



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 517 ODF 2017

(Formerly Nairobi ELC Case No. 1145 of 2015)

LENGARE OLE NGAPE.....PLAINTIFF

VERSUS

MPAA OLE DAMO.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

By a Complaint dated the 9th November, 2015, the Plaintiff prays for judgment against the Defendant for:

- i) A Declaration that the Plaintiff LENGARE OLE NGAPE is the absolute proprietor of TITLE NUMBER LOITOKTOK/ENDONET/ 401.
- ii) A Declaration that the alleged Title Deed issued to the 1st Defendant MPAA OLE DAMO on the 27th January, 2015 naming him as the absolute proprietor of TITLE NUMBER LOITOKTOK/ENDONET/ 401.
- iii) A Declaration that the District Land Registrar Kajiado acted unlawfully by issuing the 1st Defendant with a Title Deed of TITLE NUMBER LOITOKTOK/ENDONET/ 401.
- iv) A Declaration that any dealings in TITLE NUMBER LOITOKTOK/ENDONET/ 401 by the Defendants with any party prior to and/or after filing of this suit is null and void.
- v) An Order that the Title Deed over TITLE NUMBER LOITOKTOK/ENDONET/ 401 issued on the 27th January, 2015 in the name of the 1st Defendant MPAA OLE DAMO be cancelled forthwith by Land Registrar at Kajiado.
- vi) An Order that the register be rectified and the Plaintiff LENGARE OLE NGAPE be issued with a Title Deed in respect of TITLE NUMBER LOITOKTOK/ENDONET/ 401 forthwith.
- vii) An Order permanently restraining the Defendants by themselves, servants and/or agents from entering upon, selling or otherwise disposing or in any other way dealing in the suit property without the express consent or authority of the Plaintiff.
- viii) General Damages
- ix) Costs of the suit.

The 1st Defendant filed his Defence where he denied all the averments in the Complaint except for the jurisdiction. He disputed that the Plaintiff was the owner of land parcel number LOITOKTOK/ ENDONET/ 401. He denied that LENGARE OLE NGAPE was also LEMARON OLE NKIOK. He stated that the suit was fatally defective as it had been instituted by a non-existent person. He further denied colluding with the 2nd Defendant and forging the relevant documents to perpetuate the fraudulent transfer of land parcel number LOITOKTOK/ ENDONET/ 401 to him.

The matter proceeded for hearing where the Plaintiff had four witnesses while the Defendants called three witnesses

Evidence of the Plaintiff

The Plaintiff LENGARE OLE NGAPE claims that he is also called LEMARON OLE NKIOK. He explained that his father was called LENGARE while his grandfather was called NKIOK SAREIYO. Further, that he was given the name LENGARE OLE NGAPE through his age set of ISEURI during moranship. It was his testimony that the name LEMARON OLE NKIOK was given to him by his parents. He got his Identity Card when he returned from Tanzania and the pattern of his names was written by the Registrar of Persons. He contended that the name LENGARE OLE NGAPE is not in the Identity Card although he had used it to get land while a Moran. He avoided to use his name LEMARON OLE NKIOK because he was avoiding to pay certain taxes that had been introduced by the Colonialists. He stated that he was given land parcel number LOITOKTOK/ ENTONET / 401 hereinafter referred to as the 'suit land' in 1968 when they were morans. He moved to Tanzania to live with his relatives but when he returned he found the 1st Defendant residing on the suit land. He averred that the 1st Defendant was young when he was allocated the suit land and insists he fraudulently obtained its title. He reported the matter to the Police and the 1st Defendant was charged but later acquitted. He explained that there is a pending Appeal in respect of the said criminal case. He confirmed that he had never resided on the suit land but the 1st Defendant used his name to be registered on the suit land. He said his neighbours on the suit land were OLE KELAI; MPUYA LEKAPOKUO and that there is a road that separates the suit land with the one belonging to MPAA OLE DAMO (1st Defendant). PW2 JACOB PARTIMO MONKE who used to be an Assistant Chief where the suit land is situated confirmed in Court that the 1st Defendant's family reside on the suit land and they had attempted to transfer it in their names but he had warned them not to do so as it belonged to a third party. He stated that in 2015 the 1st Defendant's family went to the District Commissioner's office to try to get the suit land registered in their names. He later learnt that they had acquired title to the suit land. He explained that the issue of nicknames was not a strange phenomenon among the Maasai's as he also has one. Further, those nicknames are given to a person on whatever they achieved during moranism. It was PW3's testimony that the Plaintiff was from the Iseuri Ageset and the sequence on how his names were written within the Identity Card was immaterial. PW3 who was from the Iseuri ageset confirmed knowing the Plaintiff since childhood and stated that he was given the names LEMARON OLE NKIOK by his parents. He confirmed residing near the disputed land. PW4 who was also from Iseuri ageset testified that the names LENGARE OLE NGAPE and LEMARON OLE NKIOK all refer to the Plaintiff. He stated that he had known the Plaintiff since childhood until they became morans.

Evidence of the Defendants

The 1st Defendant as DW1 claimed he is the owner of the suit land and produced his title deed as an exhibit. He confirmed he did not inherit the suit land from his father. He insisted his father held the land in trust for him as he was a child when it was allocated to him. He explained that he is from the Il Kishuru age set but when the suit land was being allocated to the Iseuri ageset, he was not very young but the suit land was allocated to his father to hold in trust for him. He disowned paragraph 3 of his written statement and contended that the court should believe his oral testimony. He explained that his elder brother held land parcel number LOITOKTOK/ ENTONET/ 400 neighboring the suit land but he did not know how he acquired it. He testified that they used to live together in the same land when his father was alive. He insisted that his elder brother was given land as he was from Ilnyankusi age set. He however could not recall the year he got the title deed to the suit land as it is the elders who assisted him obtain the same from an office in Kajiado. He did not produce any documents to prove the father held the suit land in trust for him. Further, that he only obtained his Identity Card to get the title deed. It was his testimony that he only thumb printed some documents to obtain the title deed but did not produce them in court. He denied obtaining the title deed to the suit land fraudulently. He admitted that he never went to the Land Control Board to procure consent to transfer suit land in his name. He reiterated that he was acquitted in the criminal case but was not aware if an Appeal had been lodged or not. He explained that he never processed the title deed to the suit land but was taken to the Land's Office by the Chairman of the Adjudication Section Mr. Ole Muyantet and told to produce his Identity Card as well as pay Kshs. 1500/= before being issued with the same. He further reiterated that he never signed any documents before receiving his title. He could not recall the period he had resided on the suit land. DW2 claimed he had known the Plaintiff since childhood and averred that he was not a moran. He insisted the Plaintiff was called LEMARON OLE NKIOK but he did not know who was called LENGARE OLE NGAPE. On cross examination he confirmed they were not in the same 'manyatta' with the Plaintiff, during moranship. He hence was not aware if the Plaintiff was given the name LENGARE OLE NGAPE during moranship. He insisted the Plaintiff is not a moran because he could not take milk with one who is a moran. DW3 who was from the Iseuri age set confirmed knowing the Plaintiff but insisted he was not a Moran. He did not know whether the name LEMARON OLE NKIOK and LENGARE OLE NGAPE referred to the Plaintiff. He insisted the 1st Defendant was allocated land during the demarcation as well as adjudication period when they were morans, which land was held in trust for him by his father. It was his testimony that during adjudication, which was done before independence, each age set, was being allocated land. He explained that the age sets allocated land were: Iseuri; Ilnyankusi; iltareto and ilterito. He confirmed that the 1st Defendant's age set Il Kishuru was not allocated land during that time. He later clarified that they were from different 'manyattas' and did not know if the Plaintiff was a moran or not. It was his testimony that the suit land was from a group ranch and Ole Muyantet was its Chairman.

The parties filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials presented in respect of the suit herein including pleadings; exhibits and witnesses testimonies, the following are the issues for determination:

- Whether the names LEMARON OLE NKIOK and LENGARE OLE NGAPE both refer to the Plaintiff.
- Whether the Plaintiff was the registered owner of the suit land.
- Whether the 1st Defendant got fraudulently registered on the suit while being aided by the 2nd Defendant.
- Whether the Plaintiff is entitled to the orders sought.
- Who should bear the costs of the suit.

As to whether the names LEMARON OLE NKIOK and LENGARE OLE NGAPE both refer to the Plaintiff.

It was the Plaintiff's testimony that both were his names. He explained that the name LENGARE OLE NGAPE was given to him during moranship while LEMARON OLE NKIOK was given to him by his parents. He produced a letter where the Chief's Office at KIMANA Location, KIMANA Division confirmed that LENGARE OLE NGAPE of ID 1347117 was also known as LEMARON OLE NKIOK. The 1st Defendant and his witnesses disputed that the Plaintiff was known with both names but never informed Court if they took any legal step to controvert the Chief's confirmation that this was one person. The Plaintiff produced various documents including a Statutory Declaration dated the 30th January, 2015 as exhibits to demonstrate he had applied to correct his name in the register from LENGARE OLE NGAPE to read LEMARON OLE NKIOK. All these documentation was never officially challenged by the 1st Defendant. Further, by dint of section 107 of the Evidence Act, the burden of proof was upon the 1st Defendant to bring forth contrary evidence to prove the Plaintiff was not LENGARE OLE NGAPE. DW2 and DW3 insisted the Plaintiff was not LENGARE OLE NGAPE and had never been a moran but in cross examination they all confirmed they were not in the same Manyatta with the Plaintiff during moranship and hence did not know if he had been given the name LENGARE OLE NGAPE. PW2 stated that the use of nicknames was not a strange phenomenon in the Maasai culture as he also had one. PW3 and PW4 all corroborated that the Plaintiff was known as LEMARON OLE NKIOK as well as LENGARE OLE NGAPE. It is against the foregoing that I find that the Plaintiff is indeed known as LEMARON OLE NKIOK and LENGARE OLE NGAPE.

As to whether the Plaintiff was the registered owner of the suit land.

The Plaintiff claims he was allocated the suit land in 1968 while a moran belonging to the Iseuri Age set. He explained that after the allocation he was shown his land and later left for Tanzania to stay with some relatives. On his return, he found the 1st Defendant in possession of his land. He currently resides on another land in Kimana. He produced a Certificate of Official Search dated the 9th January, 2014 which indicated LENGARE OLE NGAPE was registered as the proprietor of the suit land on 26th July, 1969. I note in the Certificate of Official Search produced by the 1st Defendant, it shows MPAA OLE DAMO was registered as second owner of the suit land on 27th January, 2015. There was also the Consent of Land Control Board dated the 17th September, 2014 which indicated that the Plaintiff was transferring land to the 1st Defendant but the 1st Defendant in his testimony confirmed he did not go to the Land Control Board to obtain the consent to transfer but was assisted by the Chairman Muyantet to get title.

35. (1) of the Land Registration Act provides that: **'Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved. (2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document. (3) Every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.'**

Further section 26(2) of the Land Registration Act provides that: **'(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.'**

While section 24.(a) of the Land Registration Act provides that: **' Subject to this Act— (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; '**

In reference to the legal provisions cited above, I find that the Certified Certificate of Official Search produced by the Plaintiff in respect of the suit land is conclusive evidence of ownership of the same. From the said Certificate, it is evident that the Plaintiff was registered as the owner of the suit land from 26th July, 1969 upto 22nd July, 2015 when the same was registered in the name of the 1st Defendant. It is against the foregoing and based on the evidence presented, I find the Plaintiff was indeed registered as the owner of the suit land from 26th July, 1969 upto 22nd July, 2015.

As to whether the 1st Defendant got fraudulently registered on the suit land while aided by the 2nd Defendant. The 1st Defendant contended he was the owner of the suit land and produced a title deed to that effect. It was the 1st Defendant's testimony as DW1 that he never went to the Land Control Board to obtain consent to transfer. Further, that he thumbprinted certain documents but failed to produce them in court. He insisted he had been allocated the suit land while young but his father held the same in trust for him. He however never produced any documents to prove so. He further claimed the Chairman Muyantet took him to the Land's Office in Kajiado where he paid Kshs.1,500/= after which he got his title deed. I note the 1st Defendant was charged for forging title but got acquitted. It however emerged that an Appeal against the acquittal had been lodged in the High Court and the same was pending. The 2nd Defendant in his submissions stated that they took an initiative to investigate the alleged forgery over the suit land and should hence be exonerated. I note vide a letter dated the 7th July, 2015 the Deputy County Commissioner Loitoktok Sub County wrote to the County Land Registrar stating that the suit land was fraudulently transferred to the 1st Defendant. He confirmed that the consent to transfer dated the 17th September, 2014 had a forged signature of the Chairman of the Land Control Board, while the rubber stamp therein read "DISTRICT COUNTY COMMISSIONER" instead of "DEPUTY COUNTY COMMISSIONER". In the Certificate of Official Search where it indicated the 1st Defendant was the owner of the suit land, it showed he was the second owner. In the alleged Consent of the Land Control Board, which was produced in court, no consideration is indicated therein. In the transfer forms, there seems to be a mix up of photographs. PW2 stated that he had warned the 1st Defendant not to fraudulently obtain the land as the rightful owner would come and claim it. DW3 confirmed what PW1 had said that during the period for the allocation of the land, it is the Iseuri ageset that were getting land but not the 1st Defendant's Ilkishuru age set. I note the Transfer of Land Form which the Plaintiff produced as an exhibit bore the 1st Defendant's photograph at the Transferor section and another passport photograph at the Transferee section but the Land Register made a remark on the form that the transfer was to be investigated.

*Section 26 of the Land Registration Act provides that: **' (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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.'

In the case of **Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018] eKLR** the Court of Appeal observed that : **'While we agree with the appellants that title registered under the Registered Land Act was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did.'**

On the basis of my evaluation of the evidence tendered above, and in relying on the legal provisions as well as the Court of Appeal decision cited above, it is my determination that insofar as the 1st Defendant was acquitted in the Magistrate's Court which matter has been appealed from, he acquired the title deed to the suit land fraudulently. I however exonerate the 2nd Defendant because once the issue of fraud had been brought to his attention he actually took steps to safeguard the title to the suit land.

As to whether the Plaintiff is entitled to the orders sought.

Since I have already held that the title deed to the suit land was acquired fraudulently by the 1st Defendant. I have no further recourse but to rely on section 80 (1) of the Land Registration Act which provides that: **' (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. '**

I will direct that the Land Registrar, Kajiado do rectify the title by cancelling the name of the 1st Defendant MPAA OLE DAMO and inserting the name of the Plaintiff LENGARE OLE NGAPE as the proprietor of the suit land. I will further direct that the 1st Defendant do give the Plaintiff vacant possession of the suit land and to cease to interfere with the Plaintiff's peaceful occupation of the same. As for the claim for damages and mesne profits, I note the Plaintiff never tendered any evidence in respect of the same and will hence not award him any.

As to who should bear the costs of the suit.

Since the Plaintiff has been inconvenienced, I will direct that the costs of the suit to be borne by the 1st Defendant.

It is against the foregoing that I find the Plaintiff has established his case on a balance of probability and will proceed to enter judgment in his favour as against the Defendants in the following terms:

- a) A Declaration be and is hereby entered that the Plaintiff LENGARE OLE NGAPE is the absolute proprietor of TITLE NUMBER LOITOKTOK/ENDONET/ 401.
- b) The District Land Registrar Kajiado be and is hereby ordered to forthwith cancel the title deed issued to the 1st Defendant MPAA OLE DAMO on 27th January, 2015 in respect of TITLE NUMBER LOITOKTOK/ENDONET/ 401.
- c) The District Land Registrar, Kajiado be and is hereby directed to rectify the Land Register forthwith in respect of TITLE NUMBER LOITOKTOK/ENDONET/ 401 and issue the Title Deed to the Plaintiff LENGARE OLE NGAPE.
- d) The 1st Defendant be and is hereby directed to give vacant possession of TITLE NUMBER LOITOKTOK/ENDONET/ 401 to the Plaintiff.
- e) An Order of permanent injunction be and is hereby issued restraining the Defendants by themselves, servants and/or agents from entering upon, selling or otherwise disposing or in any other way dealing in the suit property without the express consent or authority of the Plaintiff.
- f) Costs of the suit is awarded to the Plaintiff to be borne by the 1st Defendant.

Dated signed and delivered in open court at Kajiado this 27th day of May, 2019

CHRISTINE OCHIENG

JUDGE