



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT DIVISION**

**E.L.C NO. 5 OF 2017**

**(Formerly Nairobi ELC No. 566 of 2013)**

**CHRISTOPHER LEMPAKA MATAYIAN.....PLAINTIFF**

**VERSUS**

**JOHN OLE WAUPI KOBAAI.....1<sup>ST</sup> DEFENDANT**

**RICHARD RUNKESS KORES.....2<sup>ND</sup> DEFENDANT**

**MANATI ENE METOYU.....3<sup>RD</sup> DEFENDANT**

**DANIEL KORRE IKORES.....4<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR, KAJIADO.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 9<sup>th</sup> May, 2013, the Plaintiff prays for judgement against the Defendants jointly and severally for orders:

- i. That a declaration that the registration of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as the owners of Plaintiff's land was null and void;
- ii. That the register be rectified by the 5<sup>th</sup> Defendant and land parcels numbers KAJIADO/ IL DAMAT/ 253; KAJIADO/ ILDAMAT/ 377; KAJIADO/ ILDAMAT/ 378; KAJIADO/ ILDAMAT/ 379 and KAJIADO/ ILDAMAT/ 499 and any other number thereof be cancelled and the same parcel restored to the original number KAJIADO/ ILDAMAT/ 253 and be registered in the names of CHRISTOPHER LEMPAKA MATAIYAN the Plaintiff;
- iii. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, their agents or anybody claiming through them be permanently restrained from interfering with the Plaintiff's peaceful use of his land;
- iv. Costs of this suit.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a joint Defence where they denied the allegations in the Plaint and stated that the suit was frivolous, vexatious as well as an abuse of the process of the Court. They averred that the Il Damat area was declared a land adjudication section pursuant to the provisions of Section 5 of the Land Adjudication Act and subsequently a group ranch established in 1987, with Oloyiankalani Group Ranch being established under the provisions of the Land (Group Representatives Act). They explained that pursuant to the establishment of the Group Ranch, it was issued with a Certificate of Title deed being Land Reference Numbers KAJIADO/ ILDAMAT/ 21 all measuring 9,606 hectares that is approximately 23, 736.43 acres. They denied that the Plaintiff is the absolute proprietor of land parcel number KAJIADO/ ILDAMAT/ 21 as the same is registered in the name of the Group Ranch and contend that it is the Group Ranch Officials who assisted the Plaintiff to transfer this portion derived from his shares held up in the said parcel of land culminating in its subdivision to land reference numbers KAJIADO/ IL DAMAT/ 253; KAJIADO/ ILDAMAT/ 377; KAJIADO/ ILDAMAT/ 379 and KAJIADO/ ILDAMAT/ 499 respectively. They insist that all the Defendants are entitled to their exclusive possession of the aforementioned subdivisions, as it is the Plaintiff who voluntarily and without duress effected the transfers. They confirm duly executing Sale Agreements between the Plaintiff and themselves dated the 20<sup>th</sup> May, 1995 and 6<sup>th</sup> October, 1997 which is sufficient proof that the said sale on both occasions was on a **'willing buyer willing seller basis.'** They reiterate that it is the Plaintiff vide an agreement dated the 20<sup>th</sup> May, 1995 in the presence of his father Senior Chief (retired) one Mr. Francis Risa, who authorized the Oloyiankalani Group Ranch Representatives to

process title deeds, for the Defendants, on his behalf as he had not obtained one in his name. The Defendants hold that the Group Ranch was dissolved in the year 1987 in accordance with the provisions of section 13 of the Land (Group Representatives) Act. They contend that the particulars of fraud contained in paragraph 6 of the Plaint are full of falsehoods, misrepresentations of facts and unfounded statements and state that no single act of fraud took place perpetrated by the Group Ranch officials. Further, that upon dissolution of the Group Ranch, the Plaintiff had never been able to pay the costs for processing his title and that a mutation form would be prepared by a Land Surveyor, with the Plaintiff consenting to the processing of the Transfer Form. They further state that at a General Meeting held by the Group Ranch on 9<sup>th</sup> October, 1990, it was resolved that whoever wanted to dispose off his land would have to notify the Group Representatives and they would assist in the process of the transfer of land to any third party. They reiterate that the Sale Agreements were entered into on mutual trust and since land parcel number KAJIADO/ IL DAMAT/ 21 was held in the name of the Group Ranch, the Plaintiff was not required to sign any transfer document as he was not the absolute proprietor of the said parcel of land. They further insist that due process of the law was adhered to, in the transfer of KAJIADO/ IL DAMAT/ 253; KAJIADO/ IL DAMAT/ 377; KAJIADO/ IL DAMAT/ 378; and KAJIADO/ IL DAMAT/ 499 and the Plaintiff's allegations are mere falsehoods and without any legal or rational basis. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants reaffirm that the claim by the Plaintiff is baseless and motivated by malice including bad faith meant to embarrass them, with the entire suit being scandalous, vexatious as well as an abuse of the Court process.

The Plaintiff filed a reply to Defence where he denied the allegations therein and reiterated his claim. He stated that he is the absolute proprietor of land parcel number KAJIADO/ IL DAMAT/ 253 which was irregularly subdivided and transferred to the Defendants, by the Group Ranch officials who are related to them.

The matter then proceeded for hearing. The Plaintiff had one witness while the Defendants called twelve (12) witnesses.

### **Evidence of the Plaintiff**

PW1 Christopher Lempaka Mataiyian the Plaintiff herein, during his examination in chief confirmed being a member No. 55 of Oloyiankalani Group Ranch as indicated in the Area List. He contended that as member he was supposed to get land parcel no.253 measuring 72 hectares but did not get it. He discovered from the records in the Lands office that his name was cancelled as per the Green Card. He denied receiving any title deed to his land and avers that the suit land parcel number KAJIADO/ IL DAMAT/ 253 was fraudulently subdivided into land parcels numbers; KAJIADO/ IL DAMAT/ 377; KAJIADO/ IL DAMAT/ 379 and KAJIADO/ IL DAMAT/ 499 respectively without his consent. He knew the persons who were registered in the said parcels of land which he enumerated as follows: KAJIADO/ IL DAMAT/ 379 – Daniel Kores – 4<sup>th</sup> defendant; KAJIADO/ IL DAMAT/ 499 – Daniel Kores – 4<sup>th</sup> defendant; KAJIADO/ IL DAMAT/ 377 – Richard Runkess Kores – 2<sup>nd</sup> defendant; KAJIADO/ IL DAMAT/ 378 – Manato Ene Metoya – 3<sup>rd</sup> defendant; and KAJIADO/ IL DAMAT/ 253 – Johnson ole Waupi Kobaa – 1<sup>st</sup> defendant. He denied selling land to anyone and insists there were no Sale agreements between him and the defendants. He confirmed issuing a demand letter and averred that he went to the Chief who is the Secretary of group ranch to complain. He reiterates that he noticed his land was being given to third parties and was threatened when he complained.

In cross examination he confirmed being a member of Oloyiankalani Group Ranch but did not have documentation to prove it. He referred to the Area List and averred that his parcel is number KAJIADO/ IL DAMAT/ 253. He contended that the parcel number for the Group Ranch is KAJIADO/ IL DAMAT/ 21 which is registered in the name of the three (3) top officials. He denied knowledge of the dissolution of the group ranch but was aware the members were allocated land as there are minutes to that effect. He denied transferring his land to third parties and stated that he did not know the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' personally. He confirmed being the son of the late Senior Chief Ole Risa and denied that his father took him to the Oloyiankalani Group Ranch officials, when he wanted to sell land. He disputed the signatures on the Sale agreements dated the 20<sup>th</sup> May, 1995, and 6<sup>th</sup> October, 1997 respectively and denied receiving the purchase price from any of the Defendants.

He referred to the Green Card for parcel no. KAJIADO/ IL DAMAT/ 377 and stated that the first entry was on 30<sup>th</sup> December, 1994 in the name of Oloyiankalani Group Ranch. While the 2<sup>nd</sup> entry is dated the 24<sup>th</sup> October, 1996 and indicates it is a subdivision from parcel no. KAJIADO/ IL DAMAT/ 21 and a title deed was issued to 2<sup>nd</sup> defendant Richard Runkess Kores on 24<sup>th</sup> October, 1996.

He claims to have discovered the fraud in 2003 and contends that the Land Registrar colluded with the 2<sup>nd</sup> defendant and backdated the register. He denied that the 2<sup>nd</sup> defendant took a loan as indicated in the List of encumbrances and was not aware of the various transactions over the land. He confirmed that Richard Kores (2<sup>nd</sup> defendant) has put up houses and even fenced the land and was shocked to see developments on parcel number KAJIADO/ IL DAMAT/ 379. He reaffirmed that Daniel Kores (4<sup>th</sup> defendant) received his title on 24<sup>th</sup> August, 1995 but was not aware that Daniel had used the title as security for a loan. He further confirmed that Daniel had put up developments over the said land parcel but could not recall when this was done. He denied signing any transfer forms over the said land and confirmed knowing Moses Murunya only as an acquaintance. He explained that he was not aware when the group ranch was dissolved and whether there was a meeting held to obtain consent of members to dissolve it. He denied any knowledge of the mandate given to the officials to continue in office after dissolution of group ranch in order to process transfer of land to the members.

He disputed asking Mapoore who was his friend to get him a buyer for one of the parcels of land. In relation to the blue book in the Defendants' List of Documents, he confirmed making entries therein but contended that this was an agreement for grazing recorded but not for sale of land.

He explained that the Area list is the key document used by the registrar to process any title to land. He averred that the Group Ranch officials failed to transfer his land parcel number KAJIADO/ IL DAMAT/ 253 to him. He refuted the contents of paragraph 6(viii) of the Plaint where he had pleaded that Johnson works for the government but admitted that he signed his verifying affidavit confirming what he averred was true. He testified that when he saw people developing his land, he reported to the chief who convened a meeting on 5<sup>th</sup> February, 2012 which he attended but they did not resolve any issue as he denied selling land to the Kores family as well as Johnson Wuapi Kobaa. He reiterated that on the 11<sup>th</sup> June, 2015, the Court had advised them to attempt to resolve the dispute through mediation and there was a meeting convened on 28<sup>th</sup> August, 2015, at the Chief's office but he did not attend it as he was scared and did not trust the local Chief.

Further, that his lawyer as well as family members were absent and he did not know whether the issue of the land dispute was discussed and resolved. He contended that he did not attend the second meeting held on 19<sup>th</sup> September, 2015 at Kajiado show ground but his representatives were present. He insisted he did not trust both Chief Mubayo and Kores and was not aware of the outcome of the second meeting. He denied calling the Ole Risa family to convince them to take land from the 1<sup>st</sup> to 4<sup>th</sup> Defendants.

He testified that the 1<sup>st</sup> to 4<sup>th</sup> defendants were not registered members of Oloyiankalani Group Ranch hence they could not get land when the said group ranch was dissolved. He disputed that there was a meeting held by the Oloyiankalani Group Ranch on 9<sup>th</sup> October, 1990 but knew all the members of the said group ranch. He reiterated that his land was taken away fraudulently as there are no documents including the consent, mutation including transfer. He later contracted himself by referring to the Mutation form which was in the Defendants' bundle of documents, that had been signed by the officials of the Group Ranch. He however confirmed that there was an application for Land Control Board Consent for Kajiado/ Ildamat/ 21 as well as a Letter of consent from Purka Land Control Board to transfer the said land into 155 portions. He referred to the letter dated the 3<sup>rd</sup> August, 1987 from one Mr. Khaoya for the Director of the Land Adjudication Settlement to the chairman of Oloyiankalani Group Ranch that granted consent to the said Group Ranch to commence the process of subdivision but said the Group Ranch was dissolved before he received his titles. He claimed that the group ranch parcel number was KAJIADO/ILDAMAT/55. He insisted his averments in paragraphs 6 (v) were true but parcels numbers KAJIADO/ILDAMAT 377; 378 and 379 should be followed by KAJIADO /ILDAMAT / 380 and not KAJIADO/ILDAMAT 499 as pleaded. He reiterates that he discovered the fraud over his land in 2012 but had no documents to demonstrate how he discovered it. He disowned his statement dated the 9<sup>th</sup> May, 2014 and confirmed he had a son called Josephat Kipaso who was working at the Land's Office.

In reexamination, he confirmed that land parcels numbers KAJIADO/ILDAMAT /377; 378; 379 and 499 were a product of subdivision from land parcel number KAJIADO/ILDAMAT 253, which measured 72 hectares. He referred to exhibit P'7 D' which is a map and explained that the land parcel number KAJIADO/ILDAMAT 253 and claimed it was smaller and had KAJIADO/ILDAMAT 377; 378; 379 and 499 as neighbouring it. He made reference to the Letter from the Land Adjudication Officer and contended that there was nowhere indicated that a non-member should get land. He insisted that the Chairman, Secretary and Treasurer of the Group Ranch acted illegally in giving his land to a third party. He confirmed that the Group Ranch was dissolved in 1987 but the application for consent was signed by the Treasurer, Chairman and Secretary on 29<sup>th</sup> August, 1997. He challenged the Mutation Form in the Defendants' List of documents and insisted this related to KAJIADO/ILDAMAT/21.

He denied giving David Kores land as a gift, admitted his nickname is *Kampasi Risa*, acknowledged the entries in the blue book but denied he was selling land. He denied having signed the Sale Agreement for KAJIADO/ILDAMAT/ 253 measuring 80 acres. He reiterated that the ID number indicated as his was incomplete on the agreements dated 6<sup>th</sup> October, 1997; 11<sup>th</sup> October, 1997; 11<sup>th</sup> November, 1997 as well as 7<sup>th</sup> December, 1997 respectively. He further denied granting consent to the group ranch officials to sell his land.

The Plaintiff thereafter closed his case.

## **Evidence of the Defence**

### **DW1 - Shaankua ole Nkoina,**

He confirmed he was the Chairman of the Oloyiankalani Group Ranch from 1974 to date and was with 10 office bearers whom they used to work with. He stated that the main officials were Secretary Kores, Vice Chairman ole Karina and treasurer David Noormongi. He testified that the Oloyiankalani Group Ranch had 122 registered members including the Plaintiff. He stated that the Oloyiankalani group ranch was the registered proprietor of LR number KAJIADO / IIDAMAT/21, which they commenced subdividing and giving members' land when the said group ranch was dissolved. He insisted they adhered to the proper procedure to dissolve the group ranch by holding a general meeting in the presence of one officer from Lands Nairobi called Mr. Khaoya. He explained that they were advised to remain as office bearers as there were to effect transfers to the members who were yet to process their title deeds.

He confirmed that Mr. Khaoya gave them authority to sign transfer forms to the individual members and explained that they went to the Land Registrar as there was fees of Kshs. 3000 to be paid by each member. He further confirmed that they were given consent to subdivide and transfer land to the members and that they signed the transfer forms in the presence of the Land Registrar. He stated that the Plaintiff failed to pay the requisite fees to get his share of the land as was required of each member, and if one did not do so, they did not get their share. However, they later gave the Plaintiff his share as he had brought buyers for his share of the land. He reiterated that three of the buyers were from the Kores family while one was from the Kobaai family. He confirmed that the Plaintiff signed the Sale agreement dated the 20<sup>th</sup> May, 1995 which was witnessed by his father Senior Chief Risa. He denied colluding with the Land Registrar to transfer land to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He claimed there were three (3) meetings held on 5<sup>th</sup> February, 2012; 1<sup>st</sup> March, 2013 and 12<sup>th</sup> February, 2013 respectively to deliberate on land sold by the Plaintiff, which meetings all resolved that the Plaintiff had sold land and he should leave the Kores family alone. He referred to the minutes of the meeting held on 29<sup>th</sup> August, 2015 and 19<sup>th</sup> September, 2015 where it was resolved that the plaintiff had already sold land. He testified that the plaintiff had never complained anywhere about his land.

During cross examination he clarified that they gave the plaintiff his share of land of land No. 253 but did not give him title because he failed to pay the requisite fees. He confirmed that the Plaintiff brought buyers and sold his land. Further, that it was the Plaintiff who subdivided the land to smaller pieces as he could do so even if he did not have a title. He stated that the Plaintiff was given land much earlier than 2003 but in the same year, he sold the last portion to Kobaai. He however could not recall when they allocated the Plaintiff his share of land. He denied signing any Sale agreements relating to the suit lands but admitted only signing the transfer documents. He explained that the Plaintiff did not have title because he failed to pay requisite fees, but they allowed him to sell because he came with his father.

In reexamination he insisted the Plaintiff subdivided and sold his land to the 1<sup>st</sup> to 4<sup>th</sup> Defendants.

### **DW2 : David S. Noormongi**

He stated that he was the treasurer of Oloyiankalani Group ranch which was dissolved in 1985. He confirmed that the Plaintiff who was his cousin was allocated land share number 253. He denied colluding with the Land Registrar to take away the Plaintiff's land and insisted it is the Plaintiff who sold land to Daniel Kores, Kobai, Manati Ene Matoi and Richard Kores. He accepted that they had allowed the Plaintiff to sell his land as he came with his father Senior Chief Risa. He reiterated that the Plaintiff sold his land, which was 170 acres until it was finished. He contended that Daniel Kores had constructed a permanent house and put a borehole including a water dam but Richard Kores had not developed his land. Further, that Manati had constructed four (4) iron sheet houses and put piped water while Kobai had not developed his portion. He averred that the Plaintiff first complained to them over the suit land but only learnt of in February 2013, when he called the Rissa family including himself and said he wanted back the land he had sold to the 1<sup>st</sup> to 4<sup>th</sup> Defendants and sought their support but they refused as they were aware he had sold it. He explained that they called a meeting on 7<sup>th</sup> March, 2013 involving leaders (chiefs) to deliberate on the land issue where the Plaintiff was rebuked as he has sold his land and this led to his coming to court. He clarified that at the High Court in Nairobi, they were advised to mediate over the dispute relating to the suit lands and a meeting was convened on 29<sup>th</sup> August, 2015 at the Kajiado Show ground, by Chief Mpaayo where it was resolved that Murunya was tasked to talk to the Plaintiff as they were from one family. He reiterated that when they were doing the transfer to the Kores family, Murunya was involved. Further, that a second meeting was convened on 19<sup>th</sup> September, 2015 which the Plaintiff did not attend. He reaffirmed that it is the Plaintiff who subdivided his land using a surveyor called Mugo and sold it.

During cross examination he clarified that the Plaintiff was allocated a share of 170 acres, with the last portion which he sold to Kobai measured 12.77 hectares. He reiterated that the land the Plaintiff was allocated is what he sold to other people. He denied signing the sale agreement, participating in any proceedings for the sale of the Plaintiff's land nor having knowledge of the purchase price. He was categorical that it is the buyers who paid the requisite fees to the Land Registrar and that the office bearers (Chairman, Vice chairman, Secretary, Treasurer) were the ones signing transfer forms for each member.

He further clarified that Chapter 284 of the Laws of Kenya allowed the group ranch officials to sign transfer forms on behalf of the members, and if it was a purchase, the said officials signed transfer forms for vendors even if the title had not been issued in the member's name. He confirmed doing so when he sold his land. He insisted that the Plaintiff was present at the time of signing transfer forms and since they did not have an office, they used to sign the forms where the members found them.

### **DW3: Daniel Kores**

He is the 4<sup>th</sup> Defendant and stated that he resides on the suit land. He confirmed knowing the Plaintiff from 1995 when he wanted to sell his share of land after the Oloyiankalani group ranch was dissolved. He stated that he was not a member of the group ranch but the Plaintiff showed him minutes confirming that he has been allocated around 175 acres of land by the group ranch. Further, the Plaintiff first sold them 75 acres and later 80 acres. He contended that they entered into an agreement with the Plaintiff, with the 1<sup>st</sup> Agreement made on 20<sup>th</sup> May, 1995 where he paid Kshs. 8, 000 per acre as purchase price. He insisted the Plaintiff was present when they signed the agreement which was witnessed by his father former Senior Chief Risa. He referred to the agreement dated the 6<sup>th</sup> October, 1997 for the purchase of 80 acres and confirmed paying the Plaintiff 10 heads of cattle and 50 goats as well as Kshs.140,000 as purchase price. He reaffirmed that as for the second agreement, the Plaintiff was first paid Kshs.200,000 in the first instance and on 11<sup>th</sup> November, 1997 he was paid Kshs. 270,000. Further, that on 7<sup>th</sup> December, 1997 they paid him Kshs.170,000/- , with the total purchase price for second transaction being Kshs.640,000/-. He insisted that the agreement was typed at the chief's office. He claimed on 12<sup>th</sup> March, 2013, the Plaintiff went to complain to the Chief that they took his land, which meeting he attended. He clarified that the Sale Agreements were in his name since he is the surviving first born. He averred that parcels number KAJIADO/ IL DAMAT/ 499 and KAJIADO/ IL DAMAT 379. He further confirmed that he moved to parcel number KAJIADO/ IL DAMAT 379 in 1995, fenced it, constructed a structure thereon and used the titles as security to obtain loans. It was his evidence that he had built a permanent house, drilled a borehole and put up a dam. He denied colluding with the Defendants and group ranch officials to take the Plaintiff's land and insisted it is the Plaintiff who sold all of them land. He disputed having capacity to backdate his title deed, using them as security as well as interfering with the transfer form, which was signed by five people including the buyer. He pondered why the Plaintiff took 17 years to start complaining that he took his land but failed to contact him, and yet he used to do so when he used to demand his purchase price. He contended that in the course of construction of his house, the plaintiff was around but never complained. He referred to a meeting held on 5<sup>th</sup> February, 2012 at the Chief's Office where the Plaintiff including his wife were present and admitted selling him 75 acres first. At the meeting, they were advised to get witnesses who could confirm they bought 80 acres of the land from the Plaintiff. He testified that the Plaintiff did not challenge the resolution dated the 1<sup>st</sup> March, 2012 and referred to the meetings held on 12<sup>th</sup> March, 2013 whose agenda was the purchase of the suit land. It was his testimony that they used the group ranch minutes to process title from the land's office. He clarified that their parcels were being excised from parcel number KAJIADO/ IL DAMAT/ 253 in the Area List. He explained that after this suit was filed, they were referred to mediation but on the day of the meeting, the Plaintiff and his lawyer failed to attend. Further, there were subsequent meetings held on 29<sup>th</sup> August, 2015 and 19<sup>th</sup> September, 2015 respectively where it was resolved that they bought land from the Plaintiff.

During cross examination, he insisted that he bought his land but the reason it was indicated as a 'gift' was because any transfer from parcel number KAJIADO/ IL DAMAT 21 which is the original title of the group ranch bears a consideration remark 'gift'. He contended that when the Plaintiff sold him land in 1995, he had not taken his title from the group ranch officials. He denied being involved in any fraud to get their parcels numbers KAJIADO/ IL DAMAT 499; 379; and 378 which were subdivision from KAJIADO/ IL DAMAT/21 and not KAJIADO/ IL DAMAT 253 as claimed by the Plaintiff. He insisted they signed the agreement at the chief's office with the Chairman of the group ranch signing the same while the Plaintiff was present. He confirmed the agreement was drafted by Joseph Kores who was the secretary of Oloyiankalani group ranch. He admitted absence of another agreement with the Plaintiff after he had paid the Kshs.200,000 to demonstrate he had finalized the payment of the balance of Kshs.170,000. He averred that upon finalization of payment of the purchase price in 1995, they went with the Plaintiff to process the title deed and this is when the group ranch officials signed the transfer forms. Further, that the mistake on there Plaintiff's ID number was an error. He referred to an agreement where it reflected different dates of payment and explained that they did not pay all the monies at once but drafted the said Agreement and left blank spaces which were signed whenever the Plaintiff received any monies. He insisted the elders were present at the Chief's Camp at the time of preparing the agreement but did not witness when he paid the purchase price to the Plaintiff. He reiterated that the plaintiff's parcel were surveyed several times in 1995 and 1997 with one surveyor. He insisted that he paid a total of Kshs.640,000/- for the 80 acres and that whenever he was paying with herds of cattle, it was computed into cash.

During re examination, he clarified that the land parcel number KAJIADO/ IL DAMAT/21 belonged to the group ranch and each member got a share therefrom. Further, that there is a Members' Register and Area List that reflects the share of land for each member. He stated that member no.55 who is plaintiff herein had share no.253 but this is not the title. He testified that their parcels numbers KAJIADO/ IL DAMAT 499; 379; 378, and 377 were derived from KAJIADO/ IL DAMAT/21, but the land was taken from the share of the Plaintiff but his share number 253 remained intact. He contended that the Plaintiff did not sue them for non-payment. Further, that in the agreement acknowledging payment, there is no indication of the word cash as they were paying in both monies as well as livestock. He insisted that he did not have capacity to amend the Area List.

**DW4** – Richard Runge Kores who is the 2<sup>nd</sup> Defendant confirmed that the Plaintiff sold him land parcel number KAJIADO /ILDAMAT /377 measuring 25 acres. He stated that he is not a member of Oloyionkalani Group Ranch but bought land therefrom. He explained that the group ranch officials ratified the sale, with the first agreement, being signed by the Chairman, Secretary, Plaintiff including Plaintiff's father and DW4's elder brother Daniel Kores. He confirmed being present at the meeting but did not sign the said agreement dated 20<sup>th</sup> May, 1995 as his elder brother was undertaking the transaction on behalf of their family. He reiterated they bought a total of 155 acres and after subdivision, when they were finalizing the settlement of the purchase price, the Plaintiff took them to the group ranch offices and confirmed payment and as result the Plaintiff's share that they bought was given to them. He confirmed that they paid the purchase price through cash as well as cows whose value was computed into cash. He was aware of the payments made on 6<sup>th</sup> October, 1997; 11<sup>th</sup> November, 1997; as well as 7<sup>th</sup> December, 1997 as it was his elder brother making the payments but he was present at the time of signing of the agreement. He testified that in 1996 and 1997, he took a loan at Barclays Bank and charged the suit land, and the said Charges were discharged, after he finished repaying the loan. He confirmed rearing livestock on the suit land and had done subdivision as well as sold five (5) acres from land parcel number KAJIADO/ IL DAMAT/ 377. He admitted that he had never constructed on the said land and neither had he ever heard a complaint from the Plaintiff over it. He attended the meetings held on 5<sup>th</sup> December, 2012 and 1<sup>st</sup> March, 2013 held to deliberate on the suit lands but the Plaintiff failed to do so and never disputed the minutes therefrom.. He denied taking the Plaintiff's land no. 253 and argued that there was no way the Plaintiff could see developments on his land but fail to act for 20 years. Further, that the group ranch officials issued everyone with their titles from the Oloyionkalani Group Ranch. He contended that he got land parcel number KAJIADO/ IL DAMAT 377 directly from Group Ranch because the officials had capacity to sign transfer forms on behalf of the member who was selling land his land. He denied backdating any documents and contended that he did not have capacity to do so. He referred to meetings held on 29<sup>th</sup> August, 2015 and 19<sup>th</sup> September, 2015 respectively which resolved that the plaintiff sold his parcel of land to them. He challenged the Plaintiff's allegations of fraud and insisted he was lying as he acquired the suit land legally.

During cross examination he confirmed that it is the Group Ranch that was granted consent to subdivide land parcel number KAJIADO/ IL DAMAT/ 21 to its members; which subdivisions created KAJIADO/ IL DAMAT/499 and KAJIADO/ IL DAMAT/ 379 respectively. He insisted he got his land from KAJIADO/ IL DAMAT/ 21 and it is the Group Ranch officials who signed the transfer form, on behalf of the Plaintiff as he did not have a title. He reiterated it is the Plaintiff who took them to the group ranch officials and confirmed they bought land from him but the Sale Agreement was signed by his elder brother on behalf of the family. It was his testimony that he subdivided his land before the instant suit was filed and did not intend to defeat it. He reaffirmed that they first bought 75 acres for Ksh.600,000/-, and later 80 acres for Kshs 640,000/-; which they paid in cash as well as cows that was computed to cash.

In reexamination, he reiterated that the Plaintiff had never taken his title from the officials of group ranch. He reaffirmed that the group ranch officials signed for him the transfer forms and he got land parcel number KAJIADO/ IL DAMAT/ 377. He confirmed subdividing parcel number KAJIADO/ IL DAMAT/ 377 into three (3) portions in 2012.

#### **DW5 : Manati ene Metoyo**

She is the 3<sup>rd</sup> Defendant and testified in Kimaasai which had to be interpreted. She confirmed that 3<sup>rd</sup> and 4<sup>th</sup> Defendants were her brothers in law but her husband was deceased. She averred that they bought land from the Plaintiff, together with Daniel and that her land is 25 acres. She contended that she paid the Plaintiff the purchase price as she gave about 20 cows and 30 goats as purchase price. She stated that she got a title deed as a result of the transaction but could not recall the land parcel number. She has resided on the suit land for 20 years and constructed houses thereon including connecting piped water. She insisted that the Plaintiff had never raised any complaint over the suit land to any authority and only sued her but she denied colluding with government officials to defraud him of his land.

During cross examination, she confirmed staying on the suit land for about 20 years but could not recall the year of the land transaction.

In reexamination she clarified that she is illiterate and only thumb prints what is brought to her. She stated that she started buying the land when her husband had passed away.

#### **DW6 - KISHANKA SHAANKUA KOBAAI**

He averred that the Plaintiff sold him goats and told me he got them from the family of Richard Kores. He confirmed witnessing the Plaintiff signing for receipt of Kshs.200,000/- being purchase price and various agreements dated 6<sup>th</sup> October, 1997, 11<sup>th</sup> November, 1997 as well as 7<sup>th</sup> December, 1997 respectively as a witness. He further witnessed the payment of Kshs.270,000 being cash and also animals, that were made to the Plaintiff. On 7<sup>th</sup> December, 1997, he witnessed another payment where animals were computed into cash. He insisted he saw the Plaintiff signing all the three agreements dated 6<sup>th</sup> October, 1997; 11<sup>th</sup> November, 1997 and 7<sup>th</sup> December, 1997 respectively as he was a witness. He was surprised that the Plaintiff was denying he was paid for the suit lands and is aware Daniel and Manati have constructed thereon.

In cross examination he was emphatic that the Plaintiff was paid Kshs.200,000 on 6<sup>th</sup> October, 1997 as he witnessed him signing for it. He also witnessed the Plaintiff being paid Kshs 270, 000 on 11<sup>th</sup> November, 1997 and also being paid on 7<sup>th</sup> December, 1997. He clarified that the agreement was typed on one day because the plaintiff was paid at different times. He reiterated that he bought five goats from the Plaintiff who told him he got the same from Richard Kores and he also witnessed him getting goats from Richard Kores.

In reexamination he clarified that the payment of animals was done several times and this was condensed into one agreement that they all signed, when the Chairman was present.

**DW7 : Naipatet ole Lange**

He confirmed being the Plaintiff's brother in law and that he once stayed at their home for 5 years. He witnessed the Plaintiff selling land to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He recalled in October 1997 when animals were sold for 200,000/-; a second payment made for Kshs.270,000/- and a third payment Kshs. 170, 000/= where the value of the animals were computed into cash. He confirmed signing as a witness for the Plaintiff when he received the money and all the three acknowledgements for payments made. He explained that even though the payments were done at different times, the acknowledgements were printed in one document and all signing done at once. He further stated that he witnessed the Plaintiff signing the document at the Chief's office and it is hence a lie for the Plaintiff to claim he was not paid, yet he sold the land, which he got from the group ranch.

During cross examination, he confirmed that he signed the acknowledgement/agreement on 7<sup>th</sup> December, 1997 but did not recall the amount of cash paid. He averred that he was the Plaintiff's witness and could verify whenever he was paid. Further, that the Plaintiff was paid in cash as well as livestock, which were computed into cash. He was aware that the Plaintiff sold 80 acres of land.

In reexamination, he clarified that all along he was together with the Plaintiff during the land transactions. It was his testimony that at one time he took cows from the Kores family to the Plaintiff's homestead and the same was computed into cash.

**DW 8: Daniel Sirpan Kupei**

He confirmed that the Plaintiff was given money as well as livestock as purchase price. He saw the Plaintiff being given Kshs.270,000/- by Daniel Kores. He averred that he signed an agreement as a witness of the Plaintiff to confirm he had been paid the purchase price and insisted that no one took away his land fraudulently.

In cross examination, he confirmed signing an agreement at a hotel in Kajiado town in the presence of the Chairman, Secretary as well as four witnesses. He however clarified that he was not present when the agreement was being typed but just signed it. He stated that they went to sell the goats in Kiserian carrying them in a motor vehicle registration number KZJ 497. Further, that the animals comprised of 42 goats, which were sold when they were together with Richard Kores, and the prices differed per animal. He reiterated that Daniel paid other monies which totalled Kshs.270,000/-.

**DW9** John ole Waupi Kobaai who is the 1<sup>st</sup> Defendant confirmed he purchased his land from the Plaintiff who was introduced to him by Mapoore. He was aware there were people who had bought land from the Plaintiff that included Richard. He testified that the agreed purchase price was Kshs. 9,000/= per acre which totaled to Kshs. 279,000/=. He explained that there was a book where they were recording the land transaction and since he is illiterate, it is the Plaintiff who was writing therein. Further, that the book is his but the Plaintiff also had his own and he was the one signing. He insisted he paid cash as well as livestock that were computed into cash but could not recall the number as he paid the same over a period of time upto 2003. He averred that the transaction was witnessed by the Plaintiff's wife and son respectively. He contended that the Plaintiff only took him to the officials of the group ranch, after he had finalized the payment, so as to get his title deed. He denied signing the transfer forms as the same was handled by the group ranch officials. He referred to the greencard marked as exhibit '15a' and explained that the Plaintiff was allocated his share of the land by the group ranch, which share he sold to him. He confirmed building a house including a latrine on the suit land and fencing a portion. He further confirmed getting a transfer in 2003 and contended that the Plaintiff never sued him before he took the land nor did he stop him from building thereon. He denied backdating the documents relating to purchase of suit land as he has never worked at the land's office. He challenged the Plaintiff's averments that his title should be cancelled and reiterated that he never unlawfully took the Plaintiff's land. He further denied that the Plaintiff never gave him land for grazing as claimed.

During cross examination, he explained that on 12<sup>th</sup> September, 2003, the balance of the purchase price was Kshs.3,700/- which he paid. Further that on 29<sup>th</sup> October, 2003, there was a balance of Kshs.30,000/- after title deed had been issued, which he paid. He contended that on 3<sup>rd</sup> January, 2003, he paid Kshs. 111, 000/= leaving a balance of Kshs. 49,000/=. He insisted that he paid the whole purchase price after which the Plaintiff agreed to transfer the land to him. Further, that it is the Plaintiff who brought the officials of the group ranch..

In reexamination he clarified that he did not remain with the Plaintiff's balance as he did not claim it. He reiterated that it is the chairman, secretary and treasurer who were signing the transfer forms on behalf of the Plaintiff.

**DW10 – Mapoore ole Swallin Mutonga**

He confirmed knowing the Plaintiff and was the best man at his wedding. His testimony was that in 2003, the Plaintiff asked him to get him a buyer for his land measuring 31 acres. He averred that he brought the buyer one Johnson Wampu Kobaai to purchase the land. He stated that he introduced Johnson to the Plaintiff but never participated in the transaction. He however met Johnson later who told him he had bought the land and got title. He insisted that it is a lie for the Plaintiff to deny selling Johnson land. He explained that when he confronted the Plaintiff to stop being fraudulent, he told him that it is his son who had an issue over the sale. It was his testimony that the Plaintiff had sold land to someone called Daniel Kores who still resides thereon.

In cross examination, he confirmed being friends with the Plaintiff and stated that in 2003, he is the one who introduced the Plaintiff to Johnson.

**DW 11 – Joseph Ngahu Mugo**

He stated that he is a Land Surveyor and while a District Surveyor in Kajiado, He approved the subdivision of the Oloyionkalani group ranch, which was dissolved in the 1990s. He explained that upon dissolution of Group Ranch, District Surveyor allocate new number and titles. Further, that the new numbers are contained in Area list, which is based on survey done on the land. It was his explanation that once the Area list was forwarded to the Land Registrar for purposes of issuance of titles, which could only be issued once the Land register was opened. He testified that that he had access to the Register of Oloyionkalani Group Ranch and the members were more than 120 in the register. As a District Surveyor, he oversaw the subdivision of Oloyionkalani Group Ranch by undertaking measurements and preparing the members' list in consultation with the Group Ranch officials. He referred to the Area List and explained that Christopher Lempaka Mataiyian (Plaintiff) was member number 55 who was allocated title number 253. It was his testimony that from the documents presented in court, it was the representatives of Oloyiankalani group ranch who transferred land to Daniel Kores in December 1997. He reiterated that the Group Ranch representatives have power to transfer land to the member. He contended that it was the Land Registrar who was mandated to open green cards whenever the group ranch officials presented transfer forms. It was further his testimony that each member was expected to get an average of 150 acres and it was not realistic for the Plaintiff to be allocated 30 acres only.

During cross examination he confirmed that the subdivision was for members but changes were done if a member died, with his share being given to his heirs. He explained that member number 55 was to get parcel number 253 and the Green Card opened. Further, that whenever a member subdivided his share of land, there had to be evidence to that effect. He reiterated that some members asked the officials to allow them subdivide their share which request the said officials acceded to. It was his testimony that there were a number of sales that were not documented. He referred to the Green Card for land parcel number Kajiado/ Ildamat/ 253 and contended that, there was indeed a transfer but no title deed was issued. He reiterated that third parties who were not members of the group ranch were also buying land and getting titles.

In reexamination, he clarified that there was a possibility of Group Ranch officials allowing a member to subdivide his share of land and allowing group ranch officials to transfer the same to a third party directly as if he was a group ranch member. Further, this could have been what transpired in the current case as the Plaintiff only got 30 acres of land and for parcels he transferred to third parties, he never got title deeds to them.

### **Evidence of the 5<sup>th</sup> Defendant**

The evidence of the 5<sup>th</sup> Defendant was presented by Mr. Nyandoro who was the Principal Land Registrar, Kajiado. He provided the history of land parcels numbers KAJIADO/ILDAMAT/253; 377; 378; 379 and 499 respectively. It was his testimony that according to the Land Register, all the abovementioned parcels were indicated as resultant subdivisions from KAJIADO/ILDAMAT/21 that was initially registered in the name of Oloyionkalani Group Ranch. He confirmed that land certificate for land parcel number KAJIADO/ILDAMAT/21 was issued on 9<sup>th</sup> March, 1978 and the parcel closed for subdivision on 30<sup>th</sup> December, 1994. Further, that subdivision numbers were from numbers.179 – 354, thereby including parcel no.253 which is in dispute. He explained that land parcel number KAJIADO/ IL DAMAT/ 377; 378; 379 and 499 fall outside the bracket of original subdivision and there are no records in the Lands office to demonstrate how they were included as resultant subdivisions from land parcel KAJIADO/ IL DAMAT/ 21. It was his explanation that the register for land parcel number KAJIADO/ IL DAMAT/ 253 measuring 12.77 ha (37.5) acres was opened on 29<sup>th</sup> October, 2003 contrary to the closure date for subdivision. Further, that on 29<sup>th</sup> October, 2003, the land was transferred by Oloyiankalani Group Ranch to one Johnson ole Waupi Kobai which transaction was entered in presentation book Daybook no.241 dated 29<sup>th</sup> October, 2003. He referred to parcel number KAJIADO/ IL DAMAT/ 377 measuring 9.71 hectares (24) acres and confirmed it was registered on the 30<sup>th</sup> December, 1994 which did not conform to closure of register after subdivision and the same was transferred from the Group Ranch to Richard Runkess Kores on 24<sup>th</sup> October, 1996. This parcel no longer exists as it has been closed on subdivision and the new numbers KAJIADO/ IL DAMAT/ 4731 and KAJIADO/ IL DAMAT/ 4732 issued respectively. He contended that the register for parcel number KAJIADO/ IL DAMAT/ 378 which measures 2.71 ha (24 acres), was opened on 24<sup>th</sup> August, 1995 in the name of the Group Ranch and transferred to MANATI ENE METOYO. He further explained that register for parcel number KAJIADO/ IL DAMAT/ 379 measuring 9.71 ha ( 24 acres) was opened 24<sup>th</sup> August, 1995 and transferred to Daniel Kores and for parcel number KAJIADO/ IL DAMAT/ 499 measuring 32.71 Ha (80 Acres) further opened on 16<sup>th</sup> December, 1997 and transferred by the Group Ranch to Daniel Kores. This transfer was duly presented, and recorded under Day book no.177 of 16<sup>th</sup> December, 1997 and information is supported by the transfer documents between group ranch and the purchasers.

He raised the lack of clarity as to why the Group Ranch would award a member less acreage as compared to others. He clarified that there was a discrepancy on the opening and closing dates of the Land Register pertaining to the suit lands and that land parcels numbers KAJIADO/ IL DAMAT/377; 378; 379 and 499 respectively purportedly originated from parcel KAJIADO/ IL DAMAT/ 21 , yet they did not fall within the bracket of the ones issued after subdivision of the said group ranch.

During cross examination he was emphatic that he did not detect any fraud despite the fact that there was a gap on how the said parcels came into existence. He clarified that he did not deal with the group ranch directly but from his knowledge, there were members who sold their parcels of land before they were issued with title deeds. However, the Land adjudication officer had to amend the land register accordingly. He reiterated that except for parcel KAJIADO/ IL DAMAT/ 253, which fell within the bracket, he could not explain how the suit parcels became part of parcel number. KAJIADO/ IL DAMAT 21.

During further cross examination, he confirmed that the registration of land parcels number KAJIADO/ IL DAMAT/ 377; 378; 379 and 499 were conducted from his office and he had all the records. He reiterated that all transactions in the suit lands including discharge on parcel number KAJIADO/ IL DAMAT/ 378 as well as transfer of KAJIADO/ IL DAMAT/ 499 were all done through his office. He stated that he could not vividly talk of irregularities or illegality in regard to the suit lands but explained that it is not a must for the Land Registrar who dealt with a certain transaction to check the history in the green card but all he did was to confirm authenticity and genuineness of the green card. He further confirmed that transfers over the suit lands were done by the officials of the group ranch and this was not unusual because at the time they are doing the transfers, the said land was registered in the name of the group ranch. He referred to land parcel number KAJIADO/ IL DAMAT/ 253 and stated that subdivision was closed on 30<sup>th</sup> December, 1994 and the land transferred to Johnson Ole Waupi Kobai but entry number 2 in the Green Card was done in error as it was not signed. He did not know whether Johnson Koobai was a member of the group ranch but explained that a non member could acquire land from a group member and the said transaction done before it comes to their office but the adjudication records have to be amended to effect it. As per his records, the suit lands emanated from parcel number KAJIADO/ IL DAMAT/ 21. He testified that a group register can be closed and opened in special circumstances and could not confirm or

deny process if in this instance the Register was reopened. He contended that there was no evidence of fraud in the transfers of the suit lands and the Plaintiff did not formally file a complaint with the Lands Office nor did he lodge any caution over the suit lands.

The Defendants' thereafter closed their case and all parties filed their respective submissions that I have considered.

### Analysis and Determination

Upon perusal of the pleadings filed herein including the exhibits produced and upon hearing testimonies from all the witnesses as well as considering submissions of the parties herein, the following are the issues for determination:

- Whether the Plaintiff sold part of his share of the land allocated by the Oloyionkalani Group Ranch to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.
- Whether the Group Ranch officials had capacity to transfer the Plaintiff's share of land to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.
- Whether the Plaintiff's land was fraudulently transferred and registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.
- Whether the titles to land parcels numbers 377, 378, 379 and 499 should be cancelled and land register rectified and restored to land parcel number KAJIADO/ ILDAMAT/ 253 in the name of the Plaintiff.
- Who should bear the costs of the suit.

It is not in dispute that the Plaintiff was a member of the Oloyiankalani Group Ranch who allocated him shares of land. What is in dispute is the Plaintiff contention that the group ranch officials colluded with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to defraud him of his land. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants insist they purchased land from the Plaintiff at different intervals and paid the purchase price. They explained that since the Plaintiff had not procured title for the share of the land he had been allocated, as he had not paid the requisite fees to the land registry, the group ranch officials signed the transfer forms as it was a common practice and the transfer of the suit lands were effected in their favour. The 5<sup>th</sup> Defendant as the Land Registrar, Kajiado denied any wrongdoing and stated that they did not detect any fraud in the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants acquisition of their respective titles.

The Plaintiff submitted that the Group Ranch Officials colluded with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and relied on an agreement made in 1995 to transfer the entire share of his land to the Defendants contrary to section 6 of the Land Control Act which required consent to be obtained within six (6) months of the transaction. The Plaintiff stated that the green card for KAJIADO/ ILDAMAT/ 253 was backdated since the registration was closed on 30<sup>th</sup> December, 1994. The Plaintiff also submitted that section 8 (2) of the Land (Group Representatives) Act spelt out the duties of the Group Ranch Representatives and provided as follows: **'The Group Representatives are under a duty to hold any property which they hold as such, and to exercise their powers as such on behalf and for the collective benefit of all members of the group and fully and effectively to consult the other members of the group on such exercise.'** He submitted that there was no proof of the Group Ranch Officials consulting him in respect of his share of land. He reiterated that section 15 of the Land (Group Representatives) Act requires meetings to be held and approvals made when dealing with members issues but this was not the case.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that they were bona fide purchasers for value and did not collude in any way to defraud the Plaintiff of his share of the land. They insisted that they entered into various contracts of sale with the Plaintiff and the transactions were on a 'willing buyer willing seller' basis. They contended that they did not have capacity to backdate the land records as alluded by the Plaintiff. They relied on the Court of Appeal decision of **National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd Another** to support their argument. On denying the Plaintiff's allegations of fraud, they relied on the case of **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** to support their argument that the said allegations had not been proved.

As to whether the Plaintiff sold part of his share of land allocated by the Oloyionkalani Group Ranch to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively. All the Defense witnesses except for the Land Surveyor and Land Registrar, contended that the Plaintiff sold land to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as evidenced by the Sale Agreements made in 1995 as well as acknowledgement of payments made in 1995, 1997 and 2003 respectively. The group ranch officials who testified insisted that the Plaintiff informed them of his intention to sell land but they initially declined to allow him do so, and only let him proceed as they respected his father, senior Chief Risa, who witnessed the Sale Agreements. DW1 who was an official of the group ranch was emphatic that the Plaintiff brought buyers to purchase his share of land but since he did not have title, they signed the transfer forms since the title was still in the name of the group ranch and they were mandated to do so, so long as the member consented. It was the defense evidence that they paid the purchase at different intervals but the same was condensed into several agreements as well as acknowledgement of payments which were witnessed by both the Plaintiff, Plaintiff's witnesses as well as the Defendants' and their witnesses. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants confirmed that Richard Kores who had signed the agreements was purchasing land on behalf of his family members. From the proceedings herein, I note the Court had earlier referred the matter for community mediation but from the evidence presented, the Plaintiff including his lawyer declined to attend the two scheduled meetings. From a perusal of the minutes of the two meetings including the resolution therefrom, it is evident that all the members present were aware and confirmed that the Plaintiff had sold land to different parties, wherein he was paid in cash as well as livestock whose value was computed into cash.

From the Plaintiff's exhibits, which include the Area List, I note that the Plaintiff was allocated shares of land in the Group Ranch but did not

have a title. At this juncture, it is my considered view that shares in the ranch did not translate to a title deed unless the requisite fees was paid, which the Plaintiff never did so as to obtain a title. From the Plaintiff's evidence, he never once confirmed that he had been issued with a title, which was fraudulently altered by the Defendants. DW 6, DW7, and DW8 all confirmed in court that they witnessed the Plaintiff being paid in cash as well as in livestock for the purchase of the suit lands. It is noteworthy that the three were actually witnessing the transactions on behalf of the Plaintiff and not the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. What is not clear is that if indeed the Plaintiff did not sell his share of the suit lands to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively, why did he allow them to take possession, with two of the Defendants even constructing permanent homes thereon and it took him almost 17 years to file the instant suit. DW9 who was a friend to the Plaintiff confirmed that he introduced the 1<sup>st</sup> Defendant to the Plaintiff so as to purchase land. The 1<sup>st</sup> Defendant produced a blue book where the transactions between himself and the Plaintiff were being recorded, by indicating the number of cows paid as consideration towards the purchase of land. In the said blue book, the seller is indicated as *Kampasi Risa*, which the Plaintiff admitted was his nickname. The Plaintiff also acknowledged the entries in the blue book, denied, that he was selling land but explained that the agreement was for grazing rights, which he had granted the 1<sup>st</sup> Defendant. However, from a perusal of the entries in the blue book, it is clear the Plaintiff was indeed selling some land. DW9 testified that when he confronted the Plaintiff to stop being fraudulent, the Plaintiff informed him that it is his son who had an issue over the sale. DW3 Daniel Kores stated that as the family of Kores, they bought a total of 155 acres of land from the Plaintiff, which were paid up as follows: Kshs. 600,000 on 20<sup>th</sup> May, 1995; Kshs. 200,000 on 6<sup>th</sup> October, 1997; Kshs. 270, 000 on 11<sup>th</sup> November, 1997; Kshs. 170, 000 on 7<sup>th</sup> December, 1997; with some payments being made in livestock that was computed into cash. The Plaintiff claimed he discovered the fraud over his land in 2012 but did not produce any documents to demonstrate how he discovered it nor whether he reported the matter to the Police. DW2 who was a blood brother to the Plaintiff confirmed that the Plaintiff was given a share of the land by the Group Ranch officials but opted to sell it. The 1<sup>st</sup> Defendant who was DW 7 confirmed that he purchased his land from the Plaintiff by paying a total of Kshs. 283, 992 as purchase price. Which leads me to ponder the question that, how can all the ten (10) witnesses contend that the Plaintiff sold his land but it is only the Plaintiff who denies it. From the Plaintiff's submissions, he actually admitted that there was indeed an agreement made in 1995 in respect of the Sale of his shares of the land and only questioned the fact that the consent of the Land Control Board was obtained after six (6) months. I wonder how the Plaintiff who lived close to the suit lands, could allow strangers to take possession of 'his' land and watched them residing thereon for almost 17 years before taking action. From the evidence presented, it is my considered view that payments made at different intervals cannot invalidate a Sale and extricate the Plaintiff from being bound by it. In the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR**, the Court of Appeal held as follows: ' **This is in our considered view is a serious misdirection on the part of the learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regards to the terms of the clause.**'

It seems the Plaintiff had enjoyed the payments he was receiving from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants but only filed a suit when there was no more land to sell. It is against the foregoing that I find that there is overwhelming evidence confirming the Plaintiff actually sold his share of the land allocated by the group ranch but is challenging the sale by relying on technicalities as to how the transfers were effected. I find that the Plaintiff does not have clean hands by coming to court and that is why he even declined to attend the meetings as directed by the court and disowned his statement dated the 9<sup>th</sup> May, 2014.

As to whether the Group Ranch officials had capacity to transfer the Plaintiff's share of land to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. I note that at the time the Plaintiff was selling his shares of land, he did not have the title to it as the same was still registered in the name of the group ranch. This in essence means that the Plaintiff was actually not the registered proprietor of the suit lands as alleged but simply holding shares allocated by the Group ranch which could only be translated to title deed once the requisite fees was paid. DW 11 and DW12 who are a retired District Surveyor and Land Registrar respectively confirmed that the Group Ranch officials had capacity to transfer land from the Group Ranch to the purchaser. They both confirmed that this was a common practice and once this was done, the Area List was simply amended to reflect the revised acreage. I note that the Defendants pleaded in their Defence that as per the General Meeting convened by the Group Ranch on 9<sup>th</sup> October, 1990, it was resolved that a member who sought to dispose off his land would have to notify the Group Representatives and they would assist in the process of the transfer of land to any third party. This fact was not expressly controverted by the Plaintiff. I opine that the aforementioned members resolution made on 9<sup>th</sup> October, 1990 was in accordance with the consultation envisaged under the provisions of section 8 (2) of the Land ( Group Representatives) Act. DW1 confirmed in court that they were given authority by the Land Adjudication Office to transfer land to the members after which they obtained Letter of Consent to subdivide the ranch on 13<sup>th</sup> September, 1994. Further, that as the custodians of the Certificate of title of the Group Ranch, the officials were the ones who signed the transfer forms on behalf of the Plaintiff as he did not have title to his share of land. This in essence means that the officials had the capacity to transfer the Plaintiff's share of the suit land, which he had sold, so longer as the Plaintiff consented to it. DW1 upto DW10 all confirmed that the Plaintiff was paid the purchase price in both livestock and cash. The buyers all confirmed that it is the Plaintiff who took them to the Group Ranch officials to enable them sign the transfer forms, so as to get their title deeds. This is a demonstration that the Plaintiff indeed consented to the suit land being transferred to the 1<sup>st</sup> to 4<sup>th</sup> Defendants. It is against the foregoing, that I find that the Group Ranch officials were indeed legally mandated to execute the transfer forms in favour of the 1<sup>st</sup> to 4<sup>th</sup> Defendants, since the Plaintiff had consented to it.

As to whether the Plaintiff's land was fraudulently transferred and registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Plaintiff pleaded allegations of fraud in his Plaintiff and averred that the Defendants colluded and transferred his land to the 1<sup>st</sup> to 4<sup>th</sup> Defendants respectively. The Plaintiff however never produced any title deed to prove he had been registered as owner of parcel number 253 and neither did he produce any Certificates of Official Searches confirming so. It was DW1 and DW2's evidence that the Plaintiff had not paid the requisite fees to be able to get a title to his share of the suit land and that was the reason the land was still owned by the Group Ranch. Section 26. (1) of the Land Registration Act provides that: '**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, '**

In relying on the said legal provisions, I find that since it is the Group Ranch that still held the Certificate of title, it proved they still owned the said Land and the Area List which the Plaintiff referred to, only indicated the Shares of the respective members. It is my finding that the Area List cannot supersede a Certificate of title. I further note that in terms of the pleadings, the Plaintiff did not sue the Group Ranch officials as the officials who transferred his land to the 1<sup>st</sup> to 4<sup>th</sup> Defendants. Further, that the 1<sup>st</sup> to 4<sup>th</sup> Defendants did not have capacity to

prepare the land records at the Land Registry and hence could not register themselves as the proprietors of the suit lands nor backdate the said records. The Court takes judicial notice of the fact that despite the Plaintiff discovering fraud in 2003, he only filed the suit in 2015 and never tendered any evidence as to whether he made any reports to the Police to commence investigation. Further, from the Green Cards produced as exhibits in Court, the Plaintiff never lodged any restriction nor caution from 2003 to safeguard his interests in the suit lands. It was the Defendants' evidence that after they purchased the suit lands, most of them except for Daniel Kores, took occupation of the same and from the Defence exhibits, they even developed the land and put up permanent structures thereon. I note Daniel had even charged his land and undertaken subdivision which means the title no longer exists. From the various title deeds produced by the Defendants except for the 1<sup>st</sup> Defendant, the rest were issued with their titles in the 1990s and continued to be in occupation of the land. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others** [2015] eKLR, the Court of Appeal held as follows: 'To cap it all, the entire file was still missing when West End applied to peruse it, and appears to have been reluctantly produced in court, according to the observation of the trial court on the conduct of Johnson Otieno Odera (DW1), a former Senior Assistant Registrar General. The case is a clear exception to the Rule in *Turquand's* case, derived from the case of *Royal British Bank v Turquand* (1856) 6 E & B 327) which prevents outsiders from being affected by internal irregularities of which they have no means of discovering. But the Rule does not apply, amongst other exceptions, where the corporate signature is forged or if the outsider knew of the internal non-compliance, or knew facts that would lead a reasonable person to inquire further.....It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from *Bullen & Leake & Jacobs, Precedent of pleadings* 13<sup>th</sup> Edition at page 427:

**"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd's Rep. 305, 308).**

**The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 ch.D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".**

see ***Insurance Company of East Africa vs. The Attorney General & 3 Others* Hccc135/1998.**

#### **Whether there was fraud is, however, a matter of evidence.'**

From the evidence presented by the Plaintiff and relying on this decision, I find that the burden of proof was upon the Plaintiff to enumerate the acts of fraud which the Defendants perpetrated that culminated in the suit lands being transferred to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively. I find that the Plaintiff failed to prove the allegations of fraud while testifying and that is why perhaps he failed to sue the Group Ranch officials who signed the transfer forms on his behalf. The Plaintiff expected the court to make an inference from his evidence that there was fraud perpetrated against him which evidence is not convincing. Further, the District Land Registrar in charge of the records at the Land Registry, in so far as he acknowledged there were irregularities in the registration of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the respective parcels of land, as it did not include the history of the land, was emphatic that there no fraud committed. He even confirmed that the transactions relating to the 1<sup>st</sup> to 4<sup>th</sup> Defendants' parcels of land were done in his office and the said records are available.

I find that the 1<sup>st</sup> to 4<sup>th</sup> Defendants could not have been held responsible on maintenance of records at the Land Registry as they were outsiders and it was the duty of the Land Registry to ensure proper records were preserved. Further, since they had already paid the purchase price, signed respective agreements and with the group ranch officials who were legally mandated to sign the transfer forms, did so, they were deemed to be bona fide purchasers for value. It is strange that from the 1990s when the group ranch was dissolved and the Plaintiff being well aware that he had shares in the said ranch, took so long to pay the requisite fees so as to obtain his title. Plaintiff seems to have been keen on unjust enrichment and that is why it emerged in court that he had an intention of defrauding the buyers, yet he had received the purchase price. DW9 further confirmed in court that he was illiterate and it is the Plaintiff who was recording all the transactions in the 'blue book'. As ably put in the equity maxim that 'he who comes to equity must come with clean hands'. I find that the Plaintiff did not have clean hands to bring forth this suit and that there was no fraud perpetrated by the Defendants against him.

As to whether land parcels numbers KAJIADO/ IL DAMAT/ 377; 378; 379 and 499 should be cancelled and land register rectified and restored to land parcel number KAJIADO/ IL DAMAT/ 253 in the name of the Plaintiff. I note that it is only the Green Card for land parcel number KAJIADO/ IL DAMAT/ 253, registered in the name of the 1<sup>st</sup> Defendant that can be traced to parcel number KAJIADO/ IL DAMAT/ 253. However, land parcels numbers KAJIADO/ IL DAMAT/ 377, no longer exists, since it has been subdivided to KAJIADO/ IL DAMAT/ 4731 and KAJIADO/ IL DAMAT/ 4732 respectively and can also not be traced to KAJIADO/ IL DAMAT/ 253. From the Green Cards, land parcels number KAJIADO/ IL DAMAT/ 378; 379 and 499, are all resultant subdivisions of KAJIADO/ IL DAMAT/ 21. Since, I have already held above that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were purchasers for value without notice, and in relying on section 80 of the Land Registration Act which provides as 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.'**

I will decline to cancel the titles for the 1<sup>st</sup> to 4<sup>th</sup> Defendants and hold that they all hold legitimate titles.

It is against the foregoing that I find that the Plaintiff has failed to prove his case on a balance of probability and will proceed to dismiss it with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

**Dated signed and delivered in open court at Kajiado this 26th day of September 2018.**

**CHRISTINE OCHIENG**

**JUDGE**