



**Siamito v Nkaayia (Suing as Next of Kin of Nkaayia Loontareto Ntete alias Nkaayia Ole Kedoki) & 2 others (Environment and Land Appeal E042 of 2022) [2024] KEELC 1404 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1404 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E042 OF 2022  
LC KOMINGOI, J  
MARCH 14, 2024**

**BETWEEN**

**LESHOKO NKONENE SIAMITO ..... APPELLANT**

**AND**

**KANYET ENE NKAAYIA (SUING AS NEXT OF KIN OF NKAAYIA  
LOONTARETO NTETE ALIAS NKAAYIA OLE KEDOKI) .... 1<sup>ST</sup> RESPONDENT  
CHAIRMAN MAILUA GROUP RANCH ..... 2<sup>ND</sup> RESPONDENT  
LAND REGISTRAR KAJIADO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the judgement and decree of the Hon. I. Kahuya in  
Kajiado CMC ELC No. E043 of 2021 delivered at Kajiado on 31st August 2022)*

**JUDGMENT**

1. In her Judgment, dated and delivered on the 31<sup>st</sup> August 2022 Honourable Kahuya I.M (Principal Magistrate) granted the following orders;
  - a. A declaration be and is hereby issued that the registration of the 1<sup>st</sup> Defendant as the proprietor of parcel number Kajiado/Mailua/ 4959 under entry number 2 was irregular.
  - b. An order of Permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant, his family, agents, employees or servants from trespassing, cultivating, selling, disposing off or in any other manner interfering with the plaintiff's quiet possession and ownership of land reference No. Kajiado/Mailua/4952.



- c. Any order be and is hereby issued directing the 3<sup>rd</sup> Defendant to cancel entry number 2 and register land parcel number Kajiado/Mailua/4959 in the names of Nkaayia Loontareto Ntete alias Nkaayia Ole Kedoki.
  - d. Refund of Kshs 330,000/= (Three hundred and thirty thousand only) by the plaintiff to the 1<sup>st</sup> Defendant at an interest of 20% from 28/1/2011-31/8/2022.
  - e. Each party to bear their own costs of the suit.
2. Aggrieved by the said Judgement the Appellant filed a Memorandum of Appeal dated 27<sup>th</sup> September 2022 and Amended on 6<sup>th</sup> October 2022. The Appeal seeks the setting aside of the judgement and dismissal of the 1<sup>st</sup> Respondent's suit with costs on grounds that:
1. The learned trial Magistrate erred in fact and in law in making a finding that the registration of the 1<sup>st</sup> Defendant as the owner of parcel no. Kajiado/Mailua/4959 was irregular, illegal and unprocedural against the weight of the evidence and the law.
  2. The learned trial Magistrate erred in law in finding that the suit property at the time of the sale was subject to Section 45 of the *Law of Succession Act* contrary to the provisions of Section 32 and 33 of the Law of Succession on excluded property.
  3. The learned trial Magistrate erred in law by issuing an order of permanent injunction restraining the 1<sup>st</sup> Defendant/ Appellant, his family, agent, employee or servants from exposing, cultivating, selling, disposing off or in any other way interfering with the Plaintiff's quiet possession and ownership of land reference No. Kajiado/Mailua/4952 in total disregard to the proprietary rights of the Appellant against the weight of evidence by the Appellant.
  4. The learned trial Magistrate erred in law by ignoring the evidence of the Appellant that they sold the land as undivided share of Number 162 Mailua Group Ranch registered under Nkaayia Loontareto Ntete (deceased).
  5. The learned trial Magistrate erred in law by fact and law by ordering the refund of Kshs 330,000 with interest of 20% an order not sought by any party and made no finding on the 10 cows and 20 cows that were part of the consideration of the purchase on Number 162 Mailua Group Ranch.
  6. The learned trial Magistrate deliberately gave a wide berth and ignored the pleadings and the supporting evidence, both oral and documentary, of the Appellant and in so doing misdirected himself on the law and evidence.
  7. The judgement is against the weight of evidence on record and the law.
3. The Appeal was canvassed by way of written submissions.

### **The Appellant's submissions**

4. On whether the 1<sup>st</sup> Respondent sold and transferred her interest in the suit property to the Appellant, counsel submitted that there was a valid sale agreement dated 28<sup>th</sup> January 2011 between the 1<sup>st</sup> Respondent and the Appellant. But the trial court erred in finding that the 1<sup>st</sup> Respondent could not undertake the transaction since the suit property was at the time of the transaction in her late husband's name contrary to Section 45 of the *Law of Succession Act*, though the suit property was among excluded property as stipulated in Sections 32 and 33 of the *Law of Succession Act*.



5. Counsel submitted that the trial court erred in issuing a permanent injunction against the Appellant despite the principles for issuance of permanent injunctions not having been established. Adding that the Appellant obtained title to the suit property legally and was protected by Section 26 of the [Land Registration Act](#). Further that the only contention was on the size of the suit property purchased whereby the 1<sup>st</sup> Respondent claimed that the portion sold was ten (10) acres but the sale agreement showed that it was the whole share of the suit property.
6. Counsel went on to submit that it was not clear how the trial court having found that the sale agreement was valid went on to issue a permanent injunction against the Appellant and directed the 3<sup>rd</sup> Respondent to cancel title in the Appellant's name and revert to the 1<sup>st</sup> Respondent's husband's name.
7. Finally, counsel submitted that the trial court erred in ordering refund of only Kshs 330,000 disregarding the 10 cows and 20 goats which also formed part of the consideration. For the consideration to be deemed as refunded then everything that was paid should be refunded. As such, the appeal should be allowed

### **The 1st Respondent's submissions**

8. On whether the transfer and subsequent registration of the suit property Kajiado/Mailua/4959 was regular, legal and procedural, counsel submitted that the 1<sup>st</sup> Respondent denied signing the alleged sale agreement dated 28<sup>th</sup> January 2011. Neither witnesses nor the maker of the sale agreement was called to confirm its authenticity. Counsel submitted that the 1<sup>st</sup> Respondent's husband who was member number 162 was entitled to parcel number 4952 but he passed away on 12<sup>th</sup> May 2005 before the title could be registered in his name. The search showed that the green card for the suit property was opened on 15<sup>th</sup> January 2014 and immediately transferred to the Appellant.
9. Further, the alleged sale agreement between the parties was invalid because the 1<sup>st</sup> Respondent had no rights to deal with the suit property in 2011 which was in her late husband's name. This was contrary to Section 45 of the [Law of Succession Act](#) because the letters of administration were taken out by the 1<sup>st</sup> Respondent in 2022 when the suit at the Chief Magistrate's court was instituted. Reference was made to [Re Estate of Mukhobi Namonya \(Deceased\)](#) [2020] eKLR, [Linus Riungi M'Kanga vs Erastus Njagi Kamundi](#) [2018] eKLR and [Leonard Kiplangat & another v Samuel Rotich & 9 others](#) [2018] eKLR. Moreover, the sale agreement was invalid because it was not signed by the 1<sup>st</sup> Respondent, there was no evidence of payment of the consideration, no evidence of exchange of the alleged cattle or of any witness during the transaction.
10. Therefore, the trial Magistrate erred in finding that the 1<sup>st</sup> Respondent sold ten (10) acres as per minutes of a meeting held on 23<sup>rd</sup> February 2019 because the 1<sup>st</sup> Respondent was neither present at the meeting nor was any person present at the alleged meeting called as a witness.
11. On whether a court can grant a prayer not pleaded or prayed for, counsel submitted that parties are bound by their pleadings as held by the Supreme Court in [Raila Amolo Odinga & another v IEBC & 2 others](#) [2017] eKLR and Court of Appeal in [Caltex Oil \(Kenya\) Ltd v Rono Limited](#) [2016] eKLR. As such, the trial magistrate erred in directing for a refund of Kshs 330,000 at an interest of 20% from 28<sup>th</sup> January 2011 to 31<sup>st</sup> August 2022 which was neither sought by the Appellant nor was the alleged sale agreement valid.
12. On whether the Appellant's title was indefeasible, counsel submitted that anything founded on a nullity was a nullity as was held in *Macfoy vs United Africa Ltd* [1961]3 ALL ER 1169 and the Appellant's title having been founded on an alleged sale agreement that occurred before the 1<sup>st</sup>



Respondent was an administrator of her husband's estate was illegal and not protected by law. The orders for permanent injunction against the Appellant and cancellation of the title in his name should therefore be upheld and the appeal dismissed with costs.

### **Analysis and Determination**

13. I have considered the grounds of Appeal, the record of Appeal, the rival submissions and the authorities cited. The issues for determination are;
  - i. Whether the learned Trial Magistrate erred in making a finding that the registration of the Appellant as the owner of the suit property Kajiado/Mailua/4592 was irregular, illegal and unprocedural against the weight of the evidence and the law.
  - ii. Whether the Learned Trial Magistrate erred in law in finding that the suit property at the time of sale was subject to Section 45 of the [Law of Succession Act](#) Contrary to the Provisions.
  - iii. Whether the Learned Trial Magistrate erred in law by ignoring the evidence of the Appellant that he bought land as undivided share of Number 762 Mailua Group Ranch registered under Nkaayia Loontareto Ntete (Deceased).
  - iv. Whether the Appeal is merited.
  - v. Who should bear costs of the Appeal?
14. This being a first appeal, the court is duty bound to re-look at the evidence at the trial court and come up with its own determination as was held by the Court of Appeal in [Peter Kamau Njau v Emmanuel Charo Tinga](#) [2016] eKLR where it was stated;

“our duty in this appeal is to analyse a fresh and re-evaluate the evidence presented in the trial court in order to arrive at our own independent conclusion. *Selle v Associated Motor Boat Co.* [1968] EA 123”
15. Similarly, the Court of Appeal in [Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates](#) [2013] eKLR stated thus;

“This being a first appeal, we are reminded of our Primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the Learned Trial Judge are to stand or not and give reasons either way-----“.
16. The Appellant claims that the learned trial magistrate erred in finding that he was not entitled to the suit property, Kajiado/Mailua/4952 despite its finding that there was a valid sale agreement entered between him and the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent contested the appeal arguing that there was never a valid sale agreement because she neither executed the alleged agreement nor did she have the capacity to because she was not an Administrator of her husband's estate at the time.
17. The 1<sup>st</sup> Respondent filed ELC Case No. E043 of 2021 claiming that she was the wife of the late Nkaayia Loontareto Ntete who was a member number 162 of Mailua group ranch and was allotted parcel Kajiado/Mailua/4952 measuring approximately 53.90 hectares. The said Nkaayia passed away on 12<sup>th</sup> May 2005 and sometime in 2019 she got information that the suit property had been registered in the name of the Leshoko Nkonene Siamito (the Appellant herein). She filed a complaint at the Directorate of Criminal Investigation and a restriction was placed against the property. On conducting a search it was discovered that the register in regard to that property was opened on 15<sup>th</sup> January 2014 in the name



of Mailua Group Ranch and the parcel transferred to Leshoko Nkonene Siamito on the same day. This transfer was not only illegal and fraudulent since property 4952 was allotted to the late Nkaayia, but it was also intermeddling with the property of the deceased. She thus sought declaration that the registration of the Appellant as the owner was illegal, unprocedural and ought to be cancelled. She also sought permanent injunction against them as well as general damages and costs of the suit.

18. The Appellant in his Statement of Defence stated that he bought off the Plaintiff's share as member number 162 through a sale agreement dated 28<sup>th</sup> January 2011 for valuable consideration of Kshs 330,000, 10 cows and 20 goats and that is why upon subdivision he was registered the owner of property Kajiado/Mailua/ 4952.
19. The 1<sup>st</sup> Respondent contested this allegation and stated that she never sold her husband's share, she never received any consideration for the alleged sale nor has she ever attended any meeting regarding the suit property. She also stated that she only knew the Defendant by name.
20. To support her claim, she produced Grant of Letters of Administration dated 14<sup>th</sup> December 2020 vide CMC Succession Cause No. E029 of 2020; Area list which shows that the late Nkaayia member number 162 was allotted parcel number 4952; Letter dated 12<sup>th</sup> August 2020 from the Chairman Mailua Group Ranch to the 1<sup>st</sup> Respondent's advocates reads: "The parcel belongs to Nkaayia Ole Kedoki who is a registered member No. 162 in the group ranch register. The title deed was issued by the former leadership to Leshoko Nkonene Siamito without the knowledge of the owners..."
21. The Appellant stated that he was aware that the suit land was in the late Nkaayia Loontareto Ntete name but believes that the wife had rights to dispose it off. He produced a sale agreement dated 28<sup>th</sup> January 2011 and a title deed for land parcel Number Kajiado/Mailua/4952 in his name but stated that there was no evidence to show that the late Nkaayia's share was transferred to him. He also confirmed that the Plaintiff never attended the meeting that was allegedly held to resolve the dispute. He also acknowledged that there was no evidence to show he paid consideration for the land.
22. The impugned Judgement delivered on 31<sup>st</sup> August 2022 reads in part:

" ... It was not in dispute that the Plaintiff's late husband died on 12<sup>th</sup> May 2005 way before a title deed was issued in connection to his land currently owned by the 1<sup>st</sup> Defendant... The most contentious issue is whether the Plaintiff through the sale agreement dated 28<sup>th</sup> January 2011 sold her interests in the suit property to the 1<sup>st</sup> Defendant thus the status quo... In conclusion, I find that the sale agreement dated 28/1/2011 was validly entered between the Plaintiff and the 1<sup>st</sup> Defendant. Unfortunately, the suit property was at the time not in the Plaintiff's name hence she legally had no capacity to transact on the land belonging to the deceased husband..."
23. Did the trial court err in finding that there was a valid sale agreement between the parties?
24. It is not in contention that the late Nkaayia member number 162 passed on in 2005 way before the alleged agreement was entered into. The Appellant acknowledges that he was aware of that fact but believed the wife had capacity to deal with the property. Counsel for the 1<sup>st</sup> Respondent submitted that it was until 2020 when she was issued letters of administration to prosecute the suit and any other dealings with the suit property prior to that was intermeddling as per Section 45 of the [Law of Succession Act](#). Counsel for the Appellant contested that applicability of Section 45 as the suit property was excluded by Section 32 which provides:

"The provisions of this Part shall not apply to-



- (a) agricultural land and crops thereon; or
  - (b) livestock, in various Districts set out in the Schedule:... Kajiado...”
25. Section 33 of the *Law of Succession Act* which provides;
- “The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased’s community or tribe, as the case may be.”
26. Section 44 of the *Law of Succession Act* provides;
- “(1) The provisions of this Part shall not, in cases of intestacy, apply to those types of property mentioned in section 32.”
27. I find that these Sections are in regard to distribution of intestate property in the areas specified under the act. However, in this particular case the issue at hand is not on distribution of the deceased’s property/ land but the sale, its sale thereof.
28. Section 3(3) of the *Law of Contract Act* provides:
- “(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
    - (i) is in writing;
    - (ii) is signed by all the parties thereto; and
  - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:”
29. While the Appellant produced a sale agreement dated 28<sup>th</sup> January 2011, the 1<sup>st</sup> Respondent challenged it stating that she neither executed it nor did she have capacity to sell since the land that belonged to her late husband. She also questioned the thumbprint used to execute the sale agreement stating that it was not hers. No evidence was produced to show that indeed the thumbprint was hers.
30. It is on record that at the time of executing the alleged sale agreement, the late Nkaayia Loontareto Ntete was the registered member of the group ranch and the 1<sup>st</sup> Respondent was not an Administrator of his Estate. As such she had no capacity to transact as held by the learned trial magistrate. If she did not have capacity to transact on the suit property, this also means that the alleged sale agreement entered was null and void.
31. Furthermore, Section 35 of the *Law of Succession Act* only grants the surviving spouse life interest over the property but not rights to dispose it off in anyway. Limo J. in *Mary Wanjiku Kamonde v Daniel Muriithi Kamonde* [2016] eKLR held:
- “... This therefore shows that any purported sale of the estate herein by the 1<sup>st</sup> applicant is a nullity and void. This is because when a surviving spouse holds life interests over a property such as in this cause, the property does not pass to her absolutely and it cannot be registered in her name absolutely since she only enjoys a life interests and effectively only holds it in trust for the children and other heirs. She can utilize the estate by ploughing and



can even lease it out if she is unable to plough to enable her get some funds for upkeep and maintenance but she cannot sell it unless she gets express authority from the other beneficiaries and this Court...”

32. Any dealing with the late Nkaayia Loontareto Ntete’s suit property was thus null and void.
33. The Learned Trial Magistrate went on to hold that the 1<sup>st</sup> Respondent does refund the Appellant the consideration at an interest of 20%. Both parties contested this holding on the ground that the trial court issued orders that were not prayed for. Did the trial court err in issuing this order?
34. I find that the learned trial magistrate erred in ordering a refund of the Kshs 330,000/= this Court shall therefore set aside that order on grounds that there was no proof of consideration paid. Therefore ordering the 1<sup>st</sup> Respondent to refund a consideration that was not proved would be an injustice.
35. In conclusion I find no reason to interfere with the Learned Trial’s Magistrate findings except for prayer (d) which is set aside.

In essence I find no merit in this appeal and the same is dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**L. KOMINGOI**  
**JUDGE.**

In The Presence Of:

Mr. S. Mogeni for Mr. K. Mogeni for the Appellant.

Ms. Wanjiku for the Respondent.

Court Assistant – Mutisya.

