



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC.CIVIL CASE NO. 150 OF 2008

DAVID OYIARE NTUNGANI.....APPLICANT

VERSUS

MATUIYA OLE NAISUAKU ORKET.....RESPONDENT

JUDGMENT

1. In the Originating Summons dated 23rd September, 2008, the Applicant is praying for the following orders:

a. That the Plaintiff/Applicant is entitled to vacant possession and to enjoy all rights and interests appurtenant to land parcel title No. Kajiado/Lorngusua/1298 as the registered title holder.

b. That the Defendant/Respondent by himself, tenants, servants and/or agents or any other occupants do forthwith deliver and give vacant possession of Title No. Kajiado/Lorngusua/1298 to the Plaintiff/Applicant.

c. That the Defendant/Respondent, his servants, agents or any other occupant be forcefully evicted from the subject premises should they fail to deliver vacant possession within twenty one (21) days from the date of the order of the Honourable Court.

d. That the Officer Commanding Police Station Namangado assist towards a peaceful and effective eviction in compliance with the Court's eviction order.

e. That the Defendant/Respondent do bear the costs of this Application.

2. The Originating Summons is premised on the grounds that the Applicant is the bone fide registered owner of parcel of land number Kajiado/Lorngusua/1298 (*the suit land*); that the suit land was part of the Illpartimaru Group Ranch which was divided among the group members, including the Respondent and that the Applicant was allocated parcel number 333 measuring 72Ha and that the Respondent was allocated land known as Kajiado/Lorngusua/1292.

3. It is the Applicant's case that he is in possession of the original Title Deed in respect to the suit land and that his name is in the area list of the members of the Ranch.

4. The Applicant has deponed in his Affidavit that the Respondent has illegally taken possession of the suit land; that the Respondent reneged on his earlier agreement to vacate the suit land and that the Respondent has continued to frustrate his rights of owning, possessing, occupying and developing the suit land.

5. In his Replying Affidavit, the Respondent deponed that the sub-division of Illpartimaru Group Ranch was nullified by the High Court in Nairobi Civil Case No. 561 of 2000.
6. According to the Respondent, the sub-division of the Group Ranch was disproportionate, arbitrary, unfair and oppressive to a large number of the members thus precipitating the filing of Nairobi HCCC No. 561 of 2000 in which the court ordered that there should be equal sub-division and allocation of the land.
7. The Respondent deponed that the officials of the Group Ranch filed two other suits being Nairobi HCCC No. 233 of 2001 and HCCC No. 1098 of 2001 to defeat the Decree in HCCC No. 561 of 2000 and that in both suits, the court declared the Title Deeds that were issued in contravention of the Decree in HCCC No. 561 of 2000 as null and void.
8. It is the Respondent's case that there are counter-claims in HCCC Nos. 233 of 2001, 1098 of 2001 and 177 of 2008 in which the Defendants are seeking to have the Title Deeds, including the Applicant's Title Deed, declared null and void.
9. The Respondent finally deponed that he was born, brought up and initiated within the suit land and that he lives on the suit land with his family and cattle.
10. This matter proceeded by way of *viva voce* evidence.
11. The Applicant, PW1, informed the court that him, together with the Respondent are members of Illpartimaru Group Ranch; that each member was allocated land within the Ranch and that he is member number 333 within the Group Ranch.
12. According to PW1, the Respondent is member number 437 and that according to the survey plan, both the Respondent and himself were allocated land in the Ranch.
13. PW1 informed the court that just like the Respondent, he was issued with a Title Deed; that his Title Deed is in respect to the suit land while the Respondent has a Title Deed for parcel of land number 1292 which is within the Ranch and that none of the Title Deeds have been nullified.
14. According to PW1, the Respondent has refused to vacate the suit land despite being told to do so by the elders.
15. It was the evidence of PW1 that the Respondent has fenced half of the suit land which he is using to graze his cattle.
16. According to PW1, other than using part of his land, the Respondent has also continued to cut down the trees on the said land despite an order of the court that is in place restraining him to do so.
17. PW1 stated that the Respondent has never challenged his Title Deed and that he cannot rely on the Decree in Nairobi HCCC No. 561 of 2000 in which he was not a party.
18. PW1 stated that the Plaintiffs in Nairobi HCCC No. 561 of 2000 have since withdrawn the suit.
19. In cross examination, PW1 stated that the order in HCCC No. 561 of 2000 did not affect him; that indeed the Plaintiffs in that suit were given their land as per the order and that he is not aware of any order of the court cancelling his Title Deed.
20. On the other hand, the Respondent, DW1, informed the court that the Applicant's father was a member of the Group Ranch; that all the members of the Group Ranch agreed that the land belonging to the Group Ranch must be shared amongst the members equally and that it was also agreed that each member should be allocated land where he is staying.

21. According to DW1, the Applicant's father was allocated land in "EsiyeMalili" and that he has been occupying the suit land for over 30 years.
22. It was the evidence of DW1 that after the sub-division of the land belonging to the Group Ranch, the members were not happy with the manner in which the sub-division had been done.
23. It was the evidence of DW1 that some members went to court and challenged the said sub-division.
24. DW1 informed the court that he has a house and a dam on the suit land both worthy Kshs. 1,000,000.
25. In cross examination, DW1 stated that he was not a party to any of the cases that were filed by some members of the Ranch and that he did not have any document to show that the members agreed that the land should be shared equally amongst themselves.
26. In his submissions, the Applicant's advocate submitted that the Applicant's Title Deed in respect to the suit land has never been quashed; that the fate of HCCC No 561 of 2001 and the orders that were made in the year 2001 remain unknown and that the said suit was limited to three individuals.
27. The Applicant's counsel submitted that the Respondent conceded that he has a Title Deed for the land that was allocated to him and that the Respondent has not denied that he is occupying the suit land which has been registered in favour of the Applicant.
28. The Applicant's counsel relied on the provisions of Articles 40 and 60 of the Constitution and Sections 24, 25 and 26 of the Land Registration Act and submitted that the Applicant is the absolute owner of the suit land and is therefore entitled to all the rights and privileges over the suit land.
29. The Applicant's counsel relied on numerous authorities which I have considered.
30. The Respondent's advocate submitted that the sub-division of Ilpartimaru Group Ranch (*the Group Ranch*) was nullified by the High Court in Nairobi HCCC No. 561 of 2000 hence rendering all the titles issued as a result of the said sub-division null and void.
31. Counsel submitted that the Applicant's Title Deed was issued to him unlawfully and that the officials of the Group Ranch have consistently ignored the orders of the court.
32. The Respondent's counsels submitted that the land belonging to the Group Ranch was supposed to be sub-divided equally among the members; that it was agreed that each member should be allocated land where he is staying and that the Group Ranch was holding the entire land in trust for its members.
33. The Respondent's counsel relied on authorities which have considered.
34. The evidence before this court shows that Ilpartimaru Group Ranch once owned a piece of land which it subsequently sub-divided and allocated to its members.
35. The Applicant produced in evidence a list of the members of the Group Ranch. The said list showed that "Ole LusserNtungani" was member number 333 and was allocated 72.00Ha of land within the Ranch. The same "area list" shows that Ole LusserNtungani was allocated parcel of land number 1298.
36. The Applicant also produced in evidence a copy of the sub-division plan showing the position of the land that was allocated to him.
37. According to the Affidavit that was sworn by the Applicant on 16th March, 2001, the names "Ole LusserNtungani" as shown in the area list and David OyiereNtungani refers to one and the same person.
38. According to the evidence of PW1, after the allocation of the land to individual members of the Ranch, Title Deeds were processed and issued.

39. PW1 informed the court that he was issued with a Title Deed for parcel of land number Kajiado/Lorngusua/1298 on 2nd April, 2001, while the Defendant was issued with a Title Deed for a parcel of land known as Kajiado/Lorngusua/1292 measuring 33.50Ha on 8th August, 2006.
40. The Respondent's case is that the Applicant's Title Deed was issued to him unlawfully because, firstly, it was agreed that all the members should be allocated the same acreage of land, secondly, that the court in Nairobi HCCC No. 561 of 2000 had declared the sub-division of the land belonging to the Ranch null and void and finally, that each member was to be allocated the land that he was living on.
41. The Respondent did not produce any document or minutes to show that there was an agreement amongst the members of the Group Ranch that all members should be apportioned land in the Ranch on an equal basis.
42. The Respondent did not also adduce evidence to support the allegation that members were to be allocated land in the Ranch on the basis of where they live.
43. I have perused the pleadings that have been annexed on the Respondent's Replying Affidavit in respect to Nairobi HCCC No. 561 of 2000.
44. In the Plaintiff, the three Plaintiffs in HCCC No. 561 of 2000 sued Illpartimaru Group Ranch alleging that the officials of the Group Ranch had allocated themselves and their relatives bigger and better portions of land in the Ranch.
45. In the Plaintiff, the three Plaintiffs sought for an order that the process of sub-division and allocation of the land in the Ranch be repeated so that the Group members can get equal shares.
46. There is no evidence before this court to show that the suit was heard and the orders that were prayed for in the Plaintiff were granted.
47. Indeed, the Respondent's advocate is the same advocate who filed the said Plaintiff. However, the said advocate did not inform the court the position of the said suit.
48. In any event, the Applicant herein is not a party to that suit. In the absence of an order of the court showing that the Applicant should not have been issued with a Title Deed, or that the Title Deed that was issued to the Applicant is null and void, the Respondent's argument that the Title Deed that was issued to the Applicant on 2nd April, 2001 is null and void cannot hold.
49. The Respondent has also placed reliance on suits that have been filed by other members of the Group Ranch in this court to argue that the Applicant is not entitled to the suit property.
50. In Nairobi HCCC No. 418 of 2006, some of the members of the Group Ranch have sued the officials of the Group alleging that the said officials have refused to sign the transfer documents in respect to the land that was allocated to them in the Ranch.
51. The Plaintiffs in that suit are seeking for an order specific performance as against the officials of the Ranch. There is no prayer for the nullification of the Applicant's Title Deed.
52. In Nairobi HCCC No. 1098 of 2001, some of the members of the Group Ranch have sued the officials of the group Ranch seeking for orders restraining the officials from interfering with their titles. Again, there is no mention of the Applicant's Title Deed in that suit.
53. Again, in HCCC No. 233 of 2001, some members are seeking for an order to compel the officials of the Group Ranch to sign the transfer documents. That suit has nothing to do with the Applicant's Title Deed in respect to the suit property.
54. There is therefore no evidence before this court to show that the Respondent or any other party has

challenged the validity of the Applicant's Title Deed, or that the said Title Deed has been declared null and void.

55. In the absence of evidence to show that the Applicant's Title Deed was obtained fraudulently or unlawfully, and view of the provision of Section 24(a) of the Land Registration Act which provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land, the Respondent should give way.

56. Indeed, the Respondent is not a landless Kenyan. He has been allocated land within the Ranch. He should move to the land that he was allocated forthwith.

57. For those reasons, I find that the Applicant has established his claim on a balance of probabilities.

58. I therefore allow the Applicant's Originating Summons dated 23rd September, 2008 as follows:

a. The Respondent by himself, tenants, servants and or agents be and are hereby ordered to give vacant possession of parcel of land known as Kajiado/Lorngusua/1298 to the Plaintiff within sixty (60) days from the date of this Judgment.

b. The Respondent, his servants, agents or any other occupants of parcel of land known as Kajiado/Lorngusua/1298 be forcefully evicted from the suit should they fail to deliver vacant possession of the suit land within sixty (60) days from the date of this Judgment.

c. The Officer Commanding Police Station, Namanga, do assist towards a peaceful and effective eviction of the Respondent from the suit property.

d. The Respondent to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF MAY, 2017.

O. A. ANGOTE

JUDGE