



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**IN THE ENVIRONMENT AND LAND COURT**  
**ELC.NO.240 OF 2013**

NTAUWASA OLE SEMENARI.....1<sup>ST</sup> PLAINTIFF

LOGELA OLE PARPAI.....2<sup>ND</sup> PLAINTIFF

VERSUS

NANYU OLE LEYIAMBUKA.....DEFENDANT

**JUDGEMENT**

By a Plaint dated **13th August 2012**, the Plaintiffs herein have sought for various Orders. The Orders sought are:-

- a. That the Court be pleased to grant a Permanent Injunction against the Defendants, his sons, servants, agents and persons acting under his authority, restraining them from planting crops, trees, trespassing and encroaching on the Plaintiffs' parcels of Land namely title No. LTK/Kimana/Tikodo/4895 and Title No. LTK/Kimana/Tikodo/4896 each measuring 10.9 Ha. situated in Loitoktok Kajiado County.*
- b. That the Defendant be ordered to uproot and destroy all crops, and trees planted by himself and vacate from the Plaintiff's/Applicants parcels of Land namely title No. LTK/kimana/tikodo/4895 and Title No. LTK/Kimana/Tikodo/4896 each measuring 10.9 Ha. situated in Loitoktok, Kajiado County at his own costs upon the determination of this suit and that the OCS Loitoktok Police Station do supervise the enforcement of the Orders of this Court.*
- c. That the Costs of the suit be borne by the Defendant.*

In their Plaint, the Plaintiffs alleged that the Defendant herein is their Elder brother and they were born in a family of six brothers. They also alleged that they are the registered owners of **LTK/KIMANA/TIKODO/4895** and **LTK/KIMANA/TIKODO/4896** each measuring **10.9 ha.** situated in **Loitoktok**. The Plaintiffs further alleged that prior to their acquisition of the disputed parcels of land, their mother and their elder brothers namely **Sempeta Leiyampuka**, **Ntoros Leiyampuka** and **Kalama Leiyampuka**, plus the Defendant herein were each members of **Kimana/Tikodo Group Ranch**, which had **843 members** whose main objective was to purchase land and distribute to its members. They also alleged that they were not members of **Kimana/Tikodo Group Ranch** as they were still young at the time of registration of members. Further that in the year **2006**, **Kimana/Tikodo Group Ranch**, distributed land to all its members. It was their further allegation that since they did not have any source of livelihood, their mother subdivided her share of land, distributed and transferred her share into their individual

names, each measuring **27 acres**. The said distribution caused the said land to be registered as L.R. No. **LTK/KIMANA/TIKODO/4895** and **LTK/KIMANA/TIKONDO/4896**, the suit land. It was also alleged that each of their other brothers including the Defendant acquired **60 acres** from **Kimana/Tikodo Group Ranch**.

The Plaintiffs have alleged that despite having his personal land, the Defendant has forcefully and without any colour of right trespassed and encroached on their parcels of land being land titles **No. LTK/Kimana/Tikodo/4896** and **4896** and he is currently planting Miraa, and other crops without the Plaintiffs consent or authority. The plaintiffs have further alleged that the Defendant has no legal right whatsoever to claim ownership of the suit property as the Plaintiffs acquired the said parcels of land from their mother who is still alive. Further that the conduct of the Defendant is illegal and aimed at dispossessing the Plaintiffs their legal rights of ownership and unless restrained by the Court by way of injunctive orders, the Plaintiffs stand to suffer irreparable loss and damages. They also stated that they are the registered and legal owners of the disputed land and the Defendant's conduct is illegal and should be stopped by the Court. The Plaintiffs thus prayed for the orders contained in the Plaint.

The Defendant filed his Defence and Counterclaim on **26<sup>th</sup> April 2013**. In his Defence, the Defendant alleged that any registration of the Plaintiffs mother as a member of **Kimana/Tikodo Group Ranch**, was done as a replacement to the late **Mr Semereria Lolwesi**, and in her capacity as a co-administrator of the deceased. The Defendant further averred that the Registration of **L.R No. Loitoktok/Kimana-Tikodo 4261**, in the name of **Ntunke Ene Parpai** (PW2) and the subsequent subdivision of the same into **LTK/KIMANA/TIKODO/4895, 4896** and **4897** and the transfer of **4895** and **4896** to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs was done **illegally, unprocedurally** and through a **corrupt scheme**. He also alleged that the Plaintiffs hold **LTK/KIMANA-TIKODO 4895** and **4896** in trust for the estate of **Semereria Lolwesi** of which the Defendant is both a beneficiary and co-administrator. He further alleged that the plaintiffs are not entitled to Injunctive Orders sought for at all. Therefore the Defendant prayed for dismissal of the Plaintiffs case with costs.

In his Counterclaim, the Defendant alleged that he is a co-administrator of the estate of his late father **Semereria Lolwesi**, together with the 3<sup>rd</sup> Defendant to the Counter-claim. That the 3<sup>rd</sup> Defendant was registered as the owner of **Kimana/Tikodo 4261** by virtue of being a co-administrator. That the said parcel of land was supposed to be shared among the beneficiaries of estate of **Semereria Lolwesi**. Further that the 3<sup>rd</sup> Defendant to the Counter-claim transferred the land to the Plaintiffs illegally and without involvement of the Defendant herein who is a co-administrator of the estate of **Semereria Lolwesi**. The Defendant also alleged that the actions of the Plaintiffs and 3<sup>rd</sup> Defendant in transferring and subdividing L.R. No. **LTK/KIMANA-TIKODO 4261** and subsequent transfer of **LTK/KIMANA/TIKODO 4895** and **4896** to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff respectively was done illegally and unprocedurally. The Defendant in his Counter-claim prayed for the following orders.

**a. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the counterclaim are holding the parcels of land registered as LTK/KIMANA-TIKODO 4896, 4896 and 4897 respectively, in trust for the Estate of Semereria Lolwesi (Deceased).**

**b. A declaration that the 3<sup>rd</sup> Defendant to counterclaim subdivision of Loitoktok/Kimana-Tikodo/4261 was done illegally and unprocedurally.**

**c. A declaration that the purported issuance of title deeds for Loitoktok/Kimana-Tikodo 4895, 4896 and 4897 is illegal, null and void.**

**d. A declaration that Title Deeds for LTK/Kimana-Tikodo 4895, 4896 and 4897 be cancelled henceforth and the Title number Loitoktok/Kimana/Tikodo 4261 be restored in the names of the administrators of the Estate of Semereria lolwesi (Deceased).**

**e. An order of permanent Injunction to restrain the Plaintiffs their servants, workmen, licencees, agents or any other persons acting on his own behalf or on behalf of the Defendants**

**from howsoever transferring, fencing, subdividing, trespassing, erecting any structure thereof, dispossessing, alienating, reclaiming and or harassing the Defendant on interfering with his peaceful occupation and possession of the parcels of land more particularly Loitoktok/Kimana-Tikodo 4261.**

**f. Costs of the suit plus interest**

**g. Among other or further relief as this Court may deem fit and just to grant.**

The Plaintiffs filed a Reply to Defence and Defence to Counterclaim and denied all the allegations made in the Counterclaim. They further alleged that the demarcation of the disputed land was done with the knowledge, consent and authority of family members. They alleged that the entire family and clan members, agreed that the subject land be distributed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the counter-claim since they had not benefitted from the previous distribution of land that had been given to all their brothers by **Kimana/Tikodo Group Ranch**, wherein each of the members obtained **60 acres** of land. Therefore the acquisition of the Defendants to the Counter claim of the disputed land was done with the consent of family members and was also obtained procedurally and their actions to evict the Plaintiff to the counterclaim was justified. The Defendants therefore prayed for the dismissal of the Counter-claim.

The 3<sup>rd</sup> Defendant to the Counter-claim - **Ntunke Ene Parpai**, also filed her Defence to the Counter-claim and averred that she obtained **60 acres** of Land from the Group Ranch and all her adult sons obtained **60 acres** of land each as a reward for their father's membership to the Group Ranch. None of these parcels of land was subjected to Succession process. She further averred that the family members agreed on who was to be registered in place of the deceased person, and therefore the 3<sup>rd</sup> Defendant to the Counterclaim caused registration of the subject land into the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs'. She also alleged that it was agreed by the family members and the clan elders that the Plaintiff in the Counterclaim will vacate the subject land when the same is transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Countr-claim and he was to move to his portion of Land that he inherited from his deceased father. It was her averment that in the year **2006, Kimana/Tikodo Group Ranch** rewarded **60 acres** of Land to all the sons and wives of its members and the Plaintiff to the Counter-claim and all his brothers apart from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Counter-claim were each given **60 acres** of land as a result of their father's membership to the Group Ranch. This land was never subjected to the succession process before distribution.

Therefore, the 3<sup>rd</sup> Defendant to the Counter-claim prays that the Plaintiff's suit to the Counterclaim be dismissed with costs and Judgment entered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Counter-claim as prayed in the main suit.

The matter commenced hearing on **16<sup>th</sup> April 2015**, wherein the Plaintiffs called two witnesses.

### **Plaintiffs Case**

**PW.1 Ntauwasa Ole Semenari**, told the Court that he comes from Kimana area of Loitoktok and is a peasant farmer. He also testified that the Defendant is his elder brother and he sued him over the issue of Land. It was his testimony that the Land in issue was given to them by their mother who had been issued the same by **Kimana/Tikodo Group Ranch**, where the mother was a member. He also testified that his other brothers are also members of the **Group Ranch** and they were each given **60 acres** of land from the **Group Ranch**. Further that because PW.1 and his other young brother did not benefit from the Group Ranch Land, their mother gave them each **27 acres** from her portion of 60 acres that she received from the Group Ranch. Earlier on their father's land being **LTK Kimana/Tikodo 637**, had been distributed through a **Succession cause No 2088 of 1999** and each of the brothers got **2 acres** except for the **Defendant** who was given **4 acres**. He further testified that the Defendant lives on the suit land although he was given 60 acres from the Group Ranch. He told the court that every member of the Group Ranch was given 60 acres of land and since their mother was also a member, she was also given her 60 acres which she later gave 27 acres to PW.1 and his young brother. He asked the court to allow their claim

together with costs.

In cross-examination, PW.1 stated that their father died in 1988 and the family filed a Succession Cause no.2088 of 1999, and their mother and elder brother, the Defendant herein were appointed as the administrators of the estate. Further that his four other brothers were members of the **Kimana/Tikodo Group Ranch** but their father was not a member. It was his testimony that their mother, **Ntunke Ene Parpai**, did not get any land through the Succession Cause. Further that the Defendant was given 60 acres by the Group Ranch and the land is in Kimana area.

PW.2: **Ntunke Ene Parpai**, testified that the Defendant is his elder son who wants to grab land from his young brothers, the Plaintiffs herein. She testified that the land in issue was given to her by the Kimana/Tikodo Group Ranch on her own right as a member of the said Group Ranch. She also stated that each member of the Group Ranch was given 60 acres of land and that four of her sons including the Defendant got 60 acres from the Group Ranch. It was her testimony that her husband died before the land was subdivided and so he was not member of the Group Ranch. However, her four sons are members and were given land by the said Group Ranch. However, the Plaintiffs who were young were not given land by the Group Ranch and are not members.

P.W.2 also told the court that her husband owned land **LR No. LTK/Kimana/Tikodo 637** before he died. During the Succession Cause, she distributed this land to all her sons and she never got any share. Each of her son got 2 acres from **LR LTK/Kimana/Tikodo 637** and the Defendant who is the eldest son got 4 acres. However the land that the Defendant got from the Group Ranch was not part of the Succession Cause. However the defendant now wants to grab the land that she gave to her young sons from the shares she received from the Group Ranch. She emphasized that her young sons were not given land by the Group Ranch. She therefore told the court that she want the Defendant to move out of the land that she gave to the Plaintiffs, her young sons. She urged the Court to allow the Plaintiffs claim and order that the defendant be evicted from the suit land. In Cross-examination she told the Court that the land that she distributed in the Succession Cause was not a Group Ranch Land.

### **Defendant's Case**

The Defendant gave evidence for himself and called two other witnesses. **D.W.1 Nanyu Ole Leyiambuka** told the Court that he is a farmer and comes from Kimana in Loitoktok. Further that the Plaintiffs herein who have sued him are his young brothers. He also told the Court that P.W.2 is their mother. It was his further evidence that their father died in the year 1988 and he had two parcels of land. One of them was a Group Ranch and the other was ordinary one. That after the death of their father, the family filed a Succession Cause no.2088 of 1999 and the Defendant together with their mother P.W.2 were appointed as administrators of the estate of their late father.. Thereafter the ordinary land **Kimana/Tikodo/637** which was 14 acres was subdivided among the six sons. Each of the son got 2 acres but defendant was given 4 acres as he was the elder son. It was his testimony that the Group Ranch land was **LR LTK/Kimana/Tikodo 4261** which remained in the name of their father. However, this parcel of land did not have certificate of title then and so it was not distributed. It was his testimony that their father was even buried on this land **Kimana/Tikodo/4261**. At registration of the land, the same was registered in the name of their mother P.W.2 as the sole administrator. He testified that thereafter, he filed a caution and inhibition on this parcel of land since they had not agreed on distribution. However, even with the Caution, their mother subdivided the land into three portions and distributed it to the Plaintiffs and herself leaving out the other sons. He testified that the new subdivisions are No. 4895, 4896 and 4897. He also testified that the Plaintiffs gave him **Notice** to move out of this land where he has lived for 31 years. Further that their father was buried on this suit land which was not distributed through Succession Cause. It was his further testimony that he has now laid 100 pipes of water for irrigation and has also dug a dam. That he has planted Miraa on this suit land and his family live there wherein he has 18 children and 18 grand children. It was his contention that this suit land was not only meant for the Plaintiffs but for the whole family. He disputed that the clan had decided that the distribution of land should be done as per PW2 wish. He reiterated that this suit land No 4261 was part of the estate of their deceased father and should be distributed fairly. He urged the court to cancel the said distribution and the subsequent titles until the family agree on the proper mode of distribution. He urged the Court to

allow his Counter-claim.

In Cross-examination, Defendant admitted that he was given land by the Group Ranch amounting to 58 acres. He also admitted that his other brothers who are not parties to this suit were also given land by the Group Ranch. However, the Plaintiffs were not given any land by the Group Ranch. He testified that their mother was not a member of the Group Ranch but LR No.LTK/Kimana/Tikodo 4261 was for their deceased father. Defendant also admitted that in their Succession cause filed in Court, they did not indicate that land registration No. 4261 was part of the estate of the deceased and due for distribution.

**D.W.2: Daniel Meritei Nenkowet** told the Court that he knows the Plaintiffs and the Defendant herein. He also knew the deceased father, the late Semereria Lolwesi. It was his testimony that he knew about the suit land which was owned by the deceased. He also testified that the deceased six sons and his wife (PW2) all live on the suit land which was 60 acres. Further that the defendant has developed the land by planting Miraa and other crops. That the defendant had also laid down water and he lives on the land with his two wives and many children. He further testified that he is a member of Tikodo/Kimana Group Ranch and he knows that the deceased was a member too. It was his testimony that during the distribution of the land, each member was asked to give out four more names and that is how the Defendant and his other brothers got land from the Group Ranch. He further testified that as a member of the Group Ranch, he has never been called to arbitrate over this matter. It was his further testimony that the defendant deserves to inherit this land as according to the Maasai tradition, the elder son is supposed to inherit the land where the father is buried.

**DW3, Koisinget Sumulek,** told the Court that the Defendant is his neighbour at home and they are member of the same Group Ranch **Kimana/Tikodo**. Further that the defendant lives on his father's land which he has developed and has planted crops and has laid water pipes for irrigation. He also told the Court that defendant has lived in this land for long but a dispute arose over the distribution of the same. It was his testimony that this suit land was owned by the father of the Plaintiffs and defendant and should be distributed accordingly. However the Plaintiffs are now trying to send the defendant away.

After the close of Defence case, **P.W.2 Ntunke Ene Parpai** was recalled to testify and produce a Register for **Kimana-Tikodo Group Ranch**. In the said Register it showed that P.W2, **Ntunke Ene Parpai,** was member **No. 27** and that she was given land **No LTK/Kimana/Tikodo 4261**. The Defendant who is her son was member **No 447** and her other three sons were members **No 448, 449 and 450** and who were also given parcels of land by the Group Ranch. She produced the said Register of the Group Ranch as **Exhibit No 7**. In Cross-examination, she admitted that she became a member of the Group Ranch after the death of her husband. However, she denied that her membership was in place of her late husband.

The parties thereafter filed their written submissions to support their respective positions. Consequently, the Law firm of **Musungu & Company Advocates** for the plaintiffs filed their written submissions on **19<sup>th</sup> August 2016**, and set out their issues for determination. It was further submitted that PW2 lawful got registered as a proprietor of **LTK/Kimana/Tikodo 4261** and she legally subdivided the suit land and transferred to the Plaintiffs herein procedurally. It was further submitted that the Defendant has illegally occupied the Plaintiffs parcels of land and he should be ordered to vacate henceforth. The Plaintiffs further submitted that the Defendant was not able to prove any element on fraud on the part of the plaintiffs. They urged the Court to allow their claim and dismiss the counterclaim as filed by the Defendant herein. The Plaintiffs relied on the case of **Ratil Gordhanhai Patel Vs Lalji Makenji (1957) EA 314** in which this Court quoted in the case of **Mary Wairimu Dames Vs Langata Development Company Ltd ELC No 1413 of 2007** where the court held that:

**“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to gravity of the offence concerned”**

The Plaintiffs also relied on the case of **Mbothu & others Vs Wairimu & 11 others (1986) KLR 171**

where the court held that:

**“Under section 23(1) of the Registered titles Act, it is clear that the title of the registered proprietor is not subject to challenge except on the grounds of fraud or misrepresentation of which he is proved to be a party”**

Further, the Plaintiffs also relied on section 26(1) & (b) of the Land Registration Act No 3 of 2012 which reads as follows:

***The certificate of title issued by the Registrar upon registration or to a***

***purchase 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 except.***

***a. On the grounds of fraud or misrepresentation to which the member is proved to be a party.***

***b. Where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.***

In conclusion, the Plaintiffs submitted that they are the bonafide owners of the suit land and the Court should grant them the prayers sought in their Plaint and dismiss the Defendant’s Counterclaim.

On the part of the Defendant, the Law Firm of ***Kinyanjui, Kirimi & Company Advocates*** filed the Written Submission on ***13<sup>th</sup> October 2016***, and also set out the issues for determination. The Defendant submitted that PW2 had no capacity to distribute ***LTK/Kimana/Tikodo/4261***, as she was not a member of ***Kimana/Tikodo Group Ranch*** but only got registered as member ***No 27*** to replace the late ***Semereria Lolwesi***. The Defendant also submitted that ***LTK/Kimana/Tikodo/4261*** was part of the estate of the late ***Semereria Lolwesi*** and was registered in the names of PW2, to hold it in trust for her children, the Defendant included. It was therefore submitted that ***PW2 Ntunke Ene Parpai***, unprocedurally, illegally and through corrupt scheme, subdivided and transferred the suit property to the plaintiffs. The Defendant urged the Court to dismiss the Plaintiffs suit and allow his counterclaims. The Defendant relied on various decided cases. He relied on the case of ***Alice Too Vs Nickson Kipkurui Korir & 2 others (2015)KLR***, where the court held that where a title to property was acquired and no Succession proceedings were ever filed, then such a title is improperly acquired. Further, they relied on the case of ***Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another (2003 )eKLR***, where the Court held that under Section 26(1) of the Land Registration Act, a party does not have to be party to the vitiating factors therein. The Defendant also relied on the decision of the Court of Appeal in the case of ***Mwangi & Another Vs Mwangi (1986) KLR 328***, where the Court held that the rights of a person in possession or occupation of land are equitable right which are binding.

The court has now carefully considered the pleadings herein and the annexures thereto, the available evidence, the Written Submissions and the cited authorities together with the relevant provisions of law and renders itself as follows.

There is no doubt that the Plaintiffs herein and the Defendant are all brothers. They are the sons of ***Ntunke Ene Parpai***, (PW2) 3<sup>rd</sup> Defendant in the Counterclaim and the late ***Semereria Lolwesi***. There is no doubt that the said ***Semereria Lolwesi*** (Deceased) was a member of ***Kimana/Tikodo Group Ranch***. It is also evident that the said ***Semereria Lolwesi*** died on ***1<sup>st</sup> June 1988*** as evident from the Grant of Letters of Administration intestate issued on ***20<sup>th</sup> December 1999*** to ***Ntunke Parpai (PW2)*** and ***Nanyu Ole Leyiambuka***, the Defendant herein. Further, it is evident that after the death of the said ***Semereria Lolwesi*** ( Deceased), the family of the deceased filed for distribution of his Estate and the property that was described as forming part of his Estate was LR ***LTK/Kimana/Tikodo/637***, which was subsequently

distributed through the confirmation of Grant rectified **on 23<sup>rd</sup> October 2007**. It is evident from the said confirmed Grant that **LR No. LTK/Kimana//Tikodo/4261** was never described as part of the Estate of the Deceased. The said parcel of land was therefore not available for distribution and it was not distributed in the said confirmed Grant.

There is also no doubt that the suit property LR No **LTK/Kimana/Tikodo/4261** was registered in the name of PW2 **Ntunke Ene Parpai** long after Semereria Lolwesi had died and his estate distributed. All the parties were in agreement that the certificate titles for the parcels of land that were originally held by **Kimana/Tikodo Group Ranch** were issued in the year 2006. From the records produced in Court, PW2 (3<sup>rd</sup> Defendant in the Counterclaim) was registered as member No 27 in the Group Ranch Register and was issued with land parcel No **LTK/Kimana-Tikodo 4261** which was measuring 60 acres.

It is also not in doubt that PW2 had six sons and four of her sons were also given parcels of land by the said Group Ranch. The defendant herein **Nanyu Ole Parpai** was registered as member **No 448** and was given land parcel **No 4260**. **Ntoros Ole Leyiambuka** was member **No 449** and was given land parcel **No 4346**. **Sempeta Ole Leyiambuka** was member **No 448** and his parcel of land is **No 3391** whereas **Kalama Ole Leyiambuka** was member **No 450** and given land parcel **No 3392**. It is therefore not in doubt that the Plaintiffs who are also sons of PW2 were not given any parcel of land by the Group Ranch.

It is also evident that after PW2 was issued with certificate of title of **LTK/Kimana-Tikodo 4261**, she subdivided the same into three portions of Land to produce **LTK/Kimana-Tikodo 4895, 4896 and 4897** which were registered respectively in the names of the Plaintiffs and PW2. PW2 testified that since the said parcel of Land was registered in her name absolutely and since the Plaintiffs did not benefit from the distribution of land from the Group Ranch, she decided to share her portion with her young sons. Each of the Plaintiff therefore acquired 27 acres of land and PW2 remained with a small portion. It is that subdivision and transfer that is opposed by the Defendant.

The Plaintiffs have alleged that even after their mother gave them land after subdivision of **LTK/Kimana-Tikodo 4261**, the Defendant has refused and or neglected to move from their portion of land and thus this suit. The Defendant on his part has alleged that this suit land forms part of the estate of the **late Semereria Lolwesi** and should be distributed equally among the beneficiaries as per the Law of Succession. He also alleged that he has lived on this parcel of land for over 30 years wherein he had developed the same and has acquired possessory right. He urged the Court to order Cancellation of the new titles and direct that the suit property be distributed properly through the Succession Cause **No 2088 of 1999**.

That being the available evidence and the respective positions taken by the parties herein, the Court finds that the issues for determination are

- i. Was PW2 (Ntunke Ene Parpai) a member of Kimana Tikodo Group Ranch.**
- ii. Did PW2 obtain the suit land No LTK/Kimana-Tikodo/4261 as her absolute share or it was part of the Estate of Semereria Lolwesi**
- iii. Whether the suit land was subdivided and transferred to the Plaintiffs unprocedurally illegally or through Corrupt scheme**
- iv. Are the Plaintiffs entitled to the prayers sought in the Complaint and/or alternatively, is the Defendant entitled to the prayers sought in the counterclaim.**
- v. Who will bear costs of the suit and Counterclaim?.**

This court will now endeavour to answer the framed up issues.

The first issue for determination is whether **Ntunke Ene Parpai(PW2)** and 3<sup>rd</sup> Defendant in the Counter-claim and who is the mother to the Plaintiffs and the Defendant herein is a member of **Kimana-**

**Tikodo Group Ranch.** As was noted by the Court in the earlier analysis of evidence, the suit land herein falls under the **Kimana-Tikodo Group Ranch** and the parties are in agreement that in the year **2006**, the Group Ranch management decided to subdivide its land among its members and each member was entitled to receive 60 acres from the Group Ranch. It was for that reason that PW2 and her four sons each acquired **60 acres**. The Plaintiffs and PW2 testified that PW2 acquired the said **60 acres** of land by virtue of being a member of **Kimana Group Ranch**. PW2 produced the Register of the said Group Ranch as Exhibits No 7. In the said Register, the PW2 is indicated as member **No. 27** and was the registered owner of **LR LTK/Kimana-Tikodo 4261**. However, the Defendant has disputed that allegation and averred that PW2 was not a member of **Kimana-Tikodo Group Ranch** by her own right but as an administrator of the estate of **late Semereria Lolwesi** and therefore whatever land she obtained from the Group Ranch was meant to benefit the beneficiaries of the said estate. However, the Register produced by PW2 as exhibit No. 7 showed that she was a member No.27 but it was not indicated that she was an administrator of the estate of **Semereria Lolwesi**. **Kimana Tikodo Group Ranch** is governed by the provisions of the **Land Group Representation Act Cap 28, Laws of Kenya** and Section **17(1)** of

the said Act provides for maintenance of a register. It reads as follows:

**“Every Group shall maintain a register including those under disability in such form as the Registrar may require or as may be prescribed containing the name of each member, the date he become a member, his qualification for membership---“**

It is evident that PW2 names appear in the Register for the Group Ranch. The Court also considered the second schedule to this Act which provide that:

**“All members who are registered in the said adjudication register as having an interest in the group land shall be entitled to become members of the group--- no person shall has admitted to membership of the group unless:-**

**a. That person has inherited an interest from a person who was recorded on that register**

The Court finds that the PW2 name is recorded in the Group Register and adjudication record and she is therefore a member .

It was adduced by all the parties that the subdivision of **Kimana-Tikodo Group Ranch** occurred in the year 2006. The late **Semereria Lolwesi** died in **1988**. By then the suit land had not been subdivided and therefore PW2 could not have been registered as an administrator of the estate of **Semereria Lolwesi**. Further even if the Defendant questioned the membership of PW2 to **Kimana-Tikodo Group Ranch**, he did not avail evidence from the Representatives of the said Group Ranch to dispute her membership. This court therefore finds and hold that just like her sons who were members of **Kimana-Tikodo Group Ranch** members **No 447, 448, 449** and **450**, the PW2 was also a member of said Group Ranch as member No 27 as reflected in the Group Ranch Official Register and Parcels Allocation marked as exhibit No. 7.

The next issue for determination is whether PW2 obtained the suit land **LR No LTK/Kimana-Tikodo 4261** as her absolute share or whether it was part of the estate of **Semereria Lolwesi** and that she was holding it in trust for the beneficiaries of the said estate, the Defendant included. There is no doubt that the late **Semereria Lolwesi** died in the year **1988** and Succession Cause **No 2088 of 1999** was filed in respect of his estate. In the confirmation of Grant in respect of the said Estate, only parcel of land No **LTK-Kimana-Tikodo 637** was identified as the only property of the deceased which was available for distribution. It is evident that the Defendant was a joint administrator of the said estate and he did not cause the suit land to be included as part of the estate of the deceased. The suit land herein was registered in the year 2006/2007 as per the evidence of the witnesses. When the **late Semereria Lolwesi** died in the year 1988, the suit property was therefore not in existence. It was just part of the Group Ranch Land. The Defendant alleged that PW2 was registered as member No 27 to replace the **late Semereria Lolwesi**. However, the Register of the Group Ranch does not indicate that PW2 was registered as member No 27 as an administrator of the estate of the **late Semereria Lolwesi**. There was no evidence brought out by the Defendant from the Official Representatives of the Group Ranch to confirm that indeed PW2 was

registered as member No. 27 and as proprietor of **LR No. LTK –Kimana-Tikodo 4261** in her capacity as a legal representative of the estate of **Semereria Lolwesi**. Failure to call evidence to that effect leaves this Court with no option but to hold and find that PW2 was registered as the proprietor of **LR No LTK/Kimana-Tikodo 4261** as an absolute proprietor owning 60 acres just like the same way the Defendant and his other brothers were registered as proprietors of their respective parcels of land.

On the 3<sup>rd</sup> issue, this court finds that having found that PW2 was registered as a proprietor of **LTK/Kimana-Tikodo 4261** as an absolute and indefeasible owner, in her own right, then the Court finds that as provided by Sections 24(1) and 25(a) of the Land Registration Act, she had absolute right to deal with the said land as she wished. Such right could only be defeated by operation of law . It was in exercise of the said right provided by Sections 24 and 25 of the Land Registration Act that PW2 subdivided her land and transferred 27 acres to each of her young sons who did not benefit from the Group Ranch.

The Defendant alleged that PW2 subdivided the suit land illegally and unprocedurally and the said subdivision and subsequent titles should be cancelled by the Court. However, it is evident that PW2 was the registered owner of the land that she subdivided and she could transfer to whoever she chose to give shares of her land. It is clear that PW2 had six sons and four of them benefited from allocation of 60 acres, of land from **Kimana-Tikodo Group Ranch**. The Plaintiffs herein who were her young sons did not benefit from that allocation. It was therefore logical for PW2 to give them shares from her parcel of land.

Therefore this court finds that as provided by Section 26(1) of the Land Registration Act, PW2 was the absolute and indefeasible owner of LR **LTK-Kimana-Tikodo 4261** which she later subdivided into four portions. The said subdivision and subsequent transfer were within her right as provided by Sections 24 and 25 of the Land Registration Act. There was no evidence adduced by the defendant to challenge PW2 ownership of the suit property, and the subsequent transfer and the other brothers of the Defendant have not complained at all that the suit land herein was their father's land and should therefore form part of his estate which is subject to Succession Cause **No. 2088 of 1999**.

Accordingly, the Court finds, that the subdivision undertaken by PW2 on **LTK-Kimana-Tikodo 4261** to produce **LTK/Kimana-Tikodo 4895, 4896** and **4897** was lawful and procedural. The subsequent transfer to the Plaintiffs herein was not shrouded by any corrupt practices and Plaintiffs are therefore the legal owners of their respective parcels of Land.

On the fourth issue of whether the Plaintiffs are entitled to the prayers sought in the Plaintiff, the Court finds that PW2 rightfully subdivided her parcel of land **LTK/Kimana-Tikodo 4261** into three parcels of land. She later transferred two parcels of land to each of the Plaintiff herein. The Plaintiffs have their respective certificate of titles and the court finds that the said certificate of titles were not obtained fraudulently or through corrupt schemes. Therefore, the Plaintiffs' being the registered owners of their respective parcels of land **LTK/Kimana-Tikodo 4895** and **4896**, then they are deemed to be the absolute and indefeasible owners of the said parcels of land. The Plaintiffs being the absolute and indefeasible owners of their respective parcels of land they have a right to enjoy ownership of these parcels of land. Possession, use and Occupation of such parcels of land is among the right that the Plaintiffs' are entitled to. These right are provided for by virtue of Sections 24 and 25 of the Land Registration Act and also by Article 40 of the Constitution.

The Plaintiffs have alleged that the Defendant is in occupation of their respective parcels of land and thus the filing of this suit. The Defendant on his part had alleged that he has lived on the suit property for over 30 years. However, it is evident that the Defendant was given 60 acres of land by the Group Ranch and his parcel of land was **LTK/Kimana-Tikodo 4260**. The Defendant also received 4 acres from the distribution of **LTK/Kimana-Tikodo 637**, which was the only property available for distribution for the estate of the late Semereria Lolwesi. Therefore the Defendant should pave way and allow the Plaintiffs' to utilize their respective parcels of land. This court therefore arrives at a conclusion that the Plaintiffs herein are entitled to the prayers sought in the Plaintiff. On the other hand the Defendant is not entitled to any of his prayer sought in the counter-claim.

On the last issue of who should bear the costs of the suit and counter-claim, the Court finds that as provided by Section 27 of the Civil Procedure Act, costs ordinarily follow the event. The Plaintiffs are the successful litigants. Therefore the Court finds that they are entitled to costs. Consequently, the Court finds that the Defendant herein should bear the costs of the suit and Counter-claim.

Having now considered the available evidence, the written submissions and the relevant provisions of law, the court finds that the Plaintiffs have proved their case on a balance of probabilities. The upshot thereof is that the Court allows the Plaintiffs' claim in terms of prayers No (a) (b) and (c). The Defendant should vacate the suit premises and give vacant possession to the Plaintiffs within the next 3 months from the date of this judgement.

Further, the Court finds that the Defendant has failed to prove his counter-claim on a balance of probabilities. Consequently the said Counterclaim is dismissed entirely with costs to the Plaintiffs. In a nutshell, the Defendant is to bear the costs of the suit and the Counter Claim.

It is so ordered

Dated, signed and delivered in Nairobi this 23<sup>rd</sup> day of JUNE, 2017

**L. GACHERU**

**JUDGE**

**23/6/2017**

In the presence of

Hon. Gacheru, Judge

Court clerk - Hilda

Mr. Musungu for Plaintiffs

Mr. Kinyanjui for Defendant

**L. GACHERU**

**JUDGE**

**23/6/2017**

**Mr. Kinyanjui:**

I would like to be given typed copies of the proceedings and Judgement. I seek for stay of Execution.

**L. GACHERU**

**JUDGE**

**23/6/2017**

**Mr. Musungu**

No objection to the application

**L. GACHERU**

**JUDGE**

**23/6/2017**

**COURT:**

Application for stay to be filed formally, Defendant to be supplied with certified copies of the proceedings and Judgment.

**L. GACHERU**

**JUDGE**

**23/6/2017**