



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 185 OF 2004**

**JAMES SHANI SINDIYO ..... PLAINTIFF**

**VERSUS**

**TOBIKO OLE LENKUSO ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff vide a plaint dated 8<sup>th</sup> December 2004 filed in court on the same date claims that he was allocated land parcel number **Trans Mara/Kerinkani/138** (hereinafter referred to as “the suit property”) by the Kerinkani Group Ranch and that upon allocation he took occupation and possession of the same. The plaintiff avers that during land adjudication the defendant fraudulently caused the said suit property to be registered in his name and had title to the land fraudulently issued in his name thereby depriving the plaintiff of the ownership of the suit property. The plaintiff prays for judgment against the defendant for:-

- (a) A declaration that the defendant holds Plot No. Transmara/ Kerinkani/138 in trust for the plaintiff.**
- (b) That the defendant holds the said land as trustee for the plaintiff and hence should be ordered to transfer land parcel No. Transmara/ Kerinkani/138 to the plaintiff.**
- (c) Costs of the suit.**
- (d) Any other order the court deems fit to grant.**

2. The defendant filed a statement of defence dated 4<sup>th</sup> February 2005 where he stated that the plaintiff was not a member of Kerinkani Group Ranch and he could not therefore be entitled to be allocated land within the Group Ranch Land. The defendant stated that he was allocated the suit land by virtue of being a member of the Group Ranch. The defendant denies that he fraudulently acquired the suit property and/or that there was any fraud perpetrated by him when he got registered as owner. The defendant avers the occupation by the plaintiff of the suit property is unlawful and that the plaintiff is otherwise a trespasser thereon. The defendant asserts that the plaintiff’s suit is fatally defective and does not raise a cause of action against the defendant and that the same ought to be dismissed.

3. The plaintiff’s case was part heard before **Lady Justice Roselyne Korir** on 22<sup>nd</sup> November 2011 when the plaintiff and his two witnesses testified. Soire Advocate for the plaintiff sought an adjournment to enable him to procure one more witness to testify on behalf of the plaintiff. The matter was subsequently fixed for hearing a couple of times when it was not heard. On 19<sup>th</sup> June 2013 when it came up for further

hearing before **Okong'o J.** following the transfer of **Korir, J.** the parties agreed to proceed with the hearing from where **Korir, J.** had left.

4. The suit was fixed for further hearing before me on 31<sup>st</sup> may 2016 and on this occasion Mr. Soire advocate for the plaintiff notified the court that the witness he had intended to call to testify had passed away and in the circumstances he elected to close the plaintiff's case. The defendant and his two witnesses testified and the defence closed its case whereupon the court directed the parties to exchange their final written submissions.

#### 5. **The evidence by the parties;**

The plaintiff testified as PW1 and stated that he was a game warden working in Transmara Sub-county. He stated that he was informed by a member of Kerinkani Group Ranch that he could get a parcel of land. The plaintiff stated that he was allocated land parcel number **Transmara/ Kerinkani/138** by the officials of the group ranch. The plaintiff further stated the process of land adjudication was ongoing during the time he was allocated the plot. He stated that he got a letter dated 27<sup>th</sup> February 1987 from the Secretary Kerinkani Group Ranch addressed to the land adjudication officer requesting for change of ownership of parcel No. 138 from Naserian Women Group to James S. Sindinyo (plaintiff). Letter produced as "**PEx.1**". The plaintiff additionally stated that he was issued another letter by the surveyor dated 5<sup>th</sup> August 1997 (**PEx.2**) regarding the suit property who indicated the suit property had no issue and that he was required to pay kshs.10,000/= . The plaintiff further said that when he was allocated the plot he took occupation of the same but averred that when he later went to the land registrar Kilgoris he was informed that one Ole Lenkeso had been issue title to the land. The plaintiff stated that when he sought to know from the Chairman of the Group Ranch what had transpired, the chairman said the land had been given to the defendant without their approval under unclear circumstances.

6. The plaintiff stated that the chairman and the secretary informed him the defendant was not a member of the group ranch and could therefore not be entitled to be allocated land. Under cross examination the plaintiff stated that he was aware the defendant became registered proprietor of the suit land in 2001. The plaintiff further admitted he was not a member of the group ranch and that he was allocated the land by the Chairman, the Secretary and other committee members. The plaintiff affirmed that the defendant's name appeared on the list of members tendered by the defendant and which list was signed by Ole Mpuo, the Chairman. The plaintiff stated he had no document to show the suit property was transferred to him from Naserian Women Group whom he stated were the original owners of land parcel number 138. The plaintiff stated it is his sister in law who lives on the suit property and asserted he had been cultivating on the land and had four houses on the land.

7. PW2 and PW3 who were respectively Chairman and Secretary of the group ranch testified that the plaintiff was a neighbour at the group ranch and he requested to be allocated land and that they allocated him land parcel 138. The witnesses stated that the defendant was not a member of the group but that he bought land from a member. Under cross examination PW1 agreed the group ranch maintained a register of members and kept minutes of committee meetings. PW1 further stated it was the committee who informed the Lands Ministry who the beneficiaries of the plots were. PW3 who was the committee secretary stated they recorded the names of the members but stated they never used to record any minutes of the committee deliberations. PW3 under cross examination agreed the defendant's name was in the list of members but said he did not know how the name came to be on the list yet he was not a member of their group. As far as PW2 and PW3 were concerned parcel number 138 belonged to the plaintiff and not the defendant.

8. The defendant testified as DW1. He stated he is the registered owner of land parcel **Transmara/Kerinkani/138** having been allocated the same as a member of Kerinkani Group Ranch following its dissolution. The defendant produced the title deed (copy) issued on 30<sup>th</sup> November 2001 as (**DEx.1**). The defendant produced a list of members of the group ranch to illustrate that he was a member of Kerinkani Group Ranch where he is shown as member number 153 (**DEx.2**). The defendant stated that all members of the group ranch were allocated parcels of land and that is how he was allocated the suit land. The defendant stated that he does not reside on the parcel of land but that he does cultivation

thereon. He further stated that after the plaintiff filed the instant suit, the plaintiff brought a farm hand onto the parcel of land who stays thereon. The defendant averred that he was not aware the plaintiff had been allocated the suit property by the committee.

9. Under cross examination the defendant stated that members were shown their parcels after subdivision. He further stated at the present moment there is one house on the suit property which was put up when the present suit was filed. The defendant claimed he did not know who had put up the house. The defendant stated that although he resides on the other land he purchased he still farms on the suit property.

10. DW2, one Kiken Sabalan testified that he was a member of the Kerinkan Group Ranch Committee and that he knew the defendant as a member of the Group Ranch. He stated that as a committee they allocated the defendant a parcel of land although he could not recall the number. In his evidence DW2 stated thus:-

**“As committee members we were elected by the members. The residents of the shamba are the ones who were members of the ranch. The committee members are the ones who made and recorded the list of members. I do not know the plaintiff. There is no time the plaintiff appeared before the committee seeking to be allocated land...”.**

Under cross examination DW2 stated that he was the vice chairman of the Group Ranch while PW2 was the Chairman and PW3 was the Secretary. He further stated that the group ranch was exclusively for Maasai's and that no non Maasai's were allocated land.

11. DW3, Lantei Ole Ngetei testified that he was also a member of the committee of Kerinkani Group Ranch. He affirmed that land parcel 138 was allocated to the defendant and that he did not know the plaintiff. He stated that the plaintiff never at any time appeared before the committee seeking to be allocated land and stated that the plaintiff was not a member of the Group Ranch. In cross examination, DW3 reiterated that the committee members were the ones who allocated members their parcels. He affirmed all members of the Group Ranch were Maasai's and that any non members in the register of members are those persons who bought land from the Maasai.

12. The court after the close of the hearing directed the parties to file their final submissions. Both parties have filed their submissions where they basically reiterated the evidence adduced by the parties as summarized hereinabove.

### **13. Analysis and determination of the issues;**

Arising from the pleadings the evidence and the submissions by the parties, the issues that arise for determination are as follows:-

**(i) Whether the registration of the defendant as the owner of land parcel number Transmara/Kerinkani/138 was obtained fraudulently;**

**(ii) Whether the defendant holds land parcel Transmara/Kerinkani/138 in trust for the plaintiff.**

**(iii) Whether the defendant should be ordered to transfer land parcel Transmara/Kerinkani/138 to the plaintiff.**

**(iv) Who bears the costs of the suit.**

14. There is no dispute that the defendant is presently registered as the owner of land parcel **Transmara/Kerinkani/138**. The plaintiff in his evidence confirmed this fact save he stated that he did not know how the defendant got to be so registered suggesting the registration must have been procured fraudulently. The plaintiff did not adduce any evidence of fraud on the part of the defendant. The

defendant for his part stated that he was a member of the Kerinkani Group Ranch and was by virtue of that membership allocated the suit property and was subsequently issued with a title deed (**DEx.1**). The defendant produced a list of members of the Group Ranch which was duly signed by PW2 who was the Chairman (**DEx.2**). The plaintiff's witnesses PW2 and PW3 confronted with the list of members tendered by the defendant in evidence merely stated that they did not know how the defendant's name entered into the list yet according to them he was not a member of the Group Ranch.

15. DW2 and DW3 who were equally committee members of the Group Ranch were emphatic that the defendant was a member of the group ranch and that he was allocated the suit property. Their position was that it was the committee who were allocating land to members and that the plaintiff was not a member and never appeared before the committee seeking to be allocated land. The plaintiff himself admitted he was not a member of the group ranch and even PW2 and PW3 conceded that he was allocated a plot since he was a neighbour to the group ranch. The letter dated 27<sup>th</sup> February 1997 (**PEx.1**) which the plaintiff relies on to state he was allocated parcel **No. 138** was only signed by PW3 and was merely communicating an intention to change the owner of parcel number **138** from Naseriani Women Group to the plaintiff. There is no evidence to show the said Naseiriani Women Group were the owners of parcel **138** and there is nothing to show the plaintiff was allocated the said parcel of land.

16. The alleged letter dated 5<sup>th</sup> August 1997 from the surveyor appears to have been more of a private communication than an official letter which would give credence to the view that the arrangement to allocate the plaintiff parcel **138** was more or less a private arrangement involving PW2 and PW3 which would explain why DW2 and DW3 who were committee members were unaware of the allocation of parcel **138** to the plaintiff.

17. The plaintiff has alleged that the defendant procured the registration of the suit parcel of land in his name fraudulently. The plaintiff has adduced no evidence at all to prove any fraud on the part of the defendant. Where a party alleges fraud against another party the burden to prove the fraud rests with the party who alleges. The burden of proof where fraud is alleged is on a higher threshold than proof in civil cases where proof is on a balance of probability. In case of fraud, the burden of proof is higher than proof on a balance of probability though not as high as proof beyond a reasonable doubt as is required in criminal cases. I am not satisfied that the plaintiff has discharged that burden. The defendant in my view has given a reasonable account of how he got to be registered as the owner of the suit land. DW2 and DW3, who testified before me, struck me as truthful witnesses and I accept their evidence that the defendant was infact allocated the suit property and accordingly he was validly registered as the owner thereof. The evidence tendered by the plaintiff does not establish that the defendant committed any fraudulent acts to get so registered. I accordingly answer the first issue in the negative and it is my holding that the defendant was not fraudulently registered as owner of the suit property.

18. Having answered the first issue in the negative the 2<sup>nd</sup> and 3<sup>rd</sup> issues become non issues. Their determination flows from the determination of the first issue. Having declared that the defendant was validly registered as the owner of land parcel **Transmara/Kerinkani/138** it follows that he cannot be holding the same in trust for the plaintiff. The plaintiff did not demonstrate there was either, an express and/or implied trust in his favour and I accordingly hold no such trust exists so as to require the defendant to discharge the trust by transferring the suit property to the plaintiff. I therefore answer issues two and three in the negative.

19. Upon evaluation of all the evidence, I have come to the finding and holding that the plaintiff has failed to prove his case on a balance of probabilities and is accordingly not entitled to the orders he seeks. The plaintiff's suit is hereby dismissed with costs to the defendant.

**Judgment dated, signed and delivered at Kisii this 24<sup>th</sup> day of February, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the defendant

..... Court assistant

**J. M. MUTUNGI**

**JUDGE**