



**Koikai v Koikai & 6 others (Environment & Land Case E033 of 2021)
[2024] KEELC 13628 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E033 OF 2021
LC KOMINGOI, J
DECEMBER 5, 2024**

BETWEEN

LESALON KOIKAI PLAINTIFF

AND

KITAMBO OLE KOIKAI 1ST DEFENDANT

MOSES OLE MOSIANY 2ND DEFENDANT

LERASUNA OLE TOLIMO 3RD DEFENDANT

NITISHO OLE MOSIANY 4TH DEFENDANT

DIRECTOR OF LAND ADJUDICATION 5TH DEFENDANT

DISTRICT LANDS REGISTRAR KAJIADO 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

JUDGMENT

1. By the Plaint dated 6th May 2021, the Plaintiff claims that the parcel known as Kajiado/ Dalalekutuk/876 measuring approximately 40.64 hectares belonged to his mother the Late Noosekei Ene Koikai. Having settled on that land, she acquired customary rights over it and was registered as member number 130 in Enkorika Group Ranch and that parcel of land equally registered in her name. She passed away on 1st January 1982 when the Plaintiff was six (6) years old.
2. Upon her demise, the 2nd, 3rd and 4th Defendants who were officials of the Enkorika Group Ranch passed a resolution on 20th December 1983 to transfer the share to the 1st Defendant. On 1st March 1984, the said officials wrote a letter to the 5th Defendant asking them to effect changes on the register by deleting and removing his late mother’s name and replacing it with the 1st Defendant’s name. The 4th Defendant declined this request and the Plaintiff claims that this was the case until on or about 26th



September 2007 when the 2nd, 3rd and 4th Defendants signed transfer instruments of that property in favour of the 1st Defendant and certificate of title issued in his favour by the 5th Defendant. Sometime in the year 2016, the 1st Defendant started claiming ownership of the suit property being aware that it has been the family land from the 1970s. The plaintiff carried out a search only to find out that indeed the property was registered in the 1st Defendant's name albeit fraudulently. This is because it was his late mother's land which if at all, the 1st Defendant was to hold in trust for the Plaintiff; the 1st Defendant did not disclose this transfer to his other siblings who were all beneficial owners of the property; giving false information to the 2nd, 3rd, 4th and 5th Defendants and unjustly enriching himself fraudulently; intermeddling with the Estate of the deceased contrary to Section 45 of the Law of Succession Act; disinheriting the Plaintiff and other beneficiaries of their legally entitled property.

3. He averred that the 2nd, 3rd and 4th Defendants illegally replaced their late mother's name with the 1st Defendant's in the register before ascertaining the veracity of the 1st Defendant's claim; discriminating against him (plaintiff) by virtue of his age; and colluding with the 1st Defendant to disinherit other beneficiaries.
4. On the part of the 5th and 6th Defendants' he claimed that they facilitated an illegal and fraudulent transfer of the land to the 1st Defendant, engaged in actions prejudicial to the Plaintiff by violating his Constitutional rights; unlawfully effecting a transfer using a fraudulently obtained letter of consent; failing to properly scrutinise documents presented to them.
5. He therefore sought;
 - a. A declaration do issue that the suit property Kajiado/Dalalekutuk/876 measuring approximately 40.64 hectares was solely owned by Noosekei Ene Koikai (Deceased) and that the 1st Defendant is holding it in trust for all the children of the deceased.
 - b. A declaration do issue that the resolutions passed on 20th December 1983 by the 2nd, 3rd and 4th Defendants to have the name of Noosekei Ene Koikai (deceased) to be deleted from the register of members of Enkorika Group Ranch were vitiated by misrepresentation and discrimination on account of age and therefore the same are null and void and it be cancelled and or revoked forthwith
 - c. A declaration do issue that the transfer of the suit property Kajiado/Dalalekutuk/876 measuring approximately 40.64 hectares by the 2nd, 3rd, 4th, 5th and 6th Defendants to the 1st Defendant was fraudulent, illegal, and null and void.
 - d. The certificate of title deed for the land parcel number Kajiado/Dalalekutuk/876 measuring approximately 40.64 hectares issued on 26.9.2007 to the 1st Defendant be cancelled and revoked
 - e. The 6th Defendant be ordered to cancel all the entries in the register subsequent to the transfer of the suit property Kajiado/Dalalekutuk/876 made on 26.9.2007
 - f. An Order of permanent injunction do issue restraining the 1st Defendant, his agents, servants and or employees from interfering with the Plaintiff's peaceful occupation, enjoyment and use of the part or portion of suit property Kajiado/Dalalekutuk/876 until Succession proceedings are commenced and concluded
 - g. Parties be ordered to pursue Succession proceedings in the Family Court.
 - h. Costs of the suit.



6. The 1st Defendant in his statement of defence and Counterclaim dated 7th June 2022 averred that before dissolution of the Enkorika Group Ranch in December 1983, he was member number 275 as per the register of members and member number 405 in the adjudication record and their mother Noosekei Ene Koikai was member number 130 as per the register of members from the year 1978 and member number 139 in the adjudication register. She passed away on 1st January 1982
7. He went on to outline that other members of the Group ranch were the 1st Defendant's elder brother Musari Ole Koikai who was member number 127; Nooleleshuani Koikai s their step mother who was member number 128; and the late Koikai's cousin Lenkirapu Ole Ololoiputari who was member number 129. s
8. Following the adjudication process undertaken by the 5th and 6th Defendant's each member of the Group Ranch was allocated 40.64 hectares of land. And on 26th September 2007 the 1st Defendant was issued title to the suit property just like other members of the ranch. However, the late Noosekei Ene Koikai was never allocated any parcel of land because one of Mzee Isina's wives was allocated land even though she was not a registered member. Therefore, the suit property registered in the 1st Defendant's name is duly his as the bonafide registered owner and not as an inheritance from his mother.
9. The 1st Defendant claimed that in 2021, the Plaintiff trespassed and wrongfully occupied the suit property and when a notice to vacate was issued, he instituted the instant suit instead of leaving. He has since occupied the property and has threatened the 1st Defendant with physical violence if he attempts to evict him. The 1st Defendant therefore seeks:
 - a. A declaration that the 1st Defendant is the bona fide, lawful and absolute proprietor of all that parcel of land known as Kajiado/Dalalekutuk/786.
 - b. A permanent injunction restraining the Plaintiff, whether by himself or his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of all that parcel of land known as Kajiado/Dalalekutuk/786.
 - c. Eviction order against the Plaintiff, his agents, his servants from all that parcel of land known as Kajiado/Dalalekutuk/786.
 - d. An order directing the Officer Commanding station Kiserian police station to provide security during the eviction of the Plaintiff whether by himself, his agents, servants and/or any other persons claiming through him from property title deed number Kajiado/Dalalekutuk/786.
 - e. General damages for trespass.
 - f. Costs of this suit together with interest thereon.
 - g. Any other relief that the Hon. Court may deem fit and just to grant.

Evidence of the Plaintiff

10. PW1, Lesalon Koikai the Plaintiff, adopted his witness statement dated 7th February 2022 and produced his bundle of documents which were marked as P. Exhibit 1 to 12 as his evidence.
11. On cross examination he stated that the 1st Defendant was his brother and that the suit property's title deed was in his name although it as registered in his name fraudulently because it belonged to his mother and the 1st defendant should be holding it in trust. He confirmed that his elder brother Musali Ole Koikai was member number 127 in Enkorika Group ranch and his mother member 130 but he was not aware that the 1st defendant was registered member 139 although the document before



court showed that he was. He testified that the 2nd, 3rd and 4th Defendants passed a resolution to enter the 1st defendant's name in the register and delete their mother's name although the Director of Land Adjudication in the letter dated 1st March 1984 declined. He stated that when the title was issued in 2007, he was about 33 years old and in the Director of Criminal Investigations letter dated 7th December 2016 it was confirmed that the 1st Defendant's title was fraudulently acquired. He also confirmed that both the 1st defendant and him were on the suit property and although he was issued with an eviction notice, he had not vacated because the land belonged to his mother and thus he was not illegally occupying it.

12. On re-examination he affirmed that he was born on the suit property stating that when their mother died, he was 6 years old and was not aware of the happenings of the Group ranch affirming that. However, his brother the 1st Defendant was an adult at the time. On being asked about the minutes dated 20th January 2016, he testified that he filed a complaint at the Land Disputes Tribunal regarding the 1st Defendant taking possession of the whole land and he also informed the Group ranch officials of the same. He also stated that he had not laid a claim against the parcels of land belonging to his other brothers because the only property that belonged to his mother was the suit property which the 1st Defendant purported to be his by removing his mother's name on the register in the year 1984. And the 5th and 6th Defendants gave title deed to the 1st Defendant unprocedurally. He also stated that he had not filed succession proceedings because the land was in the 1st defendant's name. He thus needed that to be resolved before filing a succession cause.

Evidence of the Defendants

13. DW1, Kitambo Ole Koikai the 1st Defendant and a retired prison's officer adopted his witness statement dated 7th June 2022 and produced his bundle of documents evidence.
14. On cross examination he confirmed that he and the Plaintiff were brothers and that they both resided on the suit property. He stated that both his mother and him were members of the Group Ranch although his mother was never allocated a piece of land and that the suit property was allocated to him. He stated that he became a member of the ranch on 20th December 1983 and his mother passed away on 30th October 1983. He confirmed that as per the minutes dated 1st March 1984 he was to replace his deceased mother on the register and as per the letter dated 11th July 1994 minute number 84 showed that the late Noosekei Ene Koikai was removed because she was already inherited, although he confirmed that she was never inherited. He also confirmed that it was possible to become a member of the ranch by replacing another member. He stated that in 1984 he was 19 years and the Plaintiff was about 10 years old.
15. On being asked about P.Ex 12 he confirmed that he was familiar with it although the agreement was a forgery but went on to confirm that the signature on the agreement and the signature on the verifying affidavit were the same, he confirmed that the people who had signed it were committee members as well as the Plaintiff because he lives with him. He confirmed that while paragraph 3 of the agreement read registered beneficiaries of the land, he did not inform his brother the Plaintiff that he was going to get a title because he was not obligated to. He went on to state that he had been following up with the group officials on his mother's share but they have never responded to him about that.
16. DW2 Lerasuna Ole Tolimo the Enkorika Group Ranch's chairman affirmed that he was familiar with the 2nd Defendant Moses Ole Mosiany who was the Group Ranch's secretary and adopted Moses' witness statement as his evidence. He produced the bundle of documents marked as D. Exhibit 1-7. He testified that he was aware that the Plaintiff and the 1st Defendant's were brothers and their mother was Noosekei Koikai who was a member of the Enkorika Group ranch. He said that she passed away



before being issued with a title to her land and the title was issued to the 1st Defendant Kitambo Ole Koikai. At the time of her demise the Plaintiff was a child and he was neither known to the Group ranch, nor did the 1st Defendant inform them that he had a younger brother. He also stated that the 1st Defendant was not a member of the Group Ranch and the suit property belonged to Noosekei and it ought to be inherited by both the Plaintiff and the 1st Defendant.

17. On cross examination he stated that the late Noosekei, whom he could not recall when she passed away was member number 131 of the Group Ranch and had two sons and three daughters. However, the daughters were married off elsewhere. He stated that the group ranch had been dissolved and confirmed that as per the minutes dated 20th December 1983 there were 71 people who were added to the Group Ranch and among them were those who were inhering their parents. He confirmed that as per the minutes which were written by the Secretary Moses Mosiany, the 1st Defendant was entered as member number 279 inheriting his mother's share. On being asked about the 1st Defendant's documents he stated that they were not genuine and he even contested the adjudication records produced by the 1st Defendant. He went on to testify that the Group ranch was admitting new members who belonged to the Erangrang age group and the 1st defendant was not within that age group. He re-affirmed that the 1st defendant acquired the suit land by inheriting his late mother upon her demise. He also stated that some of the group members had larger parcels of land depending on the physical features of the land and that other members preferred to maintain the lands they had developed despite the fact that some were less in acreage.
18. On re-examination he stated that he was familiar with parties to the suit because he was the Group ranch's Chairman at the time. He stated that the Group was informed that Noosekei had passed on by the 1st Defendant and he did not inform them that he had a younger brother. Had he told the Group he had a younger brother, they would not have registered him alone. As such, if there were any costs for the suit, then the 1st Defendant ought to pay.
19. DW3 Moses Ole Mosiany stated that he was a retired senior chief and secretary of the Enkorika Group ranch and was familiar with the late Noosekei who was the Plaintiff's and 1st Defendant's mother. He stated that she was a member of the group ranch and had a share of land in the group ranch but had not been given title to her land prior to her demise. After her demise, it was registered in the 1st Defendant's name because he told the group that he was Noosekei's only son and did not state that he had a younger brother. Later on the younger brother, herein the Plaintiff went to the Group ranch claiming his mother's share. As such, the 1st Defendant acquired the whole land as a result of a lie and the Plaintiff was equally entitled to have of his mother's land.
20. On cross examination he stated that the land should be subdivided into two portions between the Plaintiff and the 1st Defendant. He also confirmed that the minutes dated 20th December 1983 added 71 new members and 17 deceased members were replaced. He confirmed that the 1st Defendant was entered on the list inheriting his mother and not as a member and that is why he was not on the list of the 71 new members.
21. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's submissions

22. On whether the 1st Defendant is entitled to parcel Kajiado/Dalalekutuk/876, counsel submitted that it was not in dispute that the 1st Defendant was the Plaintiff's elder brother both being the sons of Noosekei Ene Koikai, and that the said Noosekei who was a member of the Enkorika Group Ranch passed away when the Plaintiff was a minor. It was at this point that the 1st Defendant misrepresented



to the officials of the ranch that he was the sole heir of the late Noosekei, as testified by DW2 and DW3, as well as per the elders minutes dated 20th January 2016 and the DCI report dated 7th December 2016. Counsel went on to submit that if the 1st Defendant was the sole proprietor of the suit property, why did he execute a joint agreement with the Plaintiff donating a portion of the suit property to Isilale Water Project as per the donation agreement dated 11th August 2016? Therefore, the 1st Defendant acquired the suit property through misrepresentation as was held in *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others* [2015] eKLR.

23. As such, the Plaintiff had discharged his burden of proof as per Section 107 of the *Evidence Act* and was entitled to the orders sought.

The 1st Defendants' submissions

24. On whether the suit was time barred, counsel submitted that this being an action to recover land, it was barred by Section 7 of the *Limitation of Actions Act* since the action accrued in 1983 citing *Edward Moonge Lengusuranga vs James Lanaiyara & another* [2019] eKLR.
25. On whether the 1st Defendant was holding the property on behalf of the Plaintiff, counsel submitted that a person who claims customary trust must prove it and the Plaintiff had not done so arguing that existence of trust was to be determined on a case to case basis as held by the Supreme Court in *Isack M'Inanga Kiebia vs Isaaya Theuri M'Lintari & another* [2018] eKLR.
26. On whether the title was acquired illegally, counsel submitted that it was not and the 1st Defendant was the absolute indefeasible owner as per Section 26(1) of the *Land Registration Act* citing *Dr. Joseph Arap Ngok vs Justice Moiyo Ole Keiwa*. Also submitting that fraud had not been proved as held in *Kinyanjui Kamau vs George Kamau* [2015] eKLR and as such, the 1st defendant's counterclaim should be granted as sought.

Analysis and Determination

27. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are;
- i. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.
 - ii. Whether the 1st Defendant is entitled to the reliefs sought in the counter claim.
 - iii. What Orders should issue?
 - iv. Who should bear costs of the suit?
28. It is not in contention that the Plaintiff and the 1st defendant are siblings whose mother was the late Noosekei Ene Koikai. It is also not in contention that the late Noosekei passed away when the Plaintiff was a child, while at this time the 1st Defendant was an adult. This was consistently ascertained in all the testimonies.
29. The contention is on the ownership with the Plaintiff claiming that the suit property was their mother's while the 1st Defendant claims that the property was duly his as registered. While Section 26 of the *Land Registration Act* protects the sanctity of titles, the same should not have been acquired through fraud and/or misrepresentation:
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser 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 ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

30. And to determine whether a title is impeachable, the Court is called upon to go to its root of its as held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR where it was stated;

“... when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”

31. PW1 Lesalon Ole Koikai told the court that he is a beneficial owner of the suit property which is her mother’s share in Enkorika Group Ranch. He told the court the title deed was issued to the 1st Defendant in the year 2007.

32. It is his case that his mother Noosekei ene Koikai was member Number 130 in the register of members. It is his case that the 2nd to 4th Defendants passed a resolution that the land be registered in the 1st Defendant’s name after his mother’s name was removed.

He confirmed that he is on the land and is utilizing it but he was surprised when he was given a notice to vacate in 2021.

33. DW 2 Lerashona Ole Tolimo, confirmed that he was the Chairman of the Enkorika Group Ranch. He stated that the Plaintiff and the 1st Defendant’s mother’s share was taken by the 1st Defendant as the Plaintiff was a minor at the time. He also stated that the 1st Defendant was not a member of the Group Ranch.

When he was cross-examined he said they gave the 1st Defendant the title as he was inheriting his mother’s share.

34. DW 3, Moses Ole Mosiany the Secretary of the Group Ranch, told the court that Noonsekei ene Koikai passed on before she could be issued with a title. He stated that the 1st Defendant claimed to be her only son without disclosing that he had a younger brother. That later the Plaintiff approached them, claiming a share of his mother’s land. It is his view that the land ought to be sub-divided into two portions so that each son can get a share.

35. The 1st Defendant claims that he does not know where his mother’s share is and that she was not given any land. His case is that he got the title because he was a member of the Group Ranch. I find that he told this court lies.

36. The Plaintiff’s claim has been the suit property was fraudulently registered to his brother the 1st Defendant, produced as evidence a letter stamped 12th March 1984. The letter is from the Director of Land Adjudication to the Chairman Enkorika Group Ranch and indicates that on 20th December 1983 an Annual general Meeting (AGM) was held by the Enkorika Group Ranch and it was agreed that the 15 indicated persons on that list do replace the deceased members. Number 10 on the list is Kitambo Ole Koikai the 1st Defendant. Other documents produced included minutes of meeting held



on 13th February 1984 which once again asked the deceased persons including Noosekei Ene Koikai to be removed from the register. There are also minutes of a Land Dispute Resolution meeting held on 20th January 2016 regarding the suit property between the Plaintiff and the 1st Defendant.

37. I find that the Plaintiff has proved that he is entitled to a portion of the land which belonged to his late mother but registered in the name of the 1st Defendant. His claim is based on the existence of a customary trust, which he has proved by virtue of his occupation and utilization of the suit property. He told the court that he was born on the suit property.
38. He told the court that the 1st Defendant who is his elder brother did not inform him that he had registered the whole parcel of land in his name.

The Court of Appeal in *Isack M’Inanga Kiebia & Another Vs. Isaaya Theuri M’Lintari & Another* (2014) eKLR stated thus;

“Unless a trust is proved, the respondents have neither possessory nor occupational rights that can be protected as overriding interests..... We hasten to add that to prove a trust in land, one need not be in actual physical possession and occupation of the land.”

39. Section 28 of the *Land Registration Act* 2012, provides that;

“Unless the contrary is expressed in the Register all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register;-

- (a) spousal rights over matrimonial property;
- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) deleted by *Act No. 28 of 2016*, s. 11(b);
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law.



40. And finally on this issue the Supreme Court of Kenya in Isack M’Inanga Kiebia and Isaaya Theuri M’Lintari & Another; Petition No. 10 of 2015 (2018) eKLR stated thus;

“It is now clear that customary trusts, as well as other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted such trusts, not being overriding interests, would bind the registered proprietor in terms noted in the register. The rights of a person in possession or actual possession of land, as previously envisaged under Section 30(g) of the Registered *Land Act*, have now been subsumed in the “Customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section a person can prove the existence of a specific category of a customary trust one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.”

41. The 1st Defendant’s claim that he is entitled to the whole portion of the land fails. In essence I find no merit in his counter claim and the same is dismissed with costs.

42. In conclusion I find that the Plaintiff has proved his case as against the Defendants jointly and severally on a balance of probabilities.

43. Accordingly Judgement is entered for the Plaintiff as against the Defendants as follows:-

- a. That the suit property known as Kajiado/Dalalekutuk/786 belonged to Noosekei Ene Koikai and the 1st Defendant Kitambo Ole Koikai is holding it in trust for her children.
- b. That any transfer and registration in favour of Kitambo Ole Koikai is erroneous and should be rectified.
- c. The Land Registrar Kajiado be and is hereby directed pursuant to the provisions of Section 80 (1) and (2) of the *Land Registration Act*, to cancel the title deed and any other land registration documents in all that parcel of land known as Kajiado/Dalalekutuk/876 in the name Kitambo Ole Koikai within one hundred and twenty (120) days from the day of this Judgement in order for succession proceedings to be undertaken.
- d. That an order of permanent injunction is hereby issued restraining the Defendant by themselves and/or their agents from interfering with the Plaintiff’s possession and occupation of land known as Kajiado/Dalalekutuk/876 until succession proceedings are undertaken and finalised.
- e. That costs of the suit be awarded to the Plaintiff, to be borne by the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF DECEMBER 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Nairi for the Plaintiff.

Mr. Kipkirui for the 1st Defendant.



N/A for the 2nd to 7th Defendants.

Court Assistant – Mutisya.

