



REPUBLIC OF KENYA



KENYA LAW
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**Kinyanjui v Ndolo & 10 others (Environment & Land Case 283 of 2017)
[2023] KEELC 15773 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 283 OF 2017
MN GICHERU, J
FEBRUARY 23, 2023**

BETWEEN

PANYA OLE KINYANJUI PLAINTIFF

AND

KATILI OLA NDOLO 1ST DEFENDANT

KING'OLA NDOLO 2ND DEFENDANT

WAEMA NDOLO 3RD DEFENDANT

NZEKI NDOLO 4TH DEFENDANT

MUTUA KATILI 5TH DEFENDANT

MICHAEL KATILI 6TH DEFENDANT

PETER KATILI 7TH DEFENDANT

SAMUEL KATILI 8TH DEFENDANT

JOHN KONGOLA NDOLO 9TH DEFENDANT

PENZENI MWOLOLO NDOLO 10TH DEFENDANT

KIONG'OO KONGOLA NDOLO 11TH DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the eleven Defendants is as follows.
 - a. A declaration that L.R. No. Kajiado/Kaputiei- Sough/4919 is rightfully owned by the Plaintiff and consequential orders of eviction and demolition be issued against the Defendants jointly and severally, whether by themselves,



their husbands, wives, sons, daughters, agents, servants or anybody claiming under them from the suit land.

- b. Permanent injunction restraining the Defendants, whether by themselves, agents, servants, sons, daughters, wives, husbands or any person claiming under them from interfering with the peaceable enjoyment, quiet possession and ownership of plaintiff's property being the suit land.
 - c. Mesne profits.
 - d. Costs of the suit and interests.
 - e. Any other relief as the court may deem fit and just to grant.
2. The Plaintiff's case is as follows. He is the registered owner of the suit land which he got from Nkama Group Ranch by virtue of being a member of the said group ranch. The land which belongs to him exclusively has been invaded by the Defendants who have no legal right thereto and he prays that they be evicted.
3. In support of his case, the Plaintiff filed the following evidence.
- a. Copy of his witness statement.
 - b. Copy of the certificate of official search showing him to be registered owner.
 - c. Copy of register of members of Nkama Group Ranch.
 - d. Copy of letter dated 21/11/1990 by the Director of adjudication and settlement giving consent for the dissolution of Nkama Group Ranch.
 - e. Copy of register of the suit land showing that the Plaintiff was registered as the owner of the suit land on 2/7/2015 and that it is a subdivision of L.R. 2178.
 - f. Copy of letter dated 10/6/2019.
 - g. Copy of official receipt dated 25/6/2019.
4. The Defendants in their written statement of defence dated 13/6/2018 deny the Plaintiff's claim against them. They make the following averments.
- Firstly, the Plaintiff acquired title to the suit land fraudulently because he was not a member of the group ranch. He colluded with the officials of Nkama Group Ranch to be registered as a member of the group and with the land officers to be issued with a title deed for L.R. 2178.
- Secondly, the Plaintiff unlawfully subdivided the original parcel No. 2178 into L.R. 4919 and 4920 while this suit was pending in court with the sole aim of diverting attention from Parcel No. 2178 to evade the irregularities that were committed at the time of procuring the title deed to parcel no. 2178.
- Thirdly, in their counterclaim, the Defendants say that they have been on the land in dispute from time immemorial and it is their ancestral land.
- Fourthly, the Defendants have built permanent homes on the suit land and derive their livelihoods from the land for a period of between 40 – 50 years.
- For the above reasons, the Defendants seek the following orders.
- i. Dismissal of the Plaintiff's suit.



- ii. Cancellation of the title deed for L.R. 4919 and 4920 in the names of the Plaintiff or any other person claiming under him.
 - iii. A prohibitory order forbidding the registration of any dealings in L.R. 4919 and 4920.
 - iv. Eviction orders to issue to remove the Plaintiff or any persons claiming under him from the suit land.
 - v. Costs of the suit.
5. In support of their case the Defendants field the following evidence.
- a. Witness statements by King'ola Matolo and Michael Katih.
 - b. Copies of identify card for King'ola Matolo.
 - c. Copy of register of the group ranch showing King'ola Matolo as member number 548.
 - d. Copy of letter dated 22/2/2008 by the Chief of Nkama showing that Samuel Ntaya Katili is a permanent resident of the area.
 - e. Copy of letter for Michael Mvuke Katili written by the chief of Nkama and dated 15/7/2010. It says that he is a resident of the area and is well known there.
 - f. Copy of certificate of birth for Paul Mutua son of Katili, Veke Muoke and Kamanthe Kikoi.
 - g. Copy of plaint in Case No. 32 of 2015 between the Plaintiff and Penzini Mwololo Ndolo.
6. At the trial, only the Plaintiff and his witnesses testified. The Defendants even though given sufficient opportunity to testify did not do so.
7. Counsel for the parties filed written submissions on 1/8/2022 and 6/10/2022. I have carefully considered all the evidence adduced in this case by the parties as well as the issues raised therein. I have also considered the submissions filed by the counsel for the parties. I make the following findings:-

Firstly, I find that the Plaintiff is the registered owner of the suit land. The documents of ownership adduced especially the copy of the title deed and certificate of official search are sufficient evidence.

Secondly, I find that it is the Defendants who are in occupation of the suit land. This too is not dispute and that is why the main prayer in the suit is that they be evicted from the suit land.

Thirdly, I find that the period of occupation of the suit land by the Defendants is long.

Fourthly, it is not proved by the evidence from either party how much of the suit land has been occupied by the Defendants.

Finally, I find that while the suit was pending, the original suit land No. 2178 was subdivided into L.R. 4919 and 4920.



8. I find that there is only one issue for determination in this case. Whether the Defendants enjoy an overriding interest over the suit land in terms of Section 28(b) of the Land Registration Act (Act No. 3 of 2012). My finding is that the Defendants have an overriding interest over the suit land. Such right is recognized by the Registered Land Act (Cap 300) now repealed and Section 28(b) of the Land Registration Act (Act No. 3 of 2012). Section 30 (g) of the Registered Land Act proves as follows.

30 “Unless the contrary is experienced in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

- h. the rights of a person in possession or actual occupation of the land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.

Section 28(b) of the Land Registration Act provides 28 “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 in the register –

- (b) trusts including customary trusts.

To override means to overrule. It also means superior to or to have priority over, to reject or veto.

In my understanding of the two provisions in the Registered Land Act and the Land Registration Act, an overriding interest takes precedence over the register. The land register is inferior to an overriding interest and such overriding interest will prevail over the register.

In this case, the rights of the Defendants who are in occupation and also were in occupation long before the land was registered take priority over the rights of the Plaintiff who has the title deed.

9. It was incumbent upon the Plaintiff in this case to prove that the Defendants did not enjoy such overriding interests as are clearly spelt out in two provisions of the Registered Land Act and the Land Registration Act. The Plaintiff did not discharge this burden.
10. Even though the Defendants did not testify in this case, their occupation of the suit land is sufficient to make one finding that they own the suit land.
11. In Petition No. 10 of 2015, Isack M’Inanga Kiebia –versus- Isaya Theuri M’Linturi and Isack Ntongai M’Limtari” the Supreme Court of Kenya had this to say about overriding interests at paragraph 59 of the judgment dated 5/10/2018.

“...It is clear that Customary Trusts, as well as all other trusts are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso in 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 on the register. The rights of a person in possession or actual occupation 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”.

The facts in the above cited case were similar to the ones in this case. One party had the title deed while the other had actual occupation. The court found the party in actual possession to enjoy overriding interests superior to the title deed.

12. For the above stated reasons, I dismiss the Plaintiff's suit with costs to the Defendants.
13. Secondly, I find that the eleven Defendants are entitled to equal shares of L.R. 4919 only to the exclusion of the Plaintiff. The Plaintiff may keep L.R. 4920. I award the Defendants the costs of the counterclaim.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 23ND DAY OF FEBRUARY, 2023.

M.N. GICHERU

JUDGE

