



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 308 OF 2014

NASERIAN ENOLE KIWUAPE.....PLAINTIFF

VERSUS

JOSEPH KATAM.....1ST DEFENDANT

SIMON BORUSEI.....2ND DEFENDANT

JOSEPH TANUI.....3RD DEFENDANT

DAVID TONOI.....4TH DEFENDANT

JOHN KIKWAI.....5TH DEFENDANT

JOSEPH CHEPKWORKETER.....6TH DEFENDANT

JUDGMENT

(Suit by plaintiff for eviction; counterclaim by defendants for the same land; defendants case being that they purchased land from the plaintiff's deceased father; land being in a Group Ranch; Group Ranch had not been dissolved at time of sale and demise of the vendor; property now registered in name of plaintiff; sale agreements void for want of land control board consent; plaintiff not being personal representative of seller and hence having no capacity to be sued on behalf of her late father; claim of defendants coming after 12 years, the period given for a claim over land; counterclaim time barred; defendants' counterclaim fails; judgment entered for the plaintiff)

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a plaint filed on 5th November 2014. The plaintiff has pleaded that she is the registered owner of the land parcel CIS Mara/ Ololulunga/9763 (the suit property) and that on diverse dates in the month of June 2014, the defendants illegally trespassed into the said parcel of land. In the suit, the plaintiff has asked for the following orders :-

- (a) *A declaration that the defendants are trespassers and that they pay damages for trespass.*
- (b) *A permanent injunction to restrain them from the suit property.*
- (c) *An order to have the structures put up by the defendants demolished and an eviction order.*

(d) *Costs of the suit.*

(e) *Any other or further relief deemed fit and just to grant.*

2. The defendants entered appearance and filed a joint defence and counterclaim. They pleaded that they are beneficial owners of the suit property having purchased the same from the plaintiff's late father, one Kuiya Ole Naimodu between the years 1990 and 1993 and that they took possession of the land in the year 2001. It is averred that they took possession with the full consent of the late Ole Naimodu. It is pleaded the land formed part of a group ranch and the plaintiff was to take out letters of administration to divide the property to the defendants. In the counterclaim they have pleaded that they purchased 27 acres of the suit property from Ole Naimodu (the deceased) who was a share holder of Essinoni Group Ranch. It is pleaded that the deceased informed them that he would show them their respective parcels once the Group Ranch was dissolved. He however died before the dissolution of the Group Ranch. It is averred that in the year 1998 the plaintiff informed the defendants that she would process their title deeds and in the year 2001, she showed them the portions of land that the defendants settled on. They have pleaded that the plaintiff transferred the suit property to herself fraudulently and the following particulars of illegality, fraud, and/or bad faith are pleaded.

(a) *Knowingly transferring ownership of the suit land to herself when she was well aware her father had already said (probably meant "sold") the same to the defendants.*

(b) *Colluding to deprive the defendants of the suit land.*

(c) *Fraudulently misrepresenting facts to the defendants.*

(d) *Feigning knowledge of the defendants overriding interest in the suit land.*

(e) *Purporting to transfer the suit land to herself while knowing or expected to be knowledgeable of the defendants' ownership over the suit land and against the defendants' interest.*

(f) *Knowingly colluding with others to defraud the defendants of their land.*

(g) *Encroaching on the suit land with the full knowledge that it was the defendants'.*

3. In their counterclaim, the defendants have asked for the following orders :-

(a) *A permanent injunction against the plaintiff.*

(b) *A declaration that the defendants are the lawful owners of the suit land.*

(c) *Nullification and/or revocation of the title issued to the plaintiff and a declaration that the defendants are the bonafide owners and new titles be issued in their respective names.*

(d) *Costs of the suit.*

(e) *Any other or further relief deemed fit and just to grant.*

B. EVIDENCE OF THE PARTIES

4. The plaintiff testified as the sole witness. She testified that she was given the land by the Committee of the Esinoni Group Ranch and a title deed later issued to her. She produced a copy of the title deed and official search as exhibits. She testified that she has asked the defendants to move out but they have declined, claiming that they bought the land from her late father. She stated that she was not aware of the alleged sale. She denied having met the defendants in the year 1998 as pleaded in their defence.

5. In cross-examination, she testified that her late father was ailing for a while before he died. She did not

know where he used to live before, but was categorical that it was not on the suit property. She denied that David Tonui (4th defendant) used to take care of him in his (Tonui's) house. She thought that his father lived with his sister in a place called Enkorikori. She is the only surviving child of her father. She stated that she got the land because it was the share of her father in the Esinoni Group Ranch. She was assisted to get title by two persons, Eloontubu and Lesiolon. She was not aware of any succession cause on behalf of the estate of her father. She stated that she was not aware of the alleged sale of a portion of the land to the defendants. The land is 132 acres and she denied having sold any portion of it to the defendants. She admitted that the defendants occupy a portion of the land but she did not know for how long they have been in occupation. She got the title deed in the year 2010 and she denied that before that there was a meeting called by the Chief and village elder ostensibly to resolve the issue of the title of the defendants. She denied that she agreed with the defendants that she would subdivide to them their portions after she got title.

6. Each of the defendants testified and they also called one witness, Sanja Ole Sankei, the Chief of Ngoringori Location who testified as DW-1. He testified that the land in dispute is in his location and he knew the late Ole Naimodu, the plaintiff and defendants. He stated that the land was part of Esinoni Group Ranch and the late Ole Naimodu was a member. He died before the Group Ranch was dissolved. On dissolution of the ranch, the land was distributed. When the land was distributed any person claiming from a member was asked to pursue the parcel number allocated to the particular member. That is how the defendants moved into the land. Between the years 2000 and 2005, the defendants reported to him that they had purchased land from the late Ole Naimodu and they were at a loss on what to do. The Chief called a meeting of the elders from the family of Ole Naimodu but they did not attend. The issue lay quiet until the year 2013 when the plaintiff complained to him of the presence of the defendants. He called for a meeting with the defendants but the plaintiff did not attend. In so far as the agreements to sell were concerned, he only say one, that of Kiplagat, but he could not authenticate the signatures. In cross-examination, he testified that Ole Naimodu died before the Group Ranch was dissolved. He himself was not a committee member of the Group Ranch. He stated that there was relocation within the Group Ranch upon its dissolution so that persons settle on their now defined portions. This applied to those who had purchased land before the dissolution of the Group Ranch.

7. The defendants respectively testified that they purchased various portions of land from Ole Naimodu. They settled on some land in the Group Ranch before its dissolution. When it was dissolved, they moved to the site allocated to the deceased.

8. DW-2 the 4th defendant, stated that he purchased 6 acres of land. He produced a copy of an agreement. He stated that the original got lost. He testified that there were two witnesses to the agreement, Ayub Muge and Joseph Katam (1st defendant). He paid Kshs. 10,000/= for the 6 acres. In the year 2001, he , together with other defendants, showed the plaintiff the beacons to the land allocated to Ole Naimodu. He was aware of the sale to Tuwei and Katam. He stated that these agreements were written in his house save for the agreement between Ole Naimodu and Joseph Tonui (3rd defendant). He testified that John Kikwai (5th defendant) came after the Group Ranch had been dissolved and he settled directly into the suit property. He testified that before his death, Ole Naimodu had mentioned to him that he had sold land to 6 persons and that he had written agreements with them. He stated that they have been residing on the land since the year 2001 and that the plaintiff was present. The total acreage purchased by them is 27 acres. He stated that he was close to Ole Naimodu and that he lived in his (4th defendant's) house till he died.

9. In cross-examination, the 4th defendant stated that he purchased 6 acres and paid Kshs. 60,000/=. He stated that he bought the land at Kshs. 8,000/= per acre. He stated that he paid Kshs. 44,000/= to the deceased in installments, and in the year 2010 after the death of Ole Naimodu, he paid Kshs. 4,000/= to Ngoitila, a brother of the deceased. He denied that the defendants took advantage of Ole Naimodu's ill health.

10. DW-3 was the 2nd defendant. He stated that he bought 4 acres in 1992 from Ole Naimodu at Kshs. 8,000/= per acre. They agreed that he could pay by installments and he paid Kshs. 8,100/= in 1992; Kshs. 10,000/= in 1993; Kshs. 8,900/= in 1995. He still has a balance of Kshs. 5,000/= which he stated Ole Naimodu permitted him to pay after the dissolution of the Group Ranch. He stated that he is ready to pay

this money. He testified that in the year 2001, the plaintiff accompanied by some Committee members of the Ranch, showed them the land and she asked them to settle in one section. After about 8 years, the plaintiff promised to send a surveyor to demarcate for the defendants their portions but his was not done. In cross-examination, he admitted that the copy of agreement that he has only shows the payment of Kshs. 8,100/=. He stated that the other installments were recorded in a book which got lost.

11. DW-4 was the 5th defendant. He got to know Ole Naimodu in the year 1984 and in the year 1990 the deceased agreed to sell to him land. He paid both in money and in kind, for he allowed the deceased to collect supplies from his businesses. They later recorded their agreement which he produced. They agreed to have him purchase 5 acres at Kshs. 10,000/= per acre. The deceased had collected supplies totaling Kshs. 43,360/= and a balance of Kshs. 6,640/= remained which he stated he is ready to pay. The deceased asked one Nailowa to accommodate the 5th defendant pending dissolution of the Group Ranch. Upon dissolution of the Group Ranch, they settled on one area of the portion assigned to the deceased and demarcated the land depending on what each had purchased. He stated that they entered the land in the year 2001.

12. In cross-examination, he was not very clear on the date of the agreement. He thought that the agreement was written in the year 1995 and he denied that there were any alterations to it. He also wrote some of the agreements as he was the most enlightened. He testified that it is the Committee of the Group Ranch which showed them where to settle.

13. DW-5 was the 1st defendant. He stated that he purchased land from Ole Naimodu and they had a written agreement. He stated that the original was taken to the Group Ranch Committee and he produced a copy. He bought 3 acres at Kshs. 8,000/= per acre. He paid Kshs. 9,000/= as the first installment. Other installments were recorded in his own book which he did not produce in evidence.

14. DW-6 was Joseph Tuwei also known as Chepwoketer. He is the 6th defendant. He testified that he entered into a sale agreement with the deceased. The original got lost and he produced a copy as an exhibit. They wrote the agreement in 1992 but he could not recall the date and month. He stated that he purchased 6 acres at Kshs. 8,000/= per acre. He paid by installments and still owes Kshs. 2,100/=. He stated that Ole Naimodu died in the year 1998 and he had no one to give the balance. He has no problem paying this money. In cross-examination, he stated that they had an earlier agreement which got lost.

15. With the above evidence, the defendants closed their case.

C. SUBMISSIONS OF COUNSEL

16. Only Mr. Makori for the plaintiff, filed written submissions. There were none filed by Mr. Wambeyi for the defendant and neither did he appear on the day listed for oral submissions. In his submissions, Mr. Makori inter alia submitted that the suit property belongs to the plaintiff and she has never sold it to anyone. He submitted that there was no sale and if there was any, they are incompetent as not all the money has been paid to the deceased or the plaintiff. He was of the opinion that the plaintiff warrants the orders she has sought. He relied on the case of **Samuel Mwangi vs Jeremiah M'Itobu, Court of Appeal, Appeal No. 70 of 1994 (2012) eKLR**. I have however not seen the relevance of this case to the facts of this matter. The case therein involved a person who had no title, but in occupation, suing another, for trespass. That is clearly distinguishable to the facts of this case, for in this suit, the plaintiff does have title to the suit property.

D. DECISION

17. I have considered the pleadings, the evidence and submissions of counsel. In my view, the plaintiff's case is simple. That she has a title and she is entitled to vacant possession of the land. The case of the defendants in a nutshell is that they are entitled to portions of the suit property by way of purchase, having purchased the land from the previous owner, one Ole Naimodu (deceased) who is father to the plaintiff. They have raised a counterclaim for entitlement to the portions that they claim they purchased. It follows that if I am to allow the counterclaim, the plaintiff's suit will automatically fail. I therefore choose

to proceed and assess whether the defendants are entitled to their claim.

18. It is not contested that the suit property was previously part of Esinoni Group Ranch. From the evidence tabled, it seems as if Ole Naimodu was a member of this Group Ranch, although the issue is not beyond doubt, as none of the parties produced the register of members of Esinoni Group Ranch. But I am prepared to hold on a balance of probabilities, that it is Ole Naimodu who was a member of the Group Ranch. Ole Naimodu seems to have had a chequered life. He lost his first wife when the plaintiff was still very young and he appears to have suffered ill health for a considerable amount of time before he eventually died. The plaintiff was raised by her aunts and uncles. Ole Naimodu at some point, probably in the early 1990s married another woman, but apparently, this marriage did not last. For much of his later life, it seems as if Ole Naimodu lived a solitary life, and probably with the assistance of the 4th defendant. The plaintiff appears to be the only surviving child of Ole Naimodu.

19. Moving on the basis that Ole Naimodu was a member of the Esinoni Group Ranch, he was certainly entitled to land when the Group Ranch was dissolved. The defendants claim that Ole Naimodu sold to them what he was entitled to in future. At the time of sale, the land that Ole Naimodu was entitled to had not yet been ascertained. It had not been determined how much land he would be entitled to and where this land would be situated. The defendants have alleged that they did enter into written agreements with Ole Naimodu. I have gone through the written agreements produced as exhibits by the defendants. Save for one, that of the 2nd defendant, all the other documents produced were copies which were not certified. It is difficult to read some, if not all of them. The agreement of the 1st defendant is completely not legible. Be as it may, I do not think that these agreements can confer any rights to the defendants.

20. There is no question that the property being sold was agricultural land for which consent of the Land Control Board was required. This is by virtue of Section 6 of the Land Control Act (CAP 302). None of the parties applied for consent of the Land Control Board and it follows that the agreements of sale are null and void. The defendants cannot support their claim for entitlement of part of the suit property on the basis of agreements that cannot be enforced for want of consent of the Land Control Board.

21. It has also not been shown that the plaintiff is administrator of the estate of Ole Naimodu so that she can be sued on behalf of the late Ole Naimodu. The agreements in question were not made by the plaintiff but by Ole Naimodu who is now deceased. If at all the agreements could be enforced, they can only be enforced against a personal representative of Ole Naimodu and no other person. The plaintiff does not purport to be a personal representative of Ole Naimodu and the defendants cannot therefore pursue her on behalf of the late Ole Naimodu.

22. Even assuming that the sale agreements are enforceable, I am of the view that the suit by the defendants has been caught by limitation of time. The limitation period for the recovery of land is 12 years from the date that the cause of action arose. This is by dint of the provisions of Section 7 of the Limitation of Actions Act, CAP 22, Laws of Kenya. The agreements tabled by the defendants were made in the 1990s. It is obvious that 12 years had lapsed since the defendants presented their counterclaim.

23. It was the case of the defendants that the plaintiff procured registration by way of fraud. It will be recalled that I stated earlier, that the parties did not produce the history of the suit property prior to it being registered in the name of the plaintiff. The defendants have not therefore demonstrated to me, any iota of evidence, to demonstrate that the plaintiff was illegally or fraudulently registered as proprietor of the suit property. The only basis upon which the defendants found their claim is the sale agreements, which, as I have stated earlier, cannot be enforced.

24. The defendants could probably have had recourse to the doctrine of adverse possession, but their claim in this suit is not one of adverse possession, and I am unable to assess whether or not the defendants are entitled to the portions that they occupy through prescription.

25. In brief, the defendants have not shown to me that they are entitled to the suit property. On the other hand, the plaintiff has shown that she is the registered proprietor. She became registered as proprietor on 20 July 2010. Since she is the proprietor, and the defendants have not demonstrated any right to be on the

property, she is entitled to all rights that come along with her proprietorship including the right of exclusive possession, and the right of ingress and egress. Her claim therefore succeeds. In her prayers, the plaintiff inter alia asked for general damages for trespass. Unfortunately, she did not table concrete evidence on her loss and I will therefore only award her a token Kshs. 100,000/= in recognition that her rights to her land have been infringed.

27. The plaintiff has succeeded and the defendants have failed. I see no reason why costs should not follow the event.

Flowing from the above, I now make the following orders :-

1. *The defendants' counterclaim is hereby dismissed with costs.*
2. *The plaintiff's suit succeeds and the defendants are granted 30 days to vacate the suit property or else they evicted at their own costs.*
3. *A permanent injunction is hereby issued restraining the defendants from entering, continuing to be upon, occupying, or in any way interfering with the plaintiff's quiet possession of the suit property.*
4. *The defendants shall jointly and/or severally pay general damages to the plaintiff of Kshs. 100,000/= within 30 days and in default, execution to issue.*
5. *The plaintiff shall have costs of both suit and counterclaim.*

28. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21st Day of January 2016

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of -:

Mr. B N Makori present for plaintiff

Ms Kibos holding brief for Mr Wambeyi Makomere for defendants.

CA: Jane

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU