



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Case 62 of 2002**

**WILFRED GISEBE GISEBE ..... PLAINTIFF**

**VERSUS**

**KERINKANI GROUP RANCH ..... 1<sup>ST</sup> DEFENDANT**

**SEMEO OLE SWAKEI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff brought a suit against the defendants averring that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had unlawfully caused deletion of the names of the plaintiff and substituted his name with that of the 2<sup>nd</sup> defendant as a result of which the 2<sup>nd</sup> defendant sometime on 30<sup>th</sup> November 2004 got himself registered as the proprietor of land parcel No. Transmara/

Keriankani/218. The plaintiff alleged that there was fraud on the part of the defendants.

2. Particulars of fraud pleaded are as follows:-

(a) *Deleting name of the plaintiff from the list submitted to the Land Registrar, Kilgoris and in place of the thereof substitutive the name of the 2<sup>nd</sup> Defendant.*

(b) *Wrongfully and/or unlawfully allocating the 2<sup>nd</sup> Defendant whilst knowing that the plaintiff was the lawful owner of plot No. TRANSMARA/*

*KERINKANI/218.*

(c) *Wrongfully and/or unlawfully allocating the 2<sup>nd</sup> defendant plot NO. TRANSMARA/KERINKANI/218 which land the plaintiff is already in occupation thereof.*

3. The 2<sup>nd</sup> defendant opposed the suit claiming that his registration as proprietor of Transmara/Keriankani/218 was a first registration and the same arose after Keriankani Group Ranch had sought the consent of the Local Land Control Board for subdivision of the group land in accordance with **section 6 of Cap 302 Laws of Kenya**. He further averred that as a proprietor of Transmara/Keriankani/218 being a first registration cannot be impeached in light of the clear provisions of the **Registered Land Act Cap 300 Laws of Kenya** (now repealed).

4. It was the plaintiff's testimony that he was allocated Transmara/ Keriankani/218, given possession

of the land and began to develop it by clearing stones, fencing it and putting up a granary. He stated that in 2002, he went to collect his title deed only to find the land had been registered in the name of the 2<sup>nd</sup> defendant. The certificate of official search confirmed that the 2<sup>nd</sup> defendant was not only given parcel No.218 but also parcel Nos. 30 and 119. The plaintiff added that each member of the 1<sup>st</sup> defendant was entitled to be given one parcel of land.

5. On cross examination, it was revealed that there was a register showing the members of Keriankani group ranch and that the same list of members was taken to the Kilgoris Land Registry. The plaintiff's name was missing in the list which had a total of 206 members. Further, the plaintiff did not have any document to prove that he was a member of the 1<sup>st</sup> defendant, he did not have the 1<sup>st</sup> defendant's rules showing that each member was entitled to only one parcel of land. He did not bring a certificate of official search for parcel No.218.

6. On re-examination, it was confirmed that the 1<sup>st</sup> defendant had 206 members and the plaintiff's name was not among them.

7. PW2 was Joseph Lekakenyi Mibei, who testified that he first met the plaintiff in 1990 when he went to ask for land from the 1<sup>st</sup> defendant. PW2 was a member of the first defendant but was not a committee member. He further stated that members were not given equal shares and he was not given any document to show that he was a member. He was given parcel No.214.

8. On cross examination, he revealed that there was a register of members and he was member No.205. The group register was updated in 1990 when new members were added. He further stated that he did not know the plaintiff's membership number.

9. On re-examination, he confirmed that he was member No.205 and his title land was No.214.

10. The 2<sup>nd</sup> defendant testified that he had 3 parcels of land:- No.20, No.119 and No.218. He also produced a letter that dissolved the 1<sup>st</sup> defendant, a copy of title deed for parcel No.218 as **P. Exhibit 3** and certificate of official search as **P. Exhibit 4**. He also stated that the plaintiff was not a member of the group ranch therefore he could not get any land.

11. On cross-examination, it was revealed that no payment was made to become a member of the 1<sup>st</sup> defendant and that for one to become a member the father of such intending member had to be a member. That he did not put up a house in the ranch in 2002 after he was served with summons. He further stated that people do not live on that land because of tribal animosity.

12. On re-examination, he stated that there was a Kisii man who has lived on the property for 6 years. Currently his worker was living on the land and that he had never seen the plaintiff on the suit land.

13. DW2 was Christopher Rotiken, who testified that he was a member and secretary of the 1<sup>st</sup> defendant. As secretary, he kept group records which basically showed the members who were given land in the land registry. He produced a record of all members of the 1<sup>st</sup> defendant and their respective plots awarded to them. He confirmed that the 2<sup>nd</sup> defendant had 3 plots. He further testified that during his term as secretary, he never saw plaintiff's application to be a member and that after the 1<sup>st</sup> defendant obtained consent from the land control board the ranch was subdivided into plots and the plots were given to members and not non-members. He further stated that the 1<sup>st</sup> defendant's rules did not limit the number of plots a member could own as there were other members who owned more than one plot and at no time did the plaintiff ever complain about a plot with 1<sup>st</sup> defendant. He said he only met the plaintiff in court.

14. On cross examination, he stated that the only evidence of membership with the 1<sup>st</sup> defendant was the register. He further stated that he did not know the plaintiff but he knew PW2 as the owner of parcel No.214. He did not agree with PW2 that the plaintiff was a member of the 1<sup>st</sup> defendant. Some members

had more than 3 plots if they had asked for the plots earlier than other members and if they had large families. DW2 stated that there were no developments on plot No.218 he did not have any receipts on plot No.218 and that he had no receipts to show the plot allocation.

15. On re-examination he stated that they did not issue any membership card and they used a list of members which formed the basis of subdivisions. That he had not been shown any evidence to prove that the plaintiff was a member of the 1<sup>st</sup> defendant and that if the plaintiff was a member of the 1<sup>st</sup> defendant, his name would have appeared on the members' list.

16. On examination by the court, he stated that there was no membership fee for the membership to be a member of the 1<sup>st</sup> defendant.

17. Upon completion of giving the above evidence, it was agreed that both counsel submit written submissions. On the face of it, the plaintiff seemed to have submitted 2 sets of submissions. It was only after reading through the submissions that I realized that counsel for the defendant had titled their submission as "**Plaintiff's written Submissions**". I find it necessary to point out that counsel need check their documents carefully before presenting them to court. Such care on the part of counsel will reduce confusion with regard to pleadings and other documents filed in court.

18. After reviewing the above evidence, it is my opinion that 3 questions need to be addressed:-

- 1) *Were allegations of fraud proved on a balance of probability by the plaintiff against the 2<sup>nd</sup> defendant?*
- 2) *Who is the rightful owner of plot No.218?*
- 3) *Was the registration done in plot No.218 after adjudication a 1<sup>st</sup> registration or a 2<sup>nd</sup> registration?*

19. It is the plaintiff's testimony that he was allocated Transmara/ Keriankani/218 and given possession of the land and began to develop it. However on cross-examination he admitted that his name did not appear on the list of members of the 1<sup>st</sup> defendant. That being the case, his name was not presented to the land registry for plot allocation. Furthermore, from the plaintiff's testimony, he had no document to prove that he was a member of the 1<sup>st</sup> defendant nor did he have any documentation to prove that he owned plot 218. His witness (PW2) was a member of the 1<sup>st</sup> defendant by the fact that his name was on the list as number 205 and he was allocated parcel No.214. Surprisingly, PW2 did not know the plaintiff's membership number.

20. The 2<sup>nd</sup> defendant on the other hand produced a copy of title of parcel No.218 and a certificate of official search. His witness (DW2) as secretary of the 1<sup>st</sup> defendant shed much light in the way the internal affairs of the 1<sup>st</sup> defendant were carried out. He stated that the members of the 1<sup>st</sup> defendant did not part with any sum of money to obtain the said plots after subdivision. So long as a member's name was on the said list, he was guaranteed to get a plot. He further stated that a member could be given more than one parcel of land and looking at the record of the members and the plots allocated, it is clear that some of the members of the 1<sup>st</sup> defendant were allocated more than one plot.

21. I need to go no further than to state that by the evidence adduced, the plaintiff has not proved his case on a balance of probability to be the rightful owner of Transmara/Keriankani/218.

22. As to the issue of who is the rightful owner of the said Transmara/Keriankani/218, the name in the title deed is prima facie proof that the 2<sup>nd</sup> defendant is indeed the rightful owner of the said property.

23. With regard to the issue of whether or not the 2<sup>nd</sup> defendant's registration is a registration of 1<sup>st</sup> instance **section 13** of the **Registered Land Act (now repealed by Act No. 3 of 2012)** provides:

**“13 (1) A parcel, the title to which, on the application of this Act to the area in which it is situated, is registered under the Government Lands Act or the Land Titles Act shall continue to be dealt with in accordance with the Government Lands Act or the Land Titles Act, as the case may be, until this Act applies to that parcel under section 12 (1) (b).**

**(2) Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease which, immediately before the registration under this Act of the Land affected thereby, was registered under the Government Lands Act, the Land Titles Act, the Registration of Titles Act or the Land Registration (Special Areas) Act, and –**

**(a) those rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law which was applicable thereto immediately before the registration of the land under this Act; and**

**(b) the memorandum of equitable mortgage or memorandum of charge by deposit of title may be discharged by the execution of a discharge in the form prescribed under the Act under which the memorandum was first registered.**

**(3) Notwithstanding this section, any notice in writing required to be served under the Government Lands Act, the Land Titles Act, the Registration of Titles Act or the Land Adjudication Act upon any of the parties under any mortgage, charge, memorandum of equitable mortgage or memorandum of charge by deposit of title may be served in accordance with section 153 of this Act, and such service shall be deemed to be effective for all purposes.**

The date of first registration under this Act of any land shall:-

*(a) Be the date on which the land first came on to the land register.*

24. With the above in mind, the suit property had already been registered under the 1<sup>st</sup> defendant before the same land was subdivided into plots. I agree with counsel for the plaintiff when he stated that the 2<sup>nd</sup> defendant's registration was a 2<sup>nd</sup> registration.

25. In conclusion I make the following orders:-

*a) I dismiss the plaintiff's case as it has no merit.*

*b) The suit land Transmara/Keriankani/218 remains the property of the 2<sup>nd</sup> Defendant.*

*c) The costs of this suit are awarded to the 2<sup>nd</sup> defendant.*

**Dated and delivered at Kisii this 1<sup>st</sup> day of November, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Soire (present) for Plaintiff

N/A for 1<sup>st</sup> Defendant

M/s Ochillo & Co (absent) for 2<sup>nd</sup> Defendant

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**