



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC PETITION NO. 7 OF 2017

(FORMERLY NAIROBI PETITION NO. 195 OF 2014)

IN THE MATTER OF ARTICLES 2(1) AND (4); 73 (1) AND (2); 3; 10(1); 22(1); 20(1), (2), AND (4); 22 (2) C; 23 (1) AND 3 (a), (b), (e) and (f); 165 (3) (b); 258; 63 (1) AND (2); 40 (3) AND 75 (1) (2) AND (3)

BETWEEN

MOSES OLE KINAIYA.....1ST PETITIONER
ELIUD IKOTE MEJA.....2ND PETITIONER
REV. STEPHEN PARMUAT MPARINKOI.....3RD PETITIONER
KARERIAN OLE LANKAS.....4TH PETITIONER
ARISON OLE WUALA.....5TH PETITIONER

VERSUS

HON. MOSES SOMOINE OLE SAKUDA.....1ST RESPONDENT
SAMSON TIRIKE SEKERIAN.....2ND RESPONDENT
SIMEON MBOYO PARTAATI.....3RD RESPONDENT
OLOSHO OIBOR WATER CATCHMENT AREA GROUP.....4TH RESPONDENT
THE LAND REGISTRAR KAJIADO NORTH.....5TH RESPONDENT
THE HON. ATTORNEY GENERAL.....6TH RESPONDENT
KENYA ELECTRICITY TRANSMISSION CO. LTD.....7TH RESPONDENT

AND

THE COUNTY GOVERNMENT OF KAJIADO.....1ST INTERESTED PARTY
THE NATIONAL LAND COMMISSION.....2ND INTERESTED PARTY

JUDGEMENT

Introduction

The Petitioners' filed a Petition dated the 23rd April, 2014, which is supported by an Affidavit sworn by one, Moses Ole Kinaiya on the same date. The fulcrum of the Petition revolves around the 2nd and 3rd Respondents' acquisition of land parcel number Kajiado/ Ntashart/ 5

hereinafter referred to as the 'suit land', in trust for the 4th Respondent which is a community based organization. Further, the suit land was initially held by the 1st Interested Party in trust for the Olosho Oibor Community. This dispute emanated from the fact that the 7th Respondent proceeded to acquire an easement over the suit land and paid compensation to the 2nd and 3rd Respondents who are trustees of the 4th Respondent. The 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents filed their replying affidavits in opposing the Petition while the 1st and 2nd Interested Parties filed their respective Replying Affidavits supporting the Petition. The matter proceeded for full hearing after which all the parties filed their respective submissions.

Petitioners' Case

The Petitioners pray for the following orders and declarations:

- a) An order of Permanent Injunction restraining the 7th Respondent by itself, agents and/or servants from commencing or continuing any construction work of the Isinya – Suswa transmission line upon the suit land.
- b) An order of Mandamus compelling the 7th Respondent to compensate the community for the loss of the use of the suit land.
- c) An order of rectification cancelling the title in the name of the 2nd and 3rd Respondents and registration of the same in the name of the County Government of Kajiado in trust for the Olosho Oibor community.
- d) A declaration that Hon. Sakuda contravened the provisions of Article 75 (1) of the Constitution.
- e) An order directing the Speaker of the National Assembly to take appropriate disciplinary action against Hon. Sakuda in terms of Article 75 (2) of the Constitution.
- f) Costs of the Petition
- g) Any other relief deemed fit and just by this Honourable Court.

Evidence of 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents

The 1st Respondent opposed the Petition by filing a replying affidavit where he explained that he was a Member of Parliament (MP) for Kajiado West and in his capacity as MP, he was approached by his constituents wherein he was informed that they had registered a Community Based Organization (CBO) called Olosho Oibor Water Catchment Area. Further, that the 7th Respondent had approached them seeking an easement over the community land namely Kajiado/ Ntashart/ 5 for construction of transmission lines. He explained that he assisted the CBO obtain registration of the community land into their names after receiving 'no objection' from the Interested Parties. This was because the 7th Respondent insisted it could only deal with the registered owner of the land. He confirmed that the 7th Respondent paid the CBO Kshs. 19, 345, 560/= which amount was paid to the 2nd and 3rd Respondents. Further, the said Respondents transferred the funds to the Kajiado West Constituency CDF Account as it was meant to cater for community projects.

The 2nd and 3rd Respondents opposed the Petition by filing a replying affidavit sworn by SAMSON TIRIKE SEKETIAN where he confirmed they are the registered trustees of the aforementioned CBO which obtained its registration on 2nd July, 2013 from the Ministry of Gender, Children & Social Development. He explained that they wrote to the 2nd Interested Party vide their letter dated the 20th November, 2013 seeking assistance to obtain registration of the suit land. Further, on 20th November, 2013, they sought assistance from the 1st Respondent to write a reference to the Chairman of the 2nd Interested Party. He stated that on 20th November, 2013, the 1st Respondent wrote to the Cabinet Secretary, Ministry of Lands and Urban Development requesting her to assist them obtain a certificate of title on behalf of the community. Further, the office of the Deputy Governor issued a Letter of No Objection. He contended that the cautioners agreed to lift the Caution over the suit land to allow for issuance of the certificate of title to them for purposes of development of the local community. Further, the certificate of title was issued to them after payment of requisite fees. He explained that on 18th December, 2013 the 7th Respondent paid monies for compensation and they wrote to the 1st Respondent requesting for the said monies to be transferred to the Kajiado West Constituency CDF Bank Account, which they did. He insisted that the said monies were used for various development projects for the community. He denied that the 7th Respondent constructed on the suit land without offering them adequate compensation. He reiterated that the Petition lacks merit and an outright abuse of the court process.

The 5th and 6th Respondents opposed the Petition and filed a replying affidavit sworn by RUFUS KARIMA KALAMA, the District Land Registrar, Kajiado North District where he confirmed that on 21st November, 2013, he received a Letter from the 2nd Interested Party forwarding two letters dated 20th November, 2013 from the 1st Respondent and 1st Interested Party wherein the 1st Respondent supported the issuance of the certificate of title in respect to the suit land to the 2nd, 3rd and 4th Respondents while the 1st Interested Party issued a 'No' Objection to the said request. He explained that he lifted the Caution as the Cautioners did not have a legal interest over the suit land as it was community land reserved as a water catchment area. He contended that there being a convergence of minds between the 1st and 2nd Interested Parties, he proceeded to issue a Certificate of Title to Olosho Oibor Water Catchment Area Group and its trustees on 26th November, 2013. Further, that since the Registry File for Kajiado/ Ntarshart/ 5 was not immediately available, he did not make a simultaneous entry on the Duplicate File/ Green Card to reflect the interest created in respect to the 2nd, 3rd and 4th Respondents. He further confirmed that at the time of filing this Petition, the said interest had not been made to the original file and/ or Green Card for Kajiado/ Ntashart/ 5. He received a letter dated the 22nd January, 2014 from the Chairman of the 2nd Interested Party directing him to stop any actions in respect to the suit land long after he had issued the Certificate of Title to the 2nd, 3rd and 4th Respondents herein but nonetheless, he stopped any dealing in the land in question.

The 7th Respondent opposed the Petition and filed a replying affidavit sworn by DUNCAN MACHARIA the Company Secretary where he explained its mandate and deposed that on 28th October, 2013 the 7th Respondent wrote a Letter of Offer to OLOSHO OIBOR WATER CATCHMENT AREA with the main aim of securing a way leave over 46. 068 acres out of Kajiado/ Ntarshart/ 5. Further, the 7th Respondent upon hearing presentations from the 1st, 2nd and 3rd Respondents made an offer of Kshs. 19, 348, 560 as compensation. He confirmed that the 2nd and 3rd Respondents were requested to avail Title Documents for the suit land with their acceptance which they did after which the 7th Respondent's external Lawyers messrs Nyandoro & Company Advocates drew up an Easement Agreement which they duly executed. Further, that the Easement Agreement was duly registered at the Lands Office in Ngong and the 7th Respondent paid Kshs. 19, 348, 560 to an Equity Bank, Kajiado Account No. 0730161177755 belonging to Olosho Oibor Water Catchment Area. He reiterated that it paid the requisite Stamp Duty for the Easement Agreement and registration as well as endorsement on the certificate of title was done by Mr. Kalama. He insists the Trustees of the Olosho Oibor Water Catchment Area operated within their legal rights in granting the 7th Respondent a way leave. He denied that the 7th Respondent commenced construction of the transmission lines without compensating the community.

Evidence of the 1st and 2nd Interested Parties

The 1st Interested Party in support to the Petition, filed a replying affidavit sworn by MONICA OBEL the then County Secretary who confirmed that the suit land was registered in the name of the defunct OL Kejuado County Council on 17th May, 1982, and specifically reserved for use of the OLOSHO OIBOR WATER DAM. Further, the defunct County Council held the said land in trust for the community. She insisted that the 1st Interested Party is the legal successor to the said Ol Kejuado County Council and the suit land is thus community land. She contended that there was a Caution registered over the said land on 13th May, 1992 and it was noted in the said Register that the said Caution should not be withdrawn unless all parties appear before the Land Registrar. She explained that the 2nd and 3rd Respondent with support of the 1st Respondent and using an amorphous non legal entity which is the 4th Respondent approached the 7th Respondent and falsely represented themselves as the rightful including legal owners and/or trustees of the suit land. Further, in connivance with certain officials from the 1st Interested Party and Kajiado North Land Registry obtained a fake certificate of title in respect to the suit land and on 18th December, 2013 on the strength of the said title, the 7th Respondent proceeded to pay the 2nd and 3rd Respondents through their pseudo organization Kshs. 19, 348, 560/= as compensation for a wayleave over the suit land. She averred that on receipt of the monies, the 2nd and 3rd Respondents immediately transferred Kshs. 15 million to the Kajiado West Constituency CDF Account while the balance of Kshs. 4, 348,560 remains unaccounted for. She confirmed that vide a Letter dated the 22nd January, 2014, the District Land Registrar, Kajiado North, confirmed the suit land was still registered in the name of the 1st Interested Party. Further, the 2nd Interested Party directed the Land Registrar to stop any dealings on the suit land pending consultations. She further insisted that the 7th Respondent had no business whatsoever dealing with the 1st, 2nd, 3rd or 4th Respondents or any other person or entity other than the 1st Interested Party on any matter regarding the suit land. She disputed the Grant of Easement registered on 6th March, 2014 as there were already communication from the Interested Parties to the Land Registrar as far back as 22nd January, 2014 regarding suspending all actions relating to the suit land. She reiterated that since the certificate of title to the suit land to the 2nd, 3rd and 4th Respondents is fake, all actions, interests, rights or dealings whatsoever emanating therefrom are illegal, null and void ab initio. Further, that the 7th Respondent failed to attach a Certificate of Official Search authenticating the purported certificate of title on the basis of which it paid a substantial amount of taxpayers' money to strangers. She further insisted that the 4th Respondent is not a Trust but a CBO with limited membership and the same does not represent the Olosho Oibor community with regard to the suit land or at all.

The 2nd Interested Party filed two replying affidavits sworn by Dr. Swazuri A. Muhammad OGW its Chairman and Margaret Kaptuiya Cheboiwo, its then Director, Legal Affairs and Enforcement where they deposed that on 20th November, 2013, the National Land Commission (NLC) received letters of even date from the 1st and 2nd Respondents, requesting it to assist in the issuance of title over the suit land in favour of the 4th Respondent. They explained that NLC advised the 1st Respondent to seek the consent of the 1st Interested Party that held the suit land in trust for the Olosho Oibor Community before the land could revert directly to the community. They confirmed that on the very 20th November, 2013, NLC received a letter of even date from the 1st Interested Party, advising it that they had no objection if the land reverted back to the community. They insisted that in honest belief that the 1st Interested Party consented to the land reverting directly to the Olosho Oibor Community as represented by the 4th Respondent, NLC requested the Land Registrar Kajiado to initiate the processing of the title over the suit land to the said community as represented by the 4th Respondent. They contended that on 1st December, 2013, the 2nd Respondent rescinded its earlier position and expressed an objection to the suit land reverting to the Olosho Oibor Community. Further, immediately NLC learnt of the objection by the 1st Interested Party, in a letter dated the 22nd January, 2014, it directed the Land Registrar to stop any action in respect to the suit land pending further consultation with all the interested parties. They stated that vide a letter dated the 6th March, 2014, NLC notified the 1st Interested Party that upon receiving conflicting correspondence over the suit land, it directed the Land Registrar to stop further action over the land pending further consultation with stakeholders. They reaffirmed that the suit land was never transferred to any party and remains vested in the 1st Interested Party to hold in trust for the benefit of the Olosho Oibor Community. Further, that the 2nd Interested Party did not create an easement over the suit land in favour of the 7th Respondent.

The matter thereafter proceeded for hearing where most parties reiterated their claim as per the Petition and replying affidavits. All parties thereafter proceeded to file their respective submissions.

Analysis and Determination

Upon consideration of the Petition including the rivalling affidavits, witness testimonies, annexures as well as the submissions herein, the main issues for determination are:

- Whether the Petitioners have locus standi to institute the Petition.

- Whether the Petitioners' Constitutional rights have been violated by the Respondents.
- Whether the Petition is merited.
- Who should bear the costs of the Petition

As to whether the Petitioners have locus standi to institute the instant Petition. It is not disputed that the Petitioners are members of the Olosho Oibor community who have been utilizing the suit land. It is further not in dispute that the suit land belongs to the Olosho Oibor Community. The 1st Respondent however contends that the Petitioners do not have locus standi to institute the Petition herein. Article 22(2) (a) and (b) of the Constitution provides that: **'In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –**

- (a) A person acting on behalf of another person who cannot act in their own name;**
- (b) A person acting as a member of, or in the interest of, a group or class of persons;**

While Article 258 of the Constitution stipulates thus: **'(1) Every person has the right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –**

- (a) A person acting on behalf of another person who cannot act in their own name;**
- (b) A person acting as a member of, or in the interest of, or a group or class of persons;**
- (c) A person acting in the public interest;'**

The above mentioned provisions from the Constitution are explicit as it permits any party to institute a suit on behalf of another person or group. From a reading of the said Constitutional provisions, I find that the Petitioners as members of the Olosho Oibor Community indeed had locus standi to institute the instant Petition. I further find the 1st Respondent's averment that the Petitioners lack locus standi immaterial and will disregard it.

As to whether the Petitioners' Constitutional rights have been violated by the Respondents.

It is the Petitioners contention that the Respondents violated their rights including the right to property by proceeding to unlawfully obtain the Certificate of Title to the suit land which had been held in trust for the Olosho Oibor Community by the Ol Kejuado County Council. They contend that the Certificate of Title in respect to the suit land was issued to the 2nd and 3rd Respondents as trustees of the 4th Respondent despite the existence of a caution. Further that the 2nd and 3rd respondents then proceeded to obtain compensation from the 7th Respondent for the grant of easement over the suit land. They insist the said compensation was not utilized for the sake of the community. They have enumerated their rights which were violated to include rights to possession of property, right to fair administrative action and right to property. They contend that the Respondents acted fraudulently to deprive members of the community of their land. Further, that the 2nd and 3rd Respondents do not have capacity to hold the suit land on behalf of the community. They sought for the title to be cancelled and for the 7th Respondent to compensate them for the losses as well as damages they have incurred when the wayleave was created on the suit land. From the averments of the Petitioners and Respondents including the Interested Parties, I will proceed to analyse the evidence presented in Court. I note the District Land Registrar, Kajiado North District confirmed that on 21st November, 2013, he received a Letter from the 2nd Interested Party forwarding two letters dated 20th November, 2013 from the 1st Respondent and 1st Interested Party respectively wherein the 1st Respondent supported the issuance of a certificate of title of over the suit land to the 2nd and 3rd Respondents while the 1st Interested Party issued a 'No' Objection to the said request. Further, a Certificate of Title was issued to 2nd and 3rd Respondents on 26th November, 2013. The Land Registrar admitted that the Transfer form used to effect the Transfer was unattested. From the averments by the Interested Parties, it emerged that they withdrew their respective consents objecting to the transfer of the suit land to the 2nd and 3rd Respondents, only after the compensation had been paid out by the 7th Respondent. The Land Registrar confirmed that the Transfer was undertaken despite existence of a caution placed by Silas Parsitau, Moina Ole Metekai and Eliud Kote ole Nchoki on 13th May, 1992. Further, in 2009, the Land Registrar noted that no action could be done on the land until the cautioners were called upon for lifting the caution. It was his explanation that the Cautioners did not have an interest in the land, hence he failed to consider them while registering the transfer. It is interesting to note that the CBO was created on 2nd July, 2013 and the 7th Respondent sent out their first communication seeking to acquire an easement over the suit land, before the said land had been transferred to the CBO's name. Further, Grant of Easement Agreement dated the 25th January, 2014 was registered on the 6th March, 2014 on the title despite a letter from the 2nd Interested Party stopping action on the land.

On the issue as to why the Green Card still reflected the name of the 1st Interested party as owner of the suit land, the Land Registrar explained that he only effected changes in the Certificate of Title but was yet to do so in the Green Card. I note vide a letter dated the 18th December, 2013, the 1st Interested Party actually granted their consent to the 2nd Interested Party to make direct payment of the compensation to the account of the 4th Respondent. Further, compensation amounting to KShs. 19, 348, 560 was sent to the CBO account and on 23rd December, 2013 KShs. 15 million was transferred from the CBO account to the Kajiado West Constituency CDF account while KShs. 4 million remained with the CBO. The 1st Petitioner confirmed in court that the Petitioners have no objection to have the remaining funds to be received by the County Government of Kajiado. The Petitioners claimed that the compensatory funds had been embezzled, but failed to furnish Court with evidence to that effect. The 1st Respondent on the other hand provided evidence of the projects undertaken with the said funds and an audit report to that effect. I opine that the burden of proof was upon the Petitioners to provide evidence that the named

beneficiaries were fake and projects named in the report were not undertaken. However, since they failed to do so, I have no recourse but to accept the evidence of the 1st Respondent that the monies were put to good use for the benefit of the community.

Further in the case of **Gitson Energy Limited v Francis Chachu Ganya & 6 others [2017] eKLR** the Court of Appeal held that: **' Article 63(4) provides that community land shall not be disposed of or otherwise used except in terms of legislation and Article 63(5) empowers Parliament to enact legislation to give effect to the Article.....A comparison of Article 62 and Article 63 shows as follows. Like Public land, unregistered Community land and Trust Land is held by county government. But unlike Public land which vests in and is held by county government in trust for the people, registered community land is vested in and is held by the particular community. Further, unlike Public land which is administered on behalf of the people by the National Land Commission, registered community land is administered by the particular community through a "Registered Community" as provided in section 15 of the Community Land Act.'**

In relying on this decision and based on the evidence before me, I find that by virtue of the suit land having been transferred to the 2nd and 3rd Respondents to hold in trust for the 4th Respondent which is a CBO of 18 members, the Olosho Oibor community's right to property was indeed violated as they did not consent to the said transfer. Further, by virtue of the easement passing through the suit land without any public participation being undertaken before then, they were indeed deprived of the suit land. I further find that the Land Registrar, Kajiado North proceeding to effect the transfer to the 2nd and 3rd Respondent and the Interested Parties initially granting their consent to transfer suit land led to the Petitioners right to fair administrative action being violated. Further, all these actions infringed on the Olosho Oibor Community's fundamental rights and freedoms as enshrined in the Constitution.

Whether the Petition is merited

The Petitioners have sought for the 1st Respondent to be declared unfit to hold public office. I note the 1st Respondent was formerly the Member of Parliament for Kajiado West. He has explained his role in the process of acquisition of the title to the suit land and insists, he was merely assisting the 2nd and 3rd Respondents, which fact is disputed by the Petitioners. I note that issues in dispute herein revolved around community land and further this Court is devoid of jurisdiction to determine whether the 1st Respondent is fit to hold public office or not. In the circumstance, I will decline to grant the said prayer.

The Petitioners have further sought for an order to cancel the title held by the 2nd, 3rd and 4th Respondents and for the same to revert to the County Government of Kajiado to hold in trust for the Olosho Oibor community citing that the said 2nd and 3rd Respondents lacked capacity to hold the said land on behalf of the community. Which fact the said Respondents oppose.

Article 63 of the Constitution makes provisions on Community land and provides thus:'

(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; (b) land lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is—(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.'

Further the Community Land Act makes express provisions on how community land should be dealt with.

In the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**, the Court of Appeal while highlighting the circumstances under which a Court can issue orders of mandamus cited, with approval, *Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89* and stated thus:

"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual." ...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

From the evidence before me, it is clear that the Land Registrar Kajiado proceeded to register the 2nd and 3rd Respondents after being directed by the Interested Parties to do so. However, there was no evidence presented as to whether there was public participation among the Olosho Oibor community before the said persons were selected to be registered as proprietors of the suit land. I note the Land Registrar admitted having proceeded to deal with the suit land despite objection from the County Government as well as directive from the National Land Commission that no action was to be undertaken on the said land. It is trite that acquisition of title to land is a process and a party cannot claim indefeasibility of title if the process was flawed especially in instances where this is community land held in trust for them by a local county government. Further, it is trite that public interest in land supersedes private interest.

Section 25 and 26 of the Land Registration Act provides that:'

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

Further, Section 80 of the Land Registration Act provides that:

‘(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.’

In the case of **Mary Ruguru Njoroge V John Samuel Gachuma Mbugua & 4 others (2014) eKLR**, the Court held that: ‘It is upto the party seeking rectification, whether under the relevant statutory provisions or the equitable principles to satisfy the court or the Registrar, for that matter, that their intervention is justified. The evidence must in my view be convincing. Even though the ordinary standard of proof on a balance of probabilities applies the evidence ought to be sufficient to overcome the inherent probability that what is sought to be rectified was what was intended all along.’

In the circumstances as well as associating myself with the legal provisions and decisions cited above, I find that the 2nd and 3rd Respondents failed to adhere to the proper legal process to acquire title to the suit land and will proceed to hold that the said title was obtained by mistake, illegally and unprocedurally, hence should be cancelled and the same to revert back to the County Government of Kajiado to hold it in trust for the Olosho Oibor Community.

The Petitioners further sought for orders of Permanent Injunction restraining the 7th Respondent by itself, agents and/or servants from commencing or continuing any construction work on the Isinya – Suswa transmission line upon the suit land. Further, that an order of mandamus to issue to the 7th Respondent do compensate the community for the easement through the suit land. The 1st Petitioner admitted that the said transmission line has since been completed and I will hence decline to grant the said prayer as it has been overtaken by events. As for the issue of compensation, it emerged that the monies paid by the 7th Respondent for Grant of Easement over the suit land was deposited in the account of the 4th Respondent. It further emerged that Kshs. 15 million was transferred to the Kajiado West Constituency CDF Account. The 1st, 2nd and 3rd Respondents explained that the said monies were channelled towards development of various projects within the constituency with the 1st Respondent providing evidence to that effect including an audit report. The 1st Petitioner vehemently disputed the highlighted developments during his cross examination but to my mind since no evidence was presented to controvert the averments of the 1st to 3rd Respondents that the monies were channelled towards development within the Constituency, I will accept this part of evidence. I opine that in case there is a balance of monies to be paid by the 7th Respondent, then the same should be channelled through the 1st Interested Party to cater for development of projects within the said community. On the question of damages claimed by the Petitioners’, since I have held that the compensation which was paid was channelled to projects within the community, and in applying the standards set in the case of **Gitabu Imanyara & 2 others V Attorney General (2016) eKLR**, and further noting that I have already held that the title to the suit land should revert to the 1st Interested Party to hold in trust for the community, I will exercise my discretion and decline to award the same.

It is against the foregoing that I find that the Petition is partially merited as some other prayers have been overtaken by events. I will hence proceed to make the following final Orders:

- i. An order of rectification be and is hereby issued cancelling the Certificate of Title for land parcel number Kajiado/ Ntashart/ 5 in the name of the SAMSON TIRIKE SEKETIAN and SIMEON MBOYO PARTAATI holding in trust for the OLOSHO OIBOR WATER CATCHMENT AREA and registration of the same to be effected in the name of the County Government of Kajiado to hold in trust for the Olosho Oibor community.
- ii. Costs of the Petition is awarded to the Petitioners and the Interested Parties and the same should be borne by the 1st, 2nd, 3rd and 4th Respondents jointly and severally.

Dated Signed and Delivered at Kajiado this 26th Day of October, 2020

CHRISTINE OCHIENG

JUDGE