from the appeal the current acreages of 392 and 393 were supposed to be 10 acres each but as per the court order 100 acres was to be done to make each person 60 acres each.
15. **Shadrack Oltetia Ole Tome**, a son to Meshack Tome testified that his father, was allocated parcel no. 24 at Enabelibel/Enengetia during the Adjudication process. That during the said adjudication process the 2<sup>nd</sup> defendant's father Joram Tome and the 3<sup>rd</sup> defendant's husband, the late Gerishon filed an objection proceedings pertaining to parcel no. 24 **Enabelibel/Enengetia/24** with the Land adjudication office Narok which proceedings concluded on 15<sup>th</sup> January 1979. Aggrieved by the said decision Meshack Tome had filed an appeal no. 214 of 1980 and the same was heard and determined on 5<sup>th</sup> October 1981 with the Minister awarding the 2<sup>nd</sup> and 3<sup>rd</sup> defendants 100 acres in addition to the 20 acres already awarded by the Minister of Land Appeal No. 214 of 1980. Subsequently the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed an appeal in the High Court being 5961 of 1993 which was heard and determined via a consent order on 13<sup>th</sup> October 1999. However despite the

said orders the defendants proceeded to unlawfully and illegally collude amongst themselves and obtained No. ***Enabelibel/Enengetia/392*** and ***393*** registered in the names of Joram Oltiyeki Tome and Nanyikae Gerishon Tome each measuring 97.5 and 74.0 Hectares respectively instead of the 10 acres each as awarded by the minister in the appeal. He urged the court to cancel the titles ***Enabelibel/Enengetia/392*** and ***393*** registered in the names of Joram Oltiyeki and Nanyikae Gerishon Tome to enable the Commissioner for Lands through the 1<sup>st</sup> defendant to comply with the Minister's award in appeal no. 214 of 1980 and make fresh registration with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants 10 acres each and a further 50 acres as ordered by the court on 13<sup>th</sup> October 1999. He added that they had followed all legal processes to implement the Minister's award but the 1<sup>st</sup> defendant could not effect the same due to the fraudulent registration of the parcels.

16. ***Tabitha Mateyian Tome***, the widow of the late Meshack Ole Tome and a co-administrator of her late husband's estate reiterated Shadrack's testimony and urged the court to rectify the erroneous registration of parcels no. ***Enabelibel/Enengetia/392*** and ***393*** in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to enable her consolidate her husband's estate facilitating distribution of the same to her children. Stating that it was important for the 1<sup>st</sup> defendant to implement the Minister's award by giving the 2<sup>nd</sup> and 3<sup>rd</sup> defendants their 10 acres each instead of what is unlawfully registered in their names.

### **1<sup>st</sup> Defendant's case**

17. ***John Gabriel Mule*** testified that he works with the Ministry of Lands Housing and Urban Development having joined the service in September 1991 and was based at Narok District then at the department of Land Adjudication and Settlement. Currently he testified that he was at the Nairobi office. He testified that he was served with court summons and that the ministry has records of this case and he was able to get the file appeal No. 214/80. He had with him the original records containing the case proceedings and other correspondences but sought to adduce in court certified copies of the same.

### **2<sup>nd</sup> defendant's case**

18. The 2<sup>nd</sup> defendant in his defense called 2 witnesses. ***Fredrick Olonana Tome***, testified that the land at Enabelibel belonged to the Tome family. That initially it was Gerishon Tome who was staying on the land but he would occasionally accompany his father to the land towards 1959. The brothers stayed peaceful until the issue of the land came up when the late Meshack started claiming to be the owner of the whole land. The two brothers Joram Ole Tome and Gerishon Tome objected to this and demanded the land to be shared amongst the brothers. Gerishon Tome got ***Enabelibel/Enengetia/393*** and Joram Ole Tome got ***Enabelibel/Enengetia/24***. Meshack Tome was not satisfied and he went to the Minister who made a decision that the parties get pieces of land and also placed a boundary from one end of the land to the other. Mr. Oburu subsequently purported to write a letter indicating that he had meant to give the defendants 10 acres each. They objected to this and filed a case in Court 5961 of 1993 but the same was later withdrawn. They alleged that there were no orders issued by this court and that the family of Meshack Tome wanted to disinherit them. He further stated that when the family of Joram Tome refused to recognize the boundary as indicated by Mr. Oburu and each family went back to occupy the land registered in their name.

19. ***James Tajewo Ololmaitai*** testified that he has been a resident of Enabelibel since 1959 and knew the families of Meshack Tome, Gerishon Tome and Joram Tome. He testified that the area of Enabelibel was owned by the Narok Town Council and was opened for occupation around 1957 and 1958. That when he moved there it was only Gerishon out of all the brothers who was settled there and that he met him in Nakuru in 1959 when he had been attacked by thugs and he had gone to the same hospital for treatment for a broken leg and later on met Meshack Tome and Joram Tome when they went to visit him. That later on Gerishon's and Meshack's wife went and settled in the Gerishon's compound. He testified that Gerishon had confirmed to him that the said land

belonged to the family. At the time Meshack used to work at the District Commissioner's office while Joram was working as a veterinary officer in Narok. He further testified that during land adjudication Meshack was the chairman of the committee and that he had tried to take up the whole land but after hearing of the case the land was shared among the three brothers. That subsequently Meshack complained and the chairman, Mr. Oburu went and put a boundary. Meshack was not happy and he refused to recognize the boundary. After this the families went back to their old boundaries and obtained their title deeds.

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

20. The 3<sup>rd</sup> defendant in support of his case called 2 witnesses. **Harun Sankale Tome**, a resident of Enabelibel and son of the late Gerishon Tome testified that his father, Meshack Tome and Joram Tome were brothers. That he was born on the said land and that his father was staying alone on the said land but was later joined by the family of his two uncles Meshack Tome and Joram Tome. The three families stayed together peacefully until the time of land adjudication when Meshack demanded the whole land to be his however the case was heard by elders who decided that the land be shared amongst the three brothers. The late Gerishon Tome got **Enabelibel/Enenetia/393** and Joram Ole Tome got **Enabelibel/Enenetia/24** which was registered in his mother's name as the father was ailing at the time. Meshack went to the minister and Mr. S. E. Oburu, the then District Commissioner Narok who heard the case and went and placed a boundary across the land. His family and Joram's family were satisfied but Meshack was not. Later Mr. S. E. Oburu purported to write a letter stating that Joram's and Gerishon's family were given 10 acres each. This he claims showed that Mr. Oburu was being influenced and that even the marks on the ground could not support the allegations of 10 acres. It was his testimony that the land belonged to the three families and there was no way one family could be favored over the others.

21. **James Tinkoi Ole Kipiko**, a resident of Enabelibel since 1957 testified that he came to Enabelibel when it was 1st opened for settlement by Narok County council. That he knew the three brothers, Gerishon Tome, Joram Tome and Meshack Tome. That when he went to Enabelibel, he found the late Gerishon living under a tree and was alone on the said land. That later, he built a house and moved his wife and mother to the land. That he knew the three families before he moved to Enabelibel. Meshack was working at the District Commissioner's office at Narok while Joram was a Veterinary at Narok. That later, Meshack and Joram brought their families to Enabelibel and stayed in close proximity. Everything was peaceful until the time for demarcation when problems arose. Meshack claimed to be the owner of the whole land and wanted the brothers to miss the land. The issue was dealt with by the adjudication committee who decided that each of the three brothers was entitled to the land they were occupying and each was given the land they occupy to date.

### **Submissions**

#### **Plaintiff's Submissions ( In summary)**

15. The plaintiff listed 6 issues for determination
- i. *Whether the Minister's appeal/order has been implemented*
  - ii. *Whether the 2nd and 3rd defendants ought to continue holding larger parcels of land than they were awarded both in the Appeal and in the High Court Civil Case No. HCCC 5961 of 1993.*
  - iii. *Whether the 2nd and 3rd defendants are entitled to 60 acres each instead of the current registration of 97 hectares and 74 hectares respectively*
  - iv. *Whether this honorable court has a duty to bring this matter to an end by ordering implementing of the Minister's decision and Court Order granted on 13th October 1999.*
  - v. *Whether by this Honorable Court granting the prayers sought and ordering implementation of the Minister's decision and Court Orders of 13th October 1999.*
  - vi. *That the suit herein be marked as withdrawn with no orders as to costs.*

### **Whether the Minister's appeal/order has been implemented?**

22. The plaintiff submitted that all witnesses for both the plaintiff and the defence concurred that the Minister's appeal decision had not been acted on. No survey work had been done nor had the adjudication process come to a conclusion after the Minister's appeal that awarded the 2nd and 3rd respondents 10 acres each for sustenance.

### ***Whether the 2nd and 3rd defendants ought to continue holding larger parcels of land than they were awarded both in the Appeal and in the High Court Civil Case No. HCCC 5961 of 1993?***

23. It was submitted that the consent order given on 13th October 1999 ordered that another 100 acres be exercised from the land parcel number *Enabelibel/Enengetia/24* Adjudication Section, this being additional to the 20 acres awarded to the two plaintiffs by the decision of the Minister implemented in land Appeal Case No. 214 of 1980 decided on the 8th day of October, 1981.

24. That the District Surveyors accompanied by the parties advocates visited the site of the excisions and exercise the said 120 from to be divided equally and registered in the names of Mrs. Nanyikae Gerishom Tome and the legal representative of the deceased Joram Ole Tome. That the honorable court recognized the 2nd and 3rd defendants were awarded 10 acres in the Minister's appeal and were given an additional 50 acres each vide the consent order. The plaintiffs submit that they are willing to comply with consent orders thus their prayer for cancellation of registration of parcels *Enabelibel/Enengetia/392* and *393* with erroneous acreage from the consent order to be implemented so that each get 60 acres.

### **Whether the 2nd and 3rd defendants are entitled to 60 acres each instead of the current registration of 97 hectares and 74 hectares respectively?**

25. The plaintiff submitted that there was no reason why the 2nd and 3rd respondents should continue holding larger parcels of land than they were actually awarded in the Minister's decision and consent of 13th October 1999. They added that the registration of parcel No. *Enabelibel/Enengetia/392* and *393* were a creation of the objection proceedings which was appealed against and that the respondents only ought to hold 60 acres each as per the court order.

26. On issue no **iv, v and vi**, the plaintiffs submitted that the Court has a duty to ensure execution of its orders given by this court and the court should ensure their strict compliance. They added that the adjudication process is provided for under the Land Adjudication Act. They added that no prejudice will be occasioned to the respondents if the orders sought are granted. They submitted that the 2nd and 3rd defendants secured the registration of the parcels *Enabelibel/Enengetia/392* and *393* before the appeal period was over. The plaintiff further submitted that the defendants only filed defence statements with more denials.

27. The plaintiffs submitted that they have capacity to push for the implementation of the Minister's appeal and the High Court order in HCCC 5961 of 1993 given on 13th October 1999. They argue that the said orders cannot be implemented unless parcels No. *Enabelibel/Enengetia/392* and *393* with erroneous acreages are canceled for them to be given the proper acreages or for the surveyors to generate fresh parcel numbers with proper acreages. They submitted that they had complied with what was required for the implementation of the Appeal and court orders in order to conclude this long litigation.

### **1<sup>st</sup> Defendant's submissions**

28. It was submitted that the applicable law for ascertainment of land rights and interest over Trust land is the Land Adjudication Act, Cap 284 and that the same has given an elaborate appeal mechanism where an individual is aggrieved by a decision of the Land and Adjudication and Settlement officer, the Land and Adjudication Committee and the Land Arbitration Board and the Minister's Appeals Committee. It was further submitted that section 29(3) of the Land and

Adjudication Act Cap 284, mandates the director to sign a certificate of finality upon the completion of the adjudication process and forward the register to the Chief Land Registrar for registration before finally being signed by the Director. That Section 31 of the said Act provides that this is followed by the publication of the register, a hearing, determination and implementation of the adjudication register.

29. It submitted that section 6 and 9 of the Land and Adjudication Act mandates the Land Adjudication Committee to determine claims in land in accordance with the African customary Law, with the land Arbitration boards hearing appeals from the Land adjudication Committee. That this is the process that the plaintiffs should have complied with as the suit land was trust/community land. It was submitted that the aforementioned procedure was what the plaintiff was to have followed, if the suit in question was for Trust/community land and more so if undeserving people had been allocated their ancestral land.
30. It referred the court to Section 30(1) of the Land Adjudication Act which provided that; ***“Except with the consent in writing of the Adjudication officer, no person shall institute and no costs shall entertain any proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final.”*** The 1<sup>st</sup> defendant highlighted various aspects that the plaintiffs claim that Mr. Tome was the original allottee and original owner of Plot No. 24 in ***Enabelibel/Enenetia*** adjudication section while Joram and Gerishon Tome were his brothers and licenses. That they claim that their father filed Land Appeal No. 214 of 1980 with the Ministry of Housing and the same was allowed on 5th October 1981 ordering that parcel no. 24 to be subdivided such that Joram and Gerishon Tome get 10 acres each with the remaining portion to remain with Shadrack Ole Tome. That is evident that Joram and Gerishon appealed the Minister’s decision in Civil suit No. 5961 of 1993 and that the matter was concluded vide a consent order issued on 13th October 1999 before Justice Ole Keiwa with orders that an additional 100 acres to be awarded on top of the 20 acres awarded to the 2nd and 3rd defendants in land appeal no 214 of 1980. Further that the said order directed that the Narok District Surveyors in the company of the parties advocates to excise the 100 acres to be divided equally and registered in the names of Mrs. Nanyikae Tome and legal representative of the deceased Joram Tome, that the 1st and 2nd defendants have failed and refused to cancel title ***Enabelibel/Enenetia/392*** and ***393*** and register the two titles with 60 acres each. It submitted that the offices represented by the 1st defendant have not been able to implement the court order issued on 13th October 1999 in that they require a further court order indicating that the rest of the land was to revert back to the late Meshack Ole Tome.
31. It was further submitted that the parties are bound by the consent and that the same can only be set aside on account of fraud in review or even in an appeal. That it is not evident that the defendants complied with the provisions of Section 29 and 30 of the Land Adjudication Act in obtaining the consent of the Land Adjudication and settlement officer before filing suit no. 5961 of 1993. It was further submitted that the 2nd and 3rd respondents have consent in law on how the issue should be resolved and their efforts to set aside the court order issued on 13th October 1999 but the same was dismissed by Justice Phillip J. Ransley on 14th July 2005. That the 2nd and 3rd defendants are restrained from claiming that the suit properties were issued in 1987 and estopped from claiming that the same is the first registration taking cognizance of the provisions of the now repealed Land Act section 143 and that they are bound by the consent judgment of 13th October 1999 and the register ought to be rectified (not cancellation of the title) to give effect to the order and settle the dispute.

### **2<sup>nd</sup> and 3<sup>rd</sup> Defendant’s submissions**

They 2<sup>nd</sup> and 3<sup>rd</sup> defendants summarized the issue for determination as follows;

- i. *Whether this court can implement the consent order given in HCCC No.5961 of 19993 as sought by the plaintiffs in this suit*
- ii. *Can this court grant the orders sought in prayers No.2 of the remanded plaint considering that the*

- title in question were acquired by first registration?
- iii. Did the minister, represented by Mr. Oburu, the then District Commissioner Narok, render a decision on 5th October, 1981 or by his letter dated 19th August 1993 capable of being enforced in the manner sought by the plaintiffs in this suit?
  - iv. Are the defendants guilty of fraud as alleged in the re-amended plaint?
  - v. Who pays for costs of this suit?

**Whether this court can implement the consent order given in HCCC No.5961 of 1993 as sought by the plaintiffs in this suit?**

32. It was submitted that by the time the consent order of 13th October, 1999 was made, the land title no. **Enabelibel/Enengetia/24** was already registered under the registered Land Act, Cap 300 a fact that is not only confirmed by the reference in the order or by reference to the plaintiff's evidence and exhibits produced during trial of this case. The certificate of title to land known as **Enabelibel/Enengetia/24** was issued to Meshack Ole Tome on 11th November 1987 after the registration had been done on the same date.
33. Secondly that the parcel from which the 100 acres was to excise was the land comprised in **Enabelibel/Enengetia/24**. Title No. **Enabelibel/Enengetia/392** was registered on 2nd October 1984 while **Enabelibel/Enengetia/393** that the order of 13th October does not referred to these parcels of land even though they had been registered by the time the orders were issued and that the said consent order clearly stated which title was to lose the 100 acres. Finally, that the suit was marked as withdrawn with no orders as to costs and therefore the order begs the question as to whether there is still in existence any order capable of being enforced or implemented as prayed for in the re-amended plaint.
34. They questioned whether the said orders given in HCCC No. 5961 of 1999 can be the basis upon which this court grants prayer no.2 of the re-amended plaint and prayed that the court cannot grant prayer no.2. They added that the land from which the 100 acres was to be excised was **Enabelibel/Enengetia/24** and not the land belonging to the 2nd and 3rd defendants further that there is no order in existence capable of being enforced or implemented.
35. Further that even though there was an order capable of being enforced, this court lacks jurisdiction to enforce an order given in another suit. That the parties are legal representatives of the late Meshack Ole Tome who was a party to HCCC No. 5961 of 1999 and this suit is debarred by the afore mentioned Section 34 of the Civil Procedure Act. They relied on the case of **United Insurance Co. Ltd –vs- Lawrence Musyoka t/a Lawrence Wambua t/a L.M. Wambua & Co. Advocates**.
4. Further they submitted that the re-admitted plaint cannot be granted in that the said titles are first registrations and relied on section 143 of the Registered Land Act, Cap 300. That prayer no. 2 is prohibited by the above provision of law adding that the plaintiffs' amended plaint alleges fraud against the defendants. They relied on the case of **Ambale –vs- Masolia [1986] KLR 241** in its holding quoted with approval the decision in **Obiero –vs- Opiyo [1972] EA 227**, where it was held that, “ **On a proper construction of section 143 of the Registered Land Act, even if the alleged fraud or mistake was shown, the title of the church was indefeasible. The suit was improper and misconceived and could not be brought against the defendant.**”

Further in the case of **Mugogo –vs- Sihowa [1988] KLR 256**, it was held that, “ **There was no evidence of fraud or mistake in this case and even if fraud were established, the respondent's title could not be defeated in as much as it was acquired by a first registration. That the above express provision of the applicable law and considering that the titles in question was acquired by first registration and as such the plaintiff's suit must fail with costs.**”

- iv. Did the minister, represented by Mr. Oburu, the then District Commissioner Narok, render a decision on 5th October, 1981 or by his letter dated 19th August 1993 capable of

**being enforced in the manner sought by the plaintiffs in this suit?**

36. It was submitted that the genesis of the appeal of the Minister's (Appeal No. 214 of 1980) were objection proceedings (No.60) lodged by Joram and Gerishom Tome. The said objections came about because Meshack Tome an Adjudication Committee for Enabelibel section had attempted to take all the land belonging to his brothers including parcel no. 24. After the hearing of the said objection the following findings were made.

***“Following the above findings, I order that the surveyor to mark out the three brothers and have them recorded under their names within 60 days.”***

That under section 29(1) of the Land Adjudication Act, Cap 284, an appeal from the decision of the Land Adjudication Officer, as above was to be lodged within 60 days. That this right of appeal was clearly explained in the order given by the Land Adjudication officer of 15th January 1979. An appeal from the said decision was to have been filed by 15th March 1979 no appeal was filed and as such the same remained valid as it was never challenged. That the Meshack Tome sought to file the same on 23rd April 1979 about 38 days later no order extending time or seeking leave was sought and as such the appeal and any subsequent proceedings thereon were a nullity.

37. That the Minister's Mr. Samuel Oburu proceeded to hear the invalid appeal and purported to deliver a decision on 5th October, 1980, ordering that the late Joram Tome and Gerishom Tome be given land as indicated on the map which was land no. **392** and **393** no acreages was mentioned that indicated Joram and Gerishom to get 10 acres each adding that even from the evidence given by those that were present during the adjudication process indicated that the names of the three brothers was to be registered against the said land adding that this evidence is consistent with all circumstances prevailing that Mr. Oburu did not reverse the decision of the Land Adjudication Officer but just confirmed it.

38. That the plaintiffs later on influenced S. E. Oburu more than 3 years later to write the letter dated 19th August 1993 purporting to clarify his decision of 5th October 1980 regarding the three parcels of land as ordered by the land adjudication officer on 5th January 1979. In view of this the defendants argued that the only valid decision was given by the Land Adjudication officer on 15th January 1979 adding that the purported appeal filed by Meshack Tome was filed out of time hence the same together with the decision of 5th October, 1980 arising from the said appeal are invalid and did not overrule the order of the Land adjudication Officer. Further they submitted that the registration made in favor of Joram Oltiyeki Tonen on 2nd October 1984 in respect of Title No. **Enabelibel/Enengetia/392** and that in favor of Nanyikae Gerishom Tome made on 8th December, 1983 were lawfully and procedurally done. The late Meshack K. Ole Tome also went ahead and charged his title for **Enabelibel/Enengetia/24** to the Agricultural Finance Corporation on 21st April 1995 to secure a loan. It was their submissions that there was no decision made by the Minister, represented by S. Oburu directing that each of the defendants were only to get 10 acres each and the letter dated 19th August 1993 cannot be called a decision and Mr. S. Oburu had no good reason to write the same long after adjudication had been concluded and titles issued in respect of the parcels in dispute.

39. On allegations of fraud it was submitted that the plaintiffs submitted that although the plaintiffs pleaded fraud and gave particulars of fraud no fraud was proved against any of the defendants and that proper procedure was followed before the 2nd and 3rd defendants got their two parcels of land registered and that they had blocked the attempt by the late Meshack Tome to grab their land by lodging the necessary objections. That the only party guilty of attempted fraud is actually the plaintiffs in an attempt to deprive the defendants their land they filed this case against the Attorney General in May 2006 more than 22 years without joining the defendant who were obviously going to be affected by the said orders. That the plaintiffs then colluded with the office of the Attorney General to set excise off huge parts of the 2nd and 3rd defendants land and that the 2nd and 3rd defendants rushed to court to set aside the said court orders once they became aware of the same.

40. That another attempted fraud by the plaintiff is the letter dated 19th August 1993 adding that there is no doubt that the said letter was written at the behest of the plaintiffs knowing very well that Mr. Oburu had retired from public service and had no power to write the said to clarify a decision he had written 13 years earlier when he was gazetted by the Minister to hear appeals and as at 13th October 1993 S. E. Oburu had no power to sit on any appeal. That each of the three brothers got enough land with Meshack getting 83.5 Hectares, Joram 97.5 Hectares and Gerishon 94.0 Hectares.

41. That though the same are not equal they are nearly the same and insisting that each of the brothers get only 10 acres Meshack of being greedy and the court should not allow the plaintiffs to continue doing so. They submitted that the plaintiffs' claim is incompetent and lacks merit and threat the court has no jurisdiction to enforce orders given in another suit and that the suit in which the alleged orders were given was withdrawn and both the suit and the orders do not exist. That the titles being challenged and which the plaintiffs seek to have cancelled were procedurally and lawfully registered and arise from first registration and this court cannot cancel the titles nor amend the land sizes not only because the plaintiffs have failed to prove the alleged fraud as section 143 of the Registered Land Act expressly prohibits this court from interfering, by cancellation amendment or rectification, in a title which is acquired from the first registration.

42. Having considered the evidence, submissions and cases relied on, in my view, these are the Issues for determination;

- i. *Who was the original allottee of **Enabelibel/Enengetia/24**?*
- ii. *Has the plaintiff proved on a balance of probability that he is the owner of **Enabelibel/Enengetia/24**?*
- iii. *Has the plaintiff established fraud against the defendants?*
- iv. *Has the plaintiff proved erroneous and fraudulent registration of **Enabelibel/Enengetia/392 and 393**?*
- v. *Should the court order cancellation of **Enabelibel/Enengetia/392 and 393**?*
- vi. *Who should bear cost of suit?*

### **Determination**

43. At the time of publication of the register the said parcel of land was registered in Meshack's name so in essence he was the original allottee of **Enabelibel/Enengetia/24**. This is supported by the testimony of the plaintiff and the 1<sup>st</sup> defendant. Though the 2<sup>nd</sup> and 3<sup>rd</sup> defendant recognize that the plaintiff was the original allottee they say that he was holding the said land in trust for them. Upon the publication of the said register Timothy and Freddy lodged objection 60 before the Adjudication officer and a decision given on 15th January 1979 to the effect that the surveyor ascertains the plots developed by each brother. Subsequently the said parcel of land No. **Enabelibel/Enengetia/24** was subdivided into **Enabelibel/Enengetia/392** and **393** measuring 97.5 Ha and 74.0 Ha registered to Joram and Gerishon respectively. Meshack aggrieved by the said decision challenged the said decision before the Minister in Appeal No. 214 of 1980 it is important to note that by the time Meshack lodged the appeal the said parcels 392 and 393 had not been registered. (From the page 68 of the plaintiff's list of documents) **Chismara/Enabelibel/Enengetia/393** measuring 74.0 Hectares in favour of Nanyikae Grison Tome was registered on 8/12/83 while **Chismara/Enabelibel/Enengetia/392** measuring 97.5 Hectares was registered in favour of Joram Oltiyeki Tome on 9/7/84. There is a log showing that Meshack's appeal No. 214 of 1993 was filed on 23rd April 1979 and had been received in the land adjudication office on 23rd March 1979. There is also the letter dated 19th September 1979 from Land adjudication officer forwarding the appeal by Meshack to the Minister of land & Settlement. The said appeal was against the decision of the Objection No. 60 dealt with by the adjudication officer. From the foregoing it is clear that the registration of the two parcels **Enabelibel/Enengetia/392** and **Enabelibel/Enengetia/393** came after the plaintiff the late Meshack Tome had already lodged an appeal. On realizing the same he lodged a restriction and caution on both parcels of land respectively to secure his interests. I therefore find that though the

2nd and 3rd defendant's claim their title is secure on grounds of 1st registration the same was done knowing very well that there was a pending appeal in regards to the said parcel of land and as such their argument on the same cannot stand.

44. Meschack's appeal no. 214 of 1980 was heard and determined in his favour as evidenced by the communication letter dated 27th July 1993 from the Ministry of Land and Housing as follows;

Mr. S. E. Oburu

P.O. Box 137

Koru.

Dear Sir,

**IMPLEMENTATION OF THE DECISION OF THE MINISTER'S LAND APPEAL NO. 214 OF 1980 ME SHACK OLE TOME –VS- JORAM OLE TOME AND GERISHON OLE TOME P/NO. 24 ENABELIBEL/ENENGETIA ADJUDICATION SECTION.**

You heard and determined the above appeal case on behalf of the minister on 5th October, 1981 and your decision was as follows;

The court feels that on humanitarian grounds and for the facts that the respondents have been in this place for all that period the court is of the opinion that the respondents should be given pieces of land from P/No. 24 as indicated on the map. Plot No. 392 for Joram Tome (BCD) and plot no. 392 for Joram Tome (BCD) and plot no. 393 for Nanyikae Ene Gerishon Tome (ACD).

While the award is quite clear in the proceedings, the boundaries of the two parcels were not marked on the ground. Consequently, the District Surveyor Narok has not been able to implement your decision.

As agreed during your visit to this office on 25th June 1993, you should visit the land on Tuesday, 17th August 1993 in order to mark on the ground the external boundaries of the two pieces of land awarded to Mr. Joram and Mrs. Nanyikae Ene Gerishon Tome (deceased) to defendants.

By a copy of this letter, the District Surveyor, Narok is requested to accompany you to the disputed land in order to carry out the necessary survey work immediately.

The government will meet your transport expenses from Koru to Narok and back and at the same time you will be paid subsistence allowance at the current rate during the exercise.

Yours faithfully

DR. T. O. AROKA

For: DIRECTOR OF LAND ADJUDICATION /SETTLEMENT

45. From a reading of the said letter the 2<sup>nd</sup> and 3<sup>rd</sup> defendant were awarded 10 acres only on humanitarian grounds. The letter also called upon Mr. Okumu who had handled the matter to ensure that the same was executed by him accompanying the parties in the company of the District Surveyor to mark the external boundaries.

Subsequent to this letter there was the letter dated 8<sup>th</sup> October 1993 from Ministry of Land and Housing as follows;

The District Surveyor

P.O. Box 228

Narok.

**IMPLEMENTATION OF THE DECISION OF THE DISTRICT COMMISSIONER ON MINISTER'S LAND APPEAL CASE NO. 214 OF 1990 PLOT NO. 24 IN ENABELIBEL/ENENGETIA/ADJUDICATION SECTION**

The above appeal was heard and determined by the district Commissioner Narok on 5th October, 1981. The appeal was allowed and it was ordered that parcel no.24 should be subdivided such that Joram Ole Tome and Gerishon Ole Tome get each 10 acres the remaining portion to remain with the appellant, Meshack Ole Tome vide copy of appeal proceedings enclosed.

Please implement the order both on ground and on the R.I.M. and forward two copies of the amended prints to me for registration.

By a copy of this letter, the District Land Adjudication and settlement Officer Narok is requested to prepare new adjudication records for the new numbers that will result from the subdivision and forward the same to me for further action.

J. B. Mutsembi

For Director of Land adjudication and Settlement

c.c.

The provincial Surveyor

P.O. Box 410

Nakuru.

The District Land Adjudication and

Settlement Officer

P.O. Box 95

Narok.

The letter further emphasizes that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were entitled to get only 10 acres from the said parcel of land and that the said 10 acres were to be excised from plot. No.24.

46. Subsequent to this Joram and Gerishon filed Civil suit No. 5961 of 1993 challenging the Minister's decision and on 1st August 2002 the parties appeared before late Justice Ole Keiwa and recorded a consent to the effect that,

***“1 Another 100 acres to be excised from land parcel No. Enabelibel/Enengetia/24adjudication section, this being and addition to the 20 acres awarded to the two plaintiffs by the decision of the minister in the decision of the minister implemented in Land appeal case No. 214 of 1980 decided on 8th October 1981.***

***2. That the District Surveyors accompanied by the parties' advocates will visit the site of the excisions and excise the said 120 acres to be divided equally and registered in the names of Mrs. Nanyikae Gerishom Tome and the legal representative of the deceased Joram Ole Tome.***

**3. The suit be marked as withdrawn with no orders as to costs.”**

47. Later on in July 2005 the 2nd and 3rd defendants sought to set aside the above orders the same was heard and dismissed on 14th July 2005 by Justice Ransley on grounds of delay and that no allegation of fraud or mistake was sufficiently set out by the 2nd and 3rd defendants. Further on 4th July 2006 Lady Justice Aluoch in adopting the consent orders of the late Justice Ole Keiwa given on 1st August 2005 held,

**“1. That the orders of this honorable court in HCCC 5961 of 1993 given on 13th October 1999 are adopted subject to the cancellation of the erroneous registration of parcels number Enabelibel/Enengetia/393.**

**2. That the District Registrar Narok do carry out the above order within the next 30 days from today**

**3. No orders as to costs.”**

The said orders were stayed by Justice Aluoch on 21st June 2006. Subsequently the plaintiff's brought this suit No. 457 of 2006. As it stands from the fore going there is no review or appeal of the consent order recorded before Honorable Ole Keiwa.

**ii. Has the plaintiff established fraud against the defendants in registration of Enabelibel/Enengetia/24?**

The plaintiffs allege fraud as against the defendants. They claim that at the time of lodging the appeal the 2<sup>nd</sup> and 3<sup>rd</sup> defendants colluded with the 1<sup>st</sup> defendant to have the land unlawfully registered in their names. Fraud must be specifically pleaded and proved. In the case of *Koinange & 13 others v Koinange [1968] KLR 23* it was held that; **“allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities.”** Further the burden of proof lies on the one who alleges fraud and the standards of proof are higher than on a balance of probability as required in civil cases. On this I rely on the case of *Ratilal Gordharibhai Patel -vs- Lalji Makaiji (1957)* where it was held that **“the burden of proof in fraud case is very high approaching but below the burden of proof beyond reasonable doubt.”** Further in the case of *Chesulut vs Timothy Sangok Appeal no. 265 of 1999* it was held that;

**“it is trite law that allegations of fraud are not to be proved on a balance of probability, the burden of such proof lies somewhere between balance of probability and beyond reasonable doubt.”**

In order to prove fraud one has to call evidence to support his/her claims as was held in the case of *Telcom (K) Limited –vs- KAM Consult (2001) 2EA 575*, where it was held that, **“the submissions of the respondent's counsel that fraud which can only be found on evidence after hearing.....the party alleging fraud had to prove fraud by calling evidence.....”**

In this case the plaintiffs allege fraud on basis that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants sought to register the said parcels of land knowing too well that the same were subject of an appeal and the same had not been heard and finally determined. From the evidence adduced the registration of the parcel of land held by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were done whilst the appeal to determine the acreage the 2nd and 3<sup>rd</sup> defendants were entitled to. I therefore find and hold that there was some element of fraud on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. I am however not persuaded that the 1<sup>st</sup> defendant was a part of the fraud as it appears that he did all that was necessary in efforts to execute the Minister's decision.

**iii. Has the plaintiff proved on a balance of probability that he is the owner of**

**Enabelibel/Enengetia/24?**

From the evidence adduced before this court and the chronological occurrence of events and the decisions made by the Minister and the consent recorded in this court I find that the plaintiff was the original owner of the land and in complying and giving effect to the orders of this court I find that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had even gotten an additional 50 acres each this I find is what they are entitled to.

**v. Should the court order cancellation of Enabelibel/Enengetia/392 and 393?**

The 1<sup>st</sup> defendant has expressed difficulties in executing the same without a court order as the plot no 24 had already been subdivided to get 392 and 393. To facilitate the excise of the 60 acres for Gerishon. I therefore, make the following order; the 1<sup>st</sup> defendant shall facilitate the cancellation of title **Chismara/Enabelibel/Enengetia/393** measuring 74.0 Hectares in favor of Nanyikae Grison Tome registered on 8/12/83 while **Chismara/Enabelibel/Enengetia/392** measuring 97.5 Hectares registered in favour of Joram Oltiyeki Tome on 9/7/84. Further, the 1<sup>st</sup> defendant to facilitate the excise of 60 acres each for Gerishon and Joram from the said plot no. 24. In doing so, the 1<sup>st</sup> defendant through the office of surveyor of Mark will put into consideration area the 2<sup>nd</sup> and 3<sup>rd</sup> defendant have developed. The District Surveyor will mark out the area not exceeding 60 acres each for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. The surveyor will also ensure that the portion excised is clearly reflected in the Registry Index Map. The 1<sup>st</sup> defendant will also ensure that the said parcels of land are registered in the proper parties names in cases of where the party is deceased the same will be registered in the administrator's names to hold the same in trust for the other beneficiaries. Any cost attracted by the 1<sup>st</sup> defendant's actions will be borne by the parties in respect of costs that attributed to them.

**vi. Who should bear cost of suit?**

Being family members each party to bear its own costs.

Dated, signed and delivered this **9<sup>th</sup>** day of **JUNE** 2015.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the 1st & 2nd Plaintiff**

.....**For the 1st Defendant**

.....**For the 2nd & 3rd Defendants**

**Ms. Charity**

**Court Clerk**