

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT KILGORIS
ELC (LA) E038 OF 2024

SOIPEI OLE SAMPERU.....
.....APPELLANT

VERSUS

NTOKOYUAN OLE MASARIE.....
.....RESPONDENT

JUDGMENT

1. Aggrieved by the whole judgment of Hon. W.C. Waswa SRM delivered in Kilgoris CM.ELC case No. E021 of 2022, the Appellant Soipei Ole Sampera penned 10 grounds of Appeal and sought the following orders;
 - (i) That has Appeal be allowed with costs.
 - (ii) The entire judgment of Hon. W.C. Waswa delivered on 28th November 2024 be set aside and or quashed and its place be substituted with a finding that substituted with the plaintiff's prayers in the subordinate costs
 - (iii) The Appellant be awarded costs of this Appeal and to the court of below
2. The ground of Appeal penned in the memorandum of Appeal filed by Messrs Moerwa Omwoyo or Co. Advocates which have been considered in this judgment.
3. Upon admission of the Appeal, the court issued directions on the disposal of the Appeal by way of written submissions.

Appellant's Submissions

4. The Appellant framed and submitted on five issues for determination to wit,

- (i) Whether or not the Learned Trial Magistrate erred in law and in fact by failing to properly evaluate evidence on record and thus reaching erroneous finding on the subdivision and ownership of the disputed parcels.
 - (ii) Whether the Learned Trial Magistrate misdirected himself by ordering the implementation of ministerial decision that had already been overtaken by events, including valid first registration and subsequent subdivisions.
 - (iii) Whether the Respondent fraudulently intermeddled with the Adjudication Record for parcel Transmara/Moita/47 measuring 81.14 Ha.
 - (iv) Whether the Learned Trial Magistrate erred in declaring all land transactions over Transmara/Moita/47 (81.14) Ha, Transmara/Moita/626 and Transmara/Moita/627 null and void *ab initio*, contrary to the doctrine of indefeasibility of title under the Registered Land Act.
 - (v) Whether the Learned Trial Magistrate failed to appreciate that there were two distinct parcels registered as Transmara/Moita/47, one measuring 146.73 Ha (original) and the other 81 Ha (subdivided remainder) both arising from lawful adjudication and registration processes.
5. On issue number 1, the Appellants submit that the trial court failed to evaluate all evidence, as he failed to take into account the green cards as evidence of first registrations; Land Registrar's report, but the court was erroneous in taking into account a 1993 Ministerial Appeal directive.
6. On issue No. 2, the Appellant submit that the Ministerial decision dated 23.05.2002 arising from Appeal No. 261/1998, was erroneous as the Appeal had been dismissed hence the same could not generate an enforceable directive, hence by ordering implementation of the Ministerial directive, the Learned Trial Court fell in error.

7. On issue number 3, the Appellant submits that the non-signing of the Adjudication Record was a clear indication of fraud, hence the Respondent's title was acquired by fraud and cannot be protected under section 26 of the Land Registration Act.
8. On issue No. 4, the Appellant submits that his late father was the first registered owner of Transmara/Moita/47 (146.73) Ha hence his title having being acquired procedurally and lawful was protected under section 26 of the Land Registration Act, which protection equally extended to the subsequent subdivisions into Transmara/Moita/626 and Transmara/Moita/627, and the remainder of (81.14) Ha further divided into parcels Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631.
9. That the trial court confused the existence of parcels No. Transmara/Moita/47 (146.73) and Transmara/Moita/47 (81.14) which was a separate first registration resulting from subdivision hence the confusion of the two titles led to a manifest error of fact and law.
10. On the strength of the above submissions the Appellants urged the court to allow the Appeal.

Respondent's Submissions

11. At the outset of his submissions, Mr. Shira Learned Counsel for the Respondent submitted that the Appellant introduced a new ground of appeal, vide the third issue that he framed for determination, through their submission.
12. On this new ground of Appeal Mr. Shira submitted that an Appellate Court cannot entertain new issues raised for the first time on appeal, arising the same are pure points of law arising from the Record of Appeal. That the question of fraud in the adjudication record was a factual issue which the court could not be entertained on Appeal.
13. The Respondent framed and submitted on 6 issues for determination to wit

- (a) Whether the 1st Defendant/Respondent trespassed onto the Appellant's land.
 - (b) Whether the implementation of the Objection proceedings and Minister's Appeal was undertaken.
 - (c) Whether the titles held by Appellant are a product of a flawed adjudication process.
 - (d) Whether the Appellant can introduce new factual issues on Appeal.
 - (e) Whether the court has jurisdiction to order rectification of the register and cancellation of titles under section 80 of the Land Registration Act.
 - (f) Who should bear the costs of the Appeal.
14. On issue number 1, the Respondent submits that the trespass allegation was wholly unsupported no survey report was filed, no photographs of the evidence or boundary, markers produced.
15. Reliance was placed on the decision of Michael Gaiko Ngure and Another Vs. Peter Njoroge Kinyanjui, on the issue that no trespass was proven.
16. On issue number 2, the Respondents submits that objection No. 1/1990 in relation to parcel number Transmara/Moita/47 succeeded in favour of three brothers, an Appeal to the Minister being Appeal No. 261/1998 was dismissed affirming ownership to the 3 brothers in equal share. The Office of Director of Land Adjudication and Settlement thus issued directives for equal subdivision and correction of the Registry Index Map.
17. Reliance was placed on decision in Kipkobel Arap Misoi Vs. Proscila Chepkorir (2016) eKLR, to the effect that adjudication processes must run to full completion before any registration or subdivision is undertaken.
18. Having subdivided before completion of the adjudication process it is the Respondent's submission that the Appellant's title Transmara/Moita/47 and subdivisions were products of a flawed

process. (Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631)

19. On issue 3, as to whether new grounds of fraud could be introduced on Appeal, the Respondent submits and places reliance of the decisions in IEBC Vs. Stephen Mule and 3 Others as well as Raila Odinga Vs. IEBC (2017).

20. The Respondent submits that section 80 of the Land Registration Act empowers court to order rectification of the register on the indefeasibility of a title the Respondent relied on the decision in the case of Henry Muthee Kathurima Vs. Commissioner of Lands (2015).

21. On costs, the Respondent submits that costs follow the event and the said Principle be applied in this Appeal.

Issues for Determination

22. Having analyzed the record of Appeal, the rival submissions and considered the law, the court frames the following as issues for determination.

(i) whether or not the Appeal is merited, in deciding this issue the court shall whether the Plaintiff's case before the trial court was merited or whether the defence and counter-claim before the trial court ought to have been upheld?

(ii) What reliefs ought to issue?

(iii) Who bears the costs of the Appeal?

Analysis and Determination

23. The court shall now review the pleadings, proceedings and Judgment before the trial court in line with its duties as a first Appellate Court, the duty to review, "***reconsider the evidence, evaluate it and draw its own conclusion***" as was stated in Selle and Another Vs. Associated Motor Boat Limited and 3 Others.

24. In the Amended Plaint dated 22nd August 2024, appearing at pages 190-199 of the Record of Appeal, it was the Appellant as the

Plaintiff before the trial court's case that Samperu Ole Masarie (deceased) was the registered owner of all that parcel of land known as (Transmara/Moita/47) measuring about 146.73) Ha pursuant to demarcation and adjudication.

25. That the deceased had been registered as proprietor on 10th December 1997 and he caused a subdivision on the parcel resulting to Transmara/Moita/627 measuring 30.78 hectares Transmara/Moita/626, measuring 24.81 hectares and the remaining parcel retained the original parcel as Transmara/Moita/47 measuring 81.14 Ha.
26. That hitherto the subdivision the adjudication committee had demarcated the original No. Transmara/Moita/47 measuring 146.73 Ha to 1st Defendant and 2nd Defendant, each becoming registered in Transmara/Moita/627 and Transmara/Moita/626. The said allocation by the adjudication committee was appealed against and appeal allowed.
27. Plaintiff further pleaded that the Defendants never lodged any complaints regarding the demarcation of the land since 1993 and the land was registered as demarcated by the adjudication committee in their names.
28. That the remainder of Transmara/Moita/47 measuring about 81.14 was subdivided into Transmara/Moita/629 measuring approximately 26.93 which parcels were registered in the name of Kilagoi Ene Masarie (deceased) who was the Plaintiff's mother Transmara/Moita/630 in the name of the Plaintiff, and Transmara/Moita/631 Samperu Ole Masarie (deceased) the Plaintiff's father.
29. That in 2020 the 1st Defendant started encroaching and trespassing by cultivating and grazing animals on land parcel Nos. Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631 without consent of the Plaintiff's.

30. The Plaintiff pleaded particulars part of fraud against the 1st Defendant as well as particulars of Trespass and sought declaratory reliefs as to

- (i) ownership of Transmara/Moita/47 by Samperu Ole Masarie, of Transmara/Moita/631 by Samperu Ole Masarie by Kilagoni Ene Masarie, and Transmara/Moita/630 by the Plaintiff.
- (ii) An order of eviction of Defendants from Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631.
- (iii) An injunction order against the Defendants.

31. In their Joint Amended statement of Defence and Counter-claim dated 4th September 2023, the 1st to 3rd Defendants pleaded.

- (i) That the suit property was never subdivided and if the same was subdivided the same was fraudulently done without adherence to the ruling of the Objection Proceedings of 1993.
- (ii) That Transmara/Moita/626 and Transmara/Moita/627 were not adjudicated as distinct parcels numbers from the suit parcels by the committees but the same were issued from an Objection Proceedings and they were to be equal in acres to parcel Transmara/Moita/47.
- (iii) The particulars of fraud and trespass were denied in toto.
- (iv) In the Counter-claim, the Defendants/Plaintiff in the Counter-claim pleaded that they had lodged an objection No. 1 of 1990 relating to Transmara/Moita/47, whose original acreage was 136.73 Ha or 337.859 acres, which objection was determined in favour of the objectors with the award that the suit property was to be shared to all the 3 parties in the said Objection proceedings.
- (v) That the Defendant in the Counter-claim lodged an Appeal to the Minister being Case No. 261 of 1998, which appeal was not only filed out of time but it was also heard and dismissed with

directions that the suit land was to be shared equally, among the three brothers.

(vi) Despite the decision of the Minister, the Defendant in the Counter-claim subdivided the parcel taking 200.49 acres for himself and leaving small portions to the other two, and in collusion with the officials from survey office the Registry Index Map was amended so as to reflect his bigger share and the two small shares to the two other beneficiaries.

(vii) That the creation of Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631 did not take into account the existence of the earlier decision to share Transmara/Moita/47 equally.

32. (i) On the strength of the above the Plaintiffs in the Counter-claim sought

for a rectification of the registers as relates to properties Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631 to reflect acreages as 15.191 Ha or 37.539.

(ii) The original parcel Transmara/Moita/47 to be shared equally in line with the decision of the Minister for Amendment of the Registry Index Map to reflect the true position.

33. The trial court in its judgment at paragraphs 66 thereof, found that there was an objection number 1/90 filed by Ntokoyuan Ole Masarie, which Objection was allowed and Transmara/Moita/47 was to be shared equally amongst the 3 brothers, Samperu Ole Masarie, Ntokoyuan Ole Masarie and Ipari Lapanian Masarie.

34. The trial court made a finding that Transmara/Moita/627 had been allocated to Ntokoyuan Ole Masarie from the adjudication record, while Transmara/Moita/626 had been allocated to Ipari Lapanian Masarie and that Samperu Masarie had filed an Appeal to the Minister with regard to Transmara/Moita/626 and Transmara/Moita/627, which Appeal was dismissed but the said properties were to be shared equally.

35. I have reviewed the Record of Appeal as well as the Supplementary Record of Appeal.
36. The typed Objection Proceedings in relation to Transmara/Moita/47 being Objection No. 1/1990 appears at pages 2-4 of the Supplementary Record of Appeal, and the Judgment in respect of that proceedings was that the same was to be shared by all the three brothers, that decision under the hand of the Land Adjudication Officer is dated 13.05.1993.
37. The typed proceedings in respect of the Minister's Appeal in relation to parcels No. Transmara/Moita/626 and Transmara/Moita/627 being Appeal Case No. 261/198 appear at pages 5 to 8 of the Supplementary record of Appeal. The Minister's Appeal was determined on 23.05.2002; with the result that the Appeal was dismissed but parcels were to be shared equally among the 3 brothers. This Appeal had been filed by Samperu Masarie objecting the decision to demarcate and allocate Ntokoyuan Masarie and Iparet Lapanian Masarie parcels No. Transmara/Moita/626 and Transmara/Moita/627.
38. In his Amended Plaintiff the Appellant as Plaintiff had pleaded at paragraph 11(a) thereof, pleaded that no objection proceedings had been preferred in respect of Adjudication of parcel No. Transmara/Moita/47, but that at paragraph 9(a) pleaded that Samperu Ole Masarie had appealed against the decision of the adjudication committee in respect of parcels No. Transmara/Moita/627 and Transmara/Moita/626, which appeal was allowed.
39. Having reviewed the record of Appeal, contrary to the averments by the Plaintiffs that the original Transmara/Moita/47 was subdivided to create Transmara/Moita/626 and Transmara/Moita/627, the said Original Transmara/Moita/47 was not subdivided as averred in the Plaintiff and that Transmara/Moita/626 and Transmara/Moita/627 were distinct properties as per the demarcation book.

40. Similarly, the court finds that an Objection Proceedings was filed against the original Transmara/Moita/47 with result was that the same ought to have been subdivided into 3 parcels for the three brothers Samperu Ole Masarie, Ntokoyuan Masarie and Ipari Lapanian Ole Masarie in equal measures but this was not done as the whole parcel was registered in the name of Samperu Ole Masarie alone.
41. The averment that the Samperu Ole Masarie subdivided Transmara/Moita/47 into Transmara/Moita/627 and Transmara/Moita/626, is thus not factual, as the demarcation book, shows that Transmara/Moita/626 and Transmara/Moita/627 existed distinctly in the demarcation book and Adjudication Record.
42. The Plaintiff's case is founded on the non-existence of any Objection Proceedings in relation to Transmara/Moita/47 as was originally. However, the trial court as well as this court have found that indeed Objection Proceedings No. 1/1990 in relation to Transmara/Moita/47 had been filed and the decision thereof was that Transmara/Moita/47 was to be subdivided equally to the 3 brothers but this decision was not implemented.
43. The claim of trespass by the Plaintiff was founded on the allegation that the Defendants had trespassed on the Plaintiff's parcel No. Transmara/Moita/629, which is said to be a subdivision of Transmara/Moita/47.
44. Was this claim of trespass proved before the trial court?
45. The Learned Trial Magistrate found that the said claim had not been proven since there was no Survey report no photographs to show the trespass, this court finds that in addition to have been no Survey report and photographs adduced before the trial court, the Plaintiff equally held a title that was unprocedurally issued which could not confer ownership rights to him since, the registration of the title of Transmara/Moita/47 had not taken into consideration the existence of the decision of the Land Adjudication Officer in respect of the objection

and that the subdivision of Transmara/Moita/47 into Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631 were unlawfully done.

46. Section 26A of the Land Adjudication Act provides for a Register to be final where there are no objections.

47. In this case in respect of Transmara/Moita/47. The outcome of the Objection Proceedings ought to have been taken into account under Section 26 of the Land Adjudication Act, but this was not done. It follows that the registration of the title of Transmara/Moita/47 in the name of Samperu Ole Masarie was unprocedurally done, hence the subdivisions of Transmara/Moita/47 into Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631 was equally unprocedurally done, hence it could not confer any proprietary interest.

48. The said title Transmara/Moita/47 and its subdivisions being Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631 having being procured unprocedurally have no protection of the law as their issuance contravened Section 26(1) (b) of Land Registration Act; and the titles were a nullity abinitio, as was held in Kipkobel Arap Miso
Vs. Priscila Chepkorir, where the court observed that non adherence to the procedure set out in Land Adjudication Act, rendered all titles as a result of the flawed process a nullity, as per the reasoning in Macfoy Vs. United Africa Co. Ltd TALL ER 1169, where the court held *inter alia*;
“.....If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado though sometimes convenient to have the court to declare it to be so. And every proceedings which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to say there it will collapse...”

49. In this regard the Learned Trial Magistrate was therefore right in finding no trespass, in view of the fact that the Plaintiff did not prove trespass and had no valid title over the suit property, and was right in directing the implementation of the Objection Proceedings in respect of Transmara/Moita/47 as had been directed by the Office of Director of the Land Adjudication.
50. With respect to the title numbers Transmara/Moita/626 and Transmara/Moita/627, there existed Objection Proceedings and an Appeal to the Minister decision which equal was not implemented and the trial court ought to have the implementation of this decision too in respect of the said titles.
51. In the result I find no merits in the Appeal before court as the Plaintiff did not proof his case before the trial court.
52. The court has also found it very curious that the Plaintiff pleaded and believes that upon subdivision the Original number Transmara/Moita/47 was retained; this was not possible and the Land Adjudication Office and Survey office must have deliberately retained this number, while it was not supposed to be retained after subdivision.

On issue no. 2

53. On what orders ought to issue. I have found that the decision of the Land Adjudication Officer in respect of Objection proceedings Transmara/Moita/47 was not considered as required under Section 26 of the Land Adjudication Act and equally the decision of the Minister Appeals in respect of Transmara/Moita/627 was also not implemented as required under Section 29 of the Land Adjudication Act.
54. The said decisions required that the three parcels to be subdivided equally among the 3 brothers.
55. Consequently, I set aside the decision of the trial Magistrate and substitute the same as follows;

- (1) All the subdivision of Transmara/Moita/629, Transmara/Moita/630 and Transmara/Moita/631 emanating out of Transmara/Moita/47 are all hereby cancelled.
- (2) The Land Surveyor to amalgamate the 3 titles, Transmara/Moita/47, Transmara/Moita/626 and Transmara/Moita/627 into one parcel, and thereafter subdivided the same into 3 portions to the families of Samperu Ole Masarie, Ntokoyuan Ole Masarie and Iripien Ole Masarie so as to give effect to the 2 decisions in respect of the Objection Proceedings filed in respect of Transmara/Moita/47 and Appeal to the Minister; filed in respect of Transmara/Moita/626 and Transmara/Moita/627.
- (3) In subdividing the same properties, regard should be given to the areas as currently occupied by each family and the RIM should accordingly be Amended to reflect the subdivisions.
- (4) The Land Registrar Transmara West, East and South thereafter to rectify the register so as to reflect the resultant titles after the subdivisions to the said families.
- (5) For avoidance of doubt Transmara/Moita/47 refer to original parcel as was adjudicated, measuring 146 Ha and Transmara/Moita/626 and Transmara/Moita/627 equally refer to the original parcels, at time of adjudication.
- (6) The Appeal is hereby dismissed and noting that it is Samperu Ole Masarie (deceased) who was intent on short changing his brother's, his Estate represented by the Appellant shall bear the costs of this Appeal as well as the costs of the suit in the Lower Court.

Dated at Kilgoris 23rd Day of February, 2026

Hon. M.N. Mwanyale
Judge

In the presence of

CA – Sylvia/Clara

Mr. Shira for Respondent

Mr. Omwoyo for Appellant