



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ORIGINATING SUMMONS NO.400 OF 2017**

**(Formerly Nairobi ELC OS NO. 629 of 2014)**

**IN THE MATTER OF ORDER 37 37 & 40 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE KAJIADO RESIDENT MAGISTRATE COURT MISC. APPLICATION NO. 69 OF 2011**

**AND**

**IN THE MATTER OF THE DEFUNCT KAJIADO NORTH LAND DISPUTE TRIBUNAL CAUSE NO. TC/ 223/ 100/ 010**

**AND**

**IN THE MATTER OF THE ESTATE OF WUANTAI OLE SAIRE (DECEASED)**

**PARMUAT OLOIHORUA KORE.....APPLICANT**

**VERSUS**

**1. PHILIP SANTAMO WUANTAI**

**2. WUANTAI OLE SAIRE**

**3. NISA OLE WUANTAI ( Suing on their behalf and as the**

**legal representative of the estate of the late WUANTAI OLE SAIRE)**

**4. KAJIADO RESIDENT MAGISTRATE**

**5. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**JUDGEMENT**

By an Originating Summons dated the 20<sup>th</sup> May, 2014, the Applicant seeks for the following orders against the Respondents:

1. This Honourable Court do declare the proceedings of the Kajiado North Land Dispute Tribunal Cause No. TC/ 223/ 100/ 010 held by the 5<sup>th</sup> Respondent's representatives, agents, servants and/or employees null and void.
2. This Honourable Court be further pleased to declare the subsequent adoption of the award dated 8<sup>th</sup> March 2011 of the said Kajiado North Land Dispute Tribunal in KAJIADO PRINCIPAL MAGISTRATE MISC. APPLICATION NO. 69 OF 2011 (PARMUAT OLOISHORUA KORE –VS- WUANTAI OLE SAIRE) by the 4<sup>th</sup> Respondent null and void.
3. This Honorable Court be further pleased to declare all the consequential orders and effects thereof arising from the ruling of the 4<sup>th</sup> respondent dated 9<sup>th</sup> May 2014 in KAJIADO PRINCIPAL MAGISTRATE MISC. APPLICATION NO. 69 OF 2011 null and void.

4. This Honourable Court do issue a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants, employees or any other person under or acting under their instructions from trespassing into the Applicant's parcels of land title numbers KAJIADO/ OLCHORO ONYORE/ 8767; KAJIADO/ OLCHORO ONYORE/ 16463; KAJIADO/ OLCHORO ONYORE/ 20463; KAJIADO/ OLCHORO ONYORE/ 20464 and KAJIADO/ OLCHORO ONYORE/ 20466 or in any way interfering with the original boundaries as fixed.

5. This Honourable Court do issue a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from interfering with the Applicant's peaceful and quiet enjoyment of land parcel numbers KAJIADO/ OLCHORO ONYORE/ 8767; KAJIADO/ OLCHORO ONYORE/ 16463; KAJIADO/ OLCHORO ONYORE/ 20463; KAJIADO/ OLCHORO ONYORE/ 20464 and KAJIADO/ OLCHORO ONYORE/ 20466.

6. Any other further relief that this Honourable Court may deem fit to grant in the circumstances.

The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who filed a replying affidavit sworn by the 1<sup>st</sup> Respondent PHILIP SANTAMO WUANTAI who deposes that they are administrators of the estate of their late father Wuantai Ole Saire (deceased). He avers that his late father and the Applicant had severally been disputants with regards to parcels of land KAJIADO/ OLCHORO ONYORE/ 80 (a portion subdivided therefrom known as KAJIADO/ OLCHORO – ONYORE/ 4283) and KAJIADO/OLCHORO – ONYORE/ 88. He confirms that KAJIADO/OLCHORO ONYORE/ 4283 was registered in the Applicant's name while KAJIADO/OLCHORO ONYORE/ 88 is in the Respondents' name. He states that the Applicant had instituted a claim at the Kajiado Land Disputes' Tribunal against the deceased but the Tribunal issued summons to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as their father was dead and they were trustees of the suit land. He explained that in the said proceedings, the Applicant claimed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had encroached on his land parcel number KAJIADO/OLCHORO ONYORE/ 4283 but the Tribunal ruled that in the disputed portion the Applicant was entitled to 8 hectares while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' share was 20 hectares, with a public road to be carved between the two portions. He confirms they were appointed administrators of their late father's estate vide Machakos Succession Cause No. 1088 of 2012. He contends that the award from the Tribunal was filed in the Kajiado Principal Magistrate's Court vide Land Dispute Tribunal Misc. No. 69 of 2011 which adopted it as Judgment of the Court on 13<sup>th</sup> May, 2013. Further, that the said order was served upon the District Land Surveyor, Kajiado who issued a notice to the Area Chief that he would be visiting the dispute land on 19<sup>th</sup> May, 2014. He reiterates that the District Surveyor proceeded on the strength of the judgment, undertook a survey and proceeded to separate the disputed portion of land into 20 hectares as well as 8 hectares while also curving out a road between the original parcel KAJIADO/OLCHORO ONYORE/ 80 and KAJIADO/OLCHORO ONYORE/ 88 respectively. He claims KAJIADO/ OLCHORO ONYORE / 80 was subdivided and gave rise to 4283; 4284; 4285; 4286; 4287; 4288; 4289; 4290 and a road with the acreage as shown on the face of that mutation also curved out. Further, that the areas covered by the said parcels is far much larger than KAJIADO/ OLCHORO ONYORE / 80 where they emanated from. He insists that the Applicant has come to court with unclean hands as he had in utter disregard to the decree, blocked the community public access road. He reaffirms that the Government District Land Surveyor completed his work on the 19<sup>th</sup> May, 2014 as per the Judgement of the Lower Court that adopted the decision of the Land Disputes Tribunal. He reiterates that the suit as commenced by way of originating summons is defective in law.

Two witnesses provided oral testimony in respect of the dispute herein.

#### **Evidence of the Respondents'**

**DW1** Joel Mwinzi who is the Land Registrar for Kajiado North testified that they undertook the exercise to determine the boundaries as ordered by the Court to visit two parcels of land Kajiado/ Olchoro Onyore/ 80 and Kajiado/ Olchoro Onyore / 88 and file a report. He confirmed in cross-examination that the Land Disputes Tribunal decision was supported by witnesses who testified during their visit. He confirmed that the size of Kajiado/ Olchoro Onyore/ 80 as indicated on the title differs with the measurement on the ground as there is an increase in acreage. He insisted the dispute herein is not a boundary one but claim for land. He clarified that as for parcel Kajiado/ Olchoro Onyore/ 88 the registered acreage is 132 hectares while the actual size on the ground is 219.7 hectares. He confirmed that there is a disputed area of 50.0 hectares which is over 100 acres. It was his testimony that the disputed area should be subjected to adjudication but the Tribunal had already made a decision on it, which was challenged in court. Further, that the Tribunal decision was executed on the ground and this is what was challenged. He reiterated that the District Survey Office established the disputed area to be 50 hectares but the Tribunal found it to be 28 hectares.

**DW2** PHILIP SANTAMO WUANTAI who is the 1<sup>st</sup> Respondent herein relied on his replying affidavit dated the 4<sup>th</sup> June, 2014 as his evidence in court. It was his testimony that the Land Disputes Tribunal apportioned the disputed area into 20 hectares for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents while 8 hectares were allocated to the Applicant. He confirmed that the Land Disputes' Tribunal Award was adopted by the Principal Magistrates' Court Kajiado. Further, that despite the Applicant appealing to the ELC Nairobi, the Court directed the District Land Registrar to ascertain the two parcels of land as they originally were. He further confirmed that the Land Registrar visited the suit land, prepared a report, which was presented to court on 5<sup>th</sup> October, 2017 but the Applicant never cross examined him. He explained that parties failed to agree on how to share the disputed portion of land, despite a directive from court do so, as the Applicant failed to attend the meeting. He proposed that the 28 acres of land should be shared as per the Tribunal's directive while the remaining 22 acres should be apportioned on a pro rata basis. Which means the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' are to get 15.7 hectares while the Applicant is to receive 6.3 hectares respectively. It was his testimony that the Kenya Rural Roads Authority (KURRA) had offered to excavate the road and get it murramed. Further, that the said road is supposed to be the boundary between the two parcels of land. It was his evidence that parcel number KAJIADO/ OLCHORO/ ONYORE/ 88 measures 219. 7 hectares while parcel number KAJIADO/ OLCHORO/ ONYORE/ 80 is 195. 25 hectares respectively. He insisted the issue of the road is a matter of public interest and it measures about 8 kilometers. He reiterated that the dispute herein is affecting the community as well as their family.

The Respondents thereafter closed their case.

The Applicant did not testify in court.

Both the Applicant as well as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their respective submissions that I have considered.

### Analysis and Determination

Upon consideration of the Originating Summons herein including the supporting/ replying affidavits as well as the parties' submissions, and upon hearing the testimonies of the two witnesses, the following are the issues for determination:

- Whether the proceedings of the Kajiado North Land Dispute Tribunal Cause No. TC/ 223/ 100/ 010, which was adopted vide KAJIDO PRINCIPAL MAGISTRATE MISC. APPLICATION NO. 69 OF 2011 should be declared null and void.
- Whether the disputed area between land parcels number KAJIADO/ OLCHORO ONYORE/ 80 and KAJIADO/ OLCHORO/ ONYORE/ 88 should be shared in accordance with the Tribunal findings as well as the District Surveyor's measurements.
- Who should bear the costs of the suit?

The Applicant contends that the Tribunal's decision which was adopted as a judgement of the court should not be considered to resolve the dispute herein. In his submissions, he disputed the District Surveyor's report which was prepared in accordance with the decree from the Kajiado PM's court, claiming the same is fraudulent as it was anchored on the Tribunal's findings. The Applicant submitted that where land and occupation rights in a cultural context are contested then, evidence of its use must be formally produced. He relied on the case of **Isaack M' Inanga Kiebia Vs Isaya Theuri Lintari& another (2015) eKLR** to support this argument.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents support the findings of the Tribunal and submitted that the alleged 50 hectares should be adopted at a ratio of 8:20 as evident on the ground, which fact is opposed by the Applicant.

As to whether the proceedings of the Kajiado North Land Dispute Tribunal Cause No. TC/ 223/ 100/ 010, vide KAJIDO PRINCIPAL MAGISTRATE MISC. APPLICATION NO. 69 OF 2011 should be declared null and void. I note it is the Applicant who lodged a complaint at the said Tribunal. From the proceedings it is clear that the Tribunal considered the evidence from different parties and arrived at their decision where they stated as follows: **' (1) That the District Surveyor visit and place the beacons as identified by the former Land Adjudication Committee and the Registered Land Surveyor ( Moha Survey Consultants). (2) That out of the twenty eight (28) Hectares of the disputed portion of land, the complainant should be allocated (8) hectares and the Respondents the remaining (28) Hectares. (3) That the public road should be excavated as earlier on planned by the community and local authorities concerned. (4) That the two families can initiate developments in their respective portions of land as they have now been identified. (5) That both disputing parties have right of appeal to the Provincial Land Tribunal within 30 days after the adoption of this ruling by the Magistrate's Court in Kajiado.'**

DW1 who was the Land Registrar testified that the Applicant's land was much bigger after subdivision as opposed to the original acreage. Which begs the question on where the extra acreage emanated from. The Applicant was opposed to the Land Disputes Tribunal (LDT) filing their award for adoption but it is evident that the said Award was adopted in accordance with the provisions of Section 7 of repealed Land Disputes Tribunal Act that stipulates as follows: **' (1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal. (2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.'**

I find that the prayer to declare the proceedings of the Land Disputes Tribunal as well as its adoption, null and void is contrary to the above-cited provisions legal provisions. I opine that if the Applicant was aggrieved with the Land Disputes' Tribunal decision, he had a remedy to institute Judicial Review proceedings to quash the decision. It is against the foregoing that I decline to declare the findings as well as the adoption of the Land Disputes Tribunal Award null and void.

As to whether the disputed area between land parcels number KAJIADO/ OLCHORO ONYORE/ 80 and KAJIADO/ OLCHORO ONYORE/ 88 should be shared in accordance with the Tribunal findings as well as the District Surveyor's measurements.

The Applicant insists the suit land should not be shared out but remain as per the occupancy on the ground. The Respondents on the other hand have provided a formula to share out the disputed portion which formula has been disputed by the Applicant in his submissions. I note the Applicant did not cross examine the Land Registrar and hence Registrar's averments as well as findings in the report remain uncontroverted. From the pleadings filed herein as well as the testimonies of the witnesses, the District Surveyor had already proceeded and measured the disputed area as per the Decree from the Principal Magistrate's Court. The Land Registrar stated that the dispute portion measures 50 hectares as opposed to the Tribunal findings, which had indicated it is 28 hectares, and proceeded to apportion it. The Respondents support the Tribunal's findings as to how the proposed balance of twenty two (22) hectares should be shared out, after taking into account the public access road that separates the aforementioned two parcels of land. The Land Disputes Tribunal had decided as follows **' ..... (2) Out of the twenty eight (28) Hectares of the disputed portion of land, the complainant should be allocated eight (8) hectares and the Respondents the remaining (20) hectares.(3) That the public road should be excavated as earlier on planned by the community and local authorities concerned.'**

It is against the foregoing that I base my findings on the above cited Land Disputes Tribunal decision which was adopted as judgement of the Court, and direct that out of the twenty eight (28) hectares of the disputed land, the Applicant is allocated eight (8) hectares while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are granted twenty (20) hectares. I further direct that the balance of the twenty two (22) hectares should be shared equally between the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' families.

It is against the foregoing that I proceed to make the following orders:

- a) The Land Dispute Tribunal's findings which were adopted vide KAJIADO PRINCIPAL MAGISTRATE MISC. APPLICATION

NO. 69 OF 2011 be and is hereby upheld.

b) Out of the twenty eight (28) Hectares of the disputed portion of land, the Applicant be and is hereby allocated eight (8) hectares while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are granted the remaining twenty (20) hectares.

c) The public road, which had been demarcated by the District Surveyor Kajiado in May 2014, should be excavated as earlier planned by the community and local authorities concerned.

d) The balance of the twenty two (22) hectares to be shared equally between the Applicant and the 1<sup>st</sup>, 2<sup>nd</sup> as well as 3<sup>rd</sup> Respondents' families respectively.

e) Each party to bear their own costs.

**Dated signed and delivered in open court at Kajiado this 20th day of November, 2018**

**CHRISTINE OCHIENG**

**JUDGE**