



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 39 OF 2020**

**IPITIETI OLE KILONGU alias IPITE PLE KILOKU (CHAIRMAN) ....1<sup>ST</sup> PLAINTIFF**

**LENKOKO OLE NKAMPAA ( SECRETARY).....2<sup>ND</sup> PLAINTIFF**

**LEMELOI PANINI (TREASURER).....3<sup>RD</sup> PLAINTIFF**

*(All suing as the official of NARANKA SELF HELD GROUP)*

**LEMONDOI OLE RAKITA SANOE (CHAIRMAN).....4<sup>TH</sup> PLAINTIFF**

**ANTHONY MOREKE KIMINTA (SECRETARY).....5<sup>TH</sup> PLAINTIFF**

**KILINTA OLE KITOINE KARARO (TREASURER) .....6<sup>th</sup> PLAINTIFF**

*(All suing as the office bears of ENAIBOR –AJIJK NGATET 1380 SELF HELP GROUP)*

**VERSUS**

**LEKISHON OLE LINTI alias CLLR JOHN LEDIDI.....1<sup>ST</sup> DEFENDANT**

**KASHAU OLE OLOLKUO.....2<sup>ND</sup> DEFENDANT**

**NAKURRO MAMEL.....3<sup>RD</sup> DEFENDANT**

**JOSEPH OLE EMUNI LEDAMA.....4<sup>TH</sup> DEFENDANT**

**SAPONYO OLE NKURUNA.....5<sup>TH</sup> DEFENDANT**

**WILSON LETOUWON OLE NKAMASAI.....6<sup>TH</sup> DEFENDANT**

**NAIVASHA SUB-COUNTY LAND REGISTRAR.....7<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....8<sup>TH</sup> DEFENDANT**

**THE DIRECTOR OF SURVEY.....9<sup>TH</sup> DEFENDANT**

**NAKURU COUNTY LAND SURVEYOR.....10<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL .....11<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiffs have instituted the present suit as representatives on their own behalf and on behalf of the members of Naranka Self Help

Group and Enaibor Ajjik Ngatet 1380 Self Help Group.

2. The plaintiffs claim they were all beneficiaries of land parcels **Maela/Ndabibi Block 5/3073** and Maela/Ndabibi Block 5/2253 measuring 2581 acres (approximately 1028 hectares) and 1626 acres (approximately 658.6 hectares) respectively. The plaintiffs aver that their interest as beneficiaries of the suit properties was determined in Nakuru HCCC No.89 of 1996 and Nakuru Civil Appeal No.64 of 2004 where the 17 defendants (who included the plaintiffs in the present suit) represented the interests of about 3000 Maasai people who comprised the beneficiaries. The plaintiffs assert that in the said previous suit the suit properties were awarded to them as beneficiaries but aver that the 1<sup>st</sup> to 6<sup>th</sup> Defendants, contrary to the decision/judgment in Nakuru HCCC No.89 of 1996 and Nakuru Court of Appeal Civil Appeal No.64 of 2004 unlawfully, fraudulently and illegally caused the suit properties to be subdivided and the resultant subdivisions to be registered in the names of the 1<sup>st</sup> to 6<sup>th</sup> Defendants.

3. *Inter alia* the plaintiffs pray for judgment against the defendants for orders that:-

1. *The Court do issue a declaration that the plaintiffs are beneficiaries of land parcels Maela/Ndabibi Block 5/2253 and 3073 and they are therefore entitled to their respective portions of land from these lands after due sub-divisions.*

2. *The Court do issue Rectification of the Register in respect of land parcel Maela/Ndabibi Block 5/2253 and 3073 and cancellation of the issued Title Deeds.*

3. *Orders do issue to have the Title Deeds to land parcel Maela/Ndabibi Block 5/2253 and 3073 issued to the 17 Defendants vide HCCC 89 of 1996 to hold in trust of themselves and all the beneficiaries who include the plaintiffs.*

4. The 1<sup>st</sup> to 6<sup>th</sup> Defendants upon being served with the suit appointed the firm of Karanja Mbugua & Company Advocates to represent them and on 6<sup>th</sup> July 2020 filed a Notice of preliminary objection on the following grounds:-

1. *That the plaintiffs suit is incompetent and unavailable to the plaintiffs under section 34(1) of the Civil Procedure Act, Cap 21 Laws of Kenya which states:-*

*“All questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit”.*

2. *That the issue raised in the present suit cannot be ventilated in this suit, but in Nakuru HCCC No.89 of 1996 (Ngai Farmers Co-operative Society Ltd –vs- Cllr John Ledid & others) because reliefs sought in the present suit relate to the execution discharge or satisfaction of a decree in the former suit.*

3. *That further and without prejudice to the foregoing point of law, this suit is “resjudicata” Nakuru HCCC No.89 of 1996 (see explanation 6 of section 7 of the Civil Procedure Act).*

5. The plaintiff filed grounds of opposition to the preliminary objection on 15<sup>th</sup> July 2020 denying the suit was incompetent and/or that the issues raised in the suit had been canvassed in Nakuru HCCC No. 89 of 1996. The plaintiffs denied the present suit was resjudicata by virtue of Nakuru HCCC No. 89 of 1996.

6. The preliminary objection was canvassed by way of written submissions. M/s Karanja Mbugua & Company Advocates filed their submissions in support of the 1<sup>st</sup> to 6<sup>th</sup> Defendants Notice of Preliminary objection while the Attorney General acting for the 7<sup>th</sup> to 11<sup>th</sup> Defendants filed his submissions in support of the preliminary objection. The plaintiffs through the firm of David K Gichuki & Co. Advocates filed submissions in response on 4<sup>th</sup> September 2020 and supplementary submissions on 16<sup>th</sup> September 2020.

7. The 1<sup>st</sup> to 6<sup>th</sup> Defendants submissions are to the effect that as the plaintiffs under paragraphs 7 and 8 concede that they have brought the present suit on their own behalf and on behalf of all members of Naranka Self Help Group and on behalf of all member of Enaibor- Ajjik Ngalet 1380 Self Help Group who were held to be beneficiaries of land parcels Maela/Ndabibi Block 5/3073 and Maela/Ndabibi Block 5/2253 in Nakuru HCCC No.89 of 1996 as well as in Nakuru Civil Appeal No.64 of 2004, the plaintiffs present suit is incompetent as the plaintiff ought to have pursued their interests, if any, in the said previous suits by virtue of section 34(1) of the Civil Procedure Act. The 1<sup>st</sup> to 6<sup>th</sup> Defendants submit that the plaintiffs present suit amounts to the plaintiffs seeking orders of this Court to enforce and/or execute the judgment and decree in the previous suit where the plaintiffs were themselves parties. The 1<sup>st</sup> to 6<sup>th</sup> Defendants contend the present suit constitutes an abuse of the Court Process and should be struck out. The defendants have in support of their submissions placed reliance on the following cases; **Charles Ngare Karaya -vs- Florence Muthoni & Another (2018) eKLR**; **Kepue ole Ngweta & Another -vs- Sarah Njoki Munge t/a Sanjomu Auctioneers (2015) eKLR**; and **James Wainaina Imunyu & 6 others -vs- Karanja Mbugua & Co Advocates & Another (2012) eKLR**.

8. The Attorney General on behalf of the 7<sup>th</sup> – 11<sup>th</sup> Defendants/respondents while supporting the preliminary objection contended that indeed the plaintiffs in the present suit were parties in Nakuru HCCC No.89 of 1996 and Nakuru Civil Appeal No.64 of 2004 which matters had been concluded by issue of a decree and judgment respectively and that their concern related to how the decree in Nakuru HCCC No.89 of 1996 was executed. The AG argued that if the plaintiff had any issue respecting how the decision in Nakuru HCCC No.89 of 1996 was implemented, they ought to have the matter canvassed in the same suit but not to file a fresh suit as they did. Alternatively the AG submitted the plaintiffs present suit was res judicata by virtue of section 7 of the Civil Procedure Act and on that account ought to be struck out.

9. The plaintiff in their submissions in opposition to the 1<sup>st</sup> to 6<sup>th</sup> Defendants preliminary objection submitted that the decision in Nakuru

HCCC No.89 of 1996 awarded to the 17 defendants in the case who represented the interest of 3000 Masaais portions of the land they were occupying by virtue of being adverse possessors. The plaintiffs state the portion of land parcel Narok Maela Estates 1380 the Maasai were occupying upon excision became land parcel Maela/Ndabibi Block 5/2253 while the portion of Narok/Maela Estates 2662 they were occupying became land parcel Maela/Ndabibi Block 5/3073. The plaintiffs contend it is these resultant parcels of land flowing from the decision in Nakuru HCCC No.89 of 1996 which are the subject of the present suit. In this regard the plaintiffs submit the 1<sup>st</sup> to the 6<sup>th</sup> defendants were not awarded the land in the said suit to the exclusion of the other beneficiaries and contend the said defendants acted fraudulently in having the parcels of land registered in their sole names to the exclusion of the vast majority of the beneficiaries entitled to benefit and further argue the 1<sup>st</sup> to the 6<sup>th</sup> defendants in carrying out the fraudulent acts were not in the process of executing the decree of the Court .

10. The plaintiff further submit the 1<sup>st</sup> to 6<sup>th</sup> defendants in having the parcels of land registered in their names were acting fraudulently and this constituted fresh causes of action that invited the institution of fresh action. The acts cannot be undone through an execution process in Nakuru HCCC No.89 of 1996 as the Respondents suggest in their submission.

11. I have, albeit briefly, set out the rival submissions of the parties. The issues for determination is really whether the plaintiffs suit offends the provisions of Section 34(1) of the Civil Procedure Act, and/or whether it is res judicata by reason of the decision in Nakuru HCCC No.89 of 1996.

12. The plaintiffs have properly made disclosure of Nakuru HCCC No.89 of 1996 and the consequent appeal that emanated there from being Nakuru Court of Appeal Civil Appeal No.64 of 2004. Copies of the pleadings in Nakuru HCCC No.89 of 1996 being the plaint, defence & counterclaim and amended reply to defence and defence to counterclaim have been exhibited as part of the plaintiffs list of documents. Equally the judgments in the High court suit and the Court of Appeal have been exhibited by the plaintiffs in their bundle of documents. By the plaint in Nakuru HCCC No.89 of 1996 the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant together with 15 other persons were sued by Ngati Farmers Co-operative Society Ltd, who sought to have them, their agents and or servants restrained from alienating, occupying and/or interfering with survey work on land reference No. Narok/Maela Estate Nos.2662, 1380 and 8398/2. Further the plaintiff sought a declaration that the defendants had invaded and occupied the suit parcels and were trespassers and an order for their eviction should be issued.

13. The defendants in Nakuru HCCC No.89 of 1996 who included the 1<sup>st</sup> plaintiff in the present suit filed a defence and counter claim and averred they were not trespassers and countered they had acquired title to the portions of land they occupied by way of adverse possession. They sought a declaration that they had indeed acquired title to land parcels Narok/Maiella Estate No.2662, 1380 and 8398/2 by adverse possession and/or prescription. The defendants succeeded in their counter claim and on appeal to the Court of Appeal, the award of the land to them on account of adverse possession/prescription was upheld.

14. Though the suit Nakuru HCCC No.89 of 1996 particularly as regards the counterclaim was not expressed to be a representative suit, it is apparent that the 17 defendants were not pursuing their own individual interest and rights but rather communal interest. In the judgment before the High Court, Rimita, J inter alia observed thus:-

*“This court visited the land in dispute and saw the disputed areas. The boundaries appeared clear. The area occupied by the Masai had old settlements and I was able to see an old school among other developments. Apart from some portions the Masai are cultivating the land rather than use for grazing purposes”*

15. Further the judge in the judgment stated as follows:-

*“What I find happened is that the Masai encroached into the land before it was bought by the plaintiff. They fixed the boundary between them and the previous owner. When the plaintiff bought the land, it did not know the correct boundaries and assumed that what the Masai occupied belonged to the Masai. The members of the Co-operative Society even sent their children to the school and went for treatment from the Dispensaries on the Masai side.”*

16. The Court of Appeal in its judgment was clear that the 17 respondents represented not only themselves but also a large group of Masai . While the Court of Appeal acknowledged the appellant bought the land from a white settlers’ company known as Maiella limited in its judgment *inter alia* stated as follows:-

*“—it is apparent that the appellant did not immediately on purchase settle its 579 members on the suit land, the main obstacle being the presence on the suit land of the 17 respondents and 3,000 other people commonly referred to as the Maasai. It is the respondents’ case that they were born on the suit land and that their members had occupied it since time immemorial and that when the appellant purchased the land it found them living on portions of it. They claim that they have always been in occupation and are still in occupation of some portions of the suit land. It is admitted by the appellant that the Maasai are in occupation of some portions of the suit land and that they had jointly built thereon five primary schools and a secondary school.”*

17. The plaintiffs in the present suit have pleaded that the 1<sup>st</sup> to 6<sup>th</sup> defendants instead of causing the land awarded to the 17 defendants and the Maasai community whom they represented in Nakuru HCCC No. 89 of 1996 registered in trust on behalf of all the beneficiaries caused the same to be registered in their individual names. The plaintiffs claim they were beneficiaries and were entitled to their respective portions of the land awarded in Nakuru HCCC No.89 of 1996.

18. The defendants have contended that the present suit offends section 34(1) of the Civil Procedure Act which provides as follows:-

*34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.”*

19. The decree extracted in Nakuru HCCC No.89 of 1996 issued on 28<sup>th</sup> June 2000 and exhibited by the plaintiffs in their bundle of documents in the material part is in the following terms:-

**IT IS HEREBY ORDERED:-**

- 1. That the plaintiffs suit be dismissed.**
- 2. That the defendants counter claim succeeds and be and is hereby allowed.**
- 3. That a declaration be and is hereby issued that the defendants have acquired title to the 2581 acres on LR No.Narok Maiela Estate No.2662 and 1626 acres on LR No.Narok/Maiela Estate No. 1380 which they have been in occupation by adverse possession and/or prescription.**
- 4. That a permanent injunction be and is hereby issued restraining the plaintiff either by itself, its agents servants or otherwise howsoever from evicting the defendants from the 2581 acres they are occupying in LR No.Narok/Maiela Estate 2662 and 1626 acres on LR No.Narok/Maiela Estate No.1380.**
- 5. That the plaintiff be and is hereby ordered to transfer 2581 acres on LR No. Narok/Maiela Estate 2662 and 1662 acres on LR No. Narok Maiela Estate 1380 to the defendants.**

20. On the basis of the copies of the title deed exhibited by the plaintiffs it is evident that land parcel **Maela/Ndabibi Block 5/2253** measuring 658.6 hectares was registered on 27<sup>th</sup> April 2015 in the joint names of **Lekishoni Ole Linti, Kashau Ole Ololkuo, Nakurroh Mamei & Joseph ole Lemuni Ledama** (1<sup>st</sup> to 4<sup>th</sup> defendants) as tenants in common in equal shares. Land parcel **Maela/Ndabibi Block 5/3073** equally was registered in the joint names of **Lekishoni Ole Linti, Nakurroh Maet, Kashau Ole Ololkuo, Sapanyo Ole Nkuruna, Wilson Letouwon Ole Nkamasai and Joseph Ole Lemuna Ledama** (1<sup>st</sup> to 6<sup>th</sup> defendants). The plaintiffs are contesting the registration of the 1<sup>st</sup> to 6<sup>th</sup> defendants as the proprietors of the suit lands alleging the registration was fraudulently procured and that the interests of all the beneficiaries of the land was not noted and/or taken into account. The suit by the plaintiff is about the beneficial ownership of the land awarded by Nakuru HCCC No.89 of 1996. The 1<sup>st</sup> to 6<sup>th</sup> defendants could be beneficiaries by reason of being part of the Masai Community but the ownership of the land could not be exclusive to them.

21. I am unable to agree with the defendants that the plaintiff's suit relates to the execution of the decree in Nakuru HCCC No.89 of 1996. The suit in my view raises new and fresh issues that do not relate to the execution of the decree in Nakuru HCCC No.89 of 1996. For instance whether the defendants did in abuse of the Court decision fraudulently cause the suit properties to be registered in their names exclusively thereby prejudicing the interests of other beneficiaries of the land. Whether the defendants (1<sup>st</sup> – 6<sup>th</sup>) ought to have been registered as holding the land in trust for the plaintiffs. The Court judgment in Nakuru HCCC No. 89 of 1996 and the Court of Appeal judgment in Nakuru Civil Appeal No.64 of 2004 may come in handy as part of the evidence in the resolution of the dispute between the plaintiffs and the defendants.

22. For the same reasons I have highlighted above I am not able to hold the present suit to be res judicata on account of the determination of Nakuru, HCCC No.89 of 1996. The issues raised in the present suit were not determined in the previous suit and are fresh issues touching on the beneficial ownership of the suit properties.

23 Accordingly I find and hold the preliminary objection taken by the 1<sup>st</sup> to 6<sup>th</sup> Defendant to be lacking in merit and I dismiss the same with costs to the plaintiffs.

**Ruling dated and delivered at Nakuru virtually this 29<sup>th</sup> day of October 2020.**

**J M MUTUNGI**

**JUDGE**