



**Buluma v Mwakio (Environment & Land Case 306 of 2015)
[2023] KEELC 18989 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 306 OF 2015
NA MATHEKA, J
JULY 27, 2023**

BETWEEN

MERCELENE KISHAGHA BULUMA PLAINTIFF

AND

PRESTONE MWAKIO DEFENDANT

JUDGMENT

1. The plaintiff states that at all material times all that piece or parcel of land now known as Plot No. Chawia/Wusi-Keya/240 is and has been ancestral land belonging to the plaintiff and the defendant who are brother and sister and which land was held firstly by their grandmother the late Mrs. Wakio Bombo who passed away in 1979 and later by their mother Mrs. Christine Mkoji Jumbe who passed away in April 2004. The plaintiff states that after the death of their said mother Mrs. Christina Mkoji Jumbe the defendant fraudulently procured the registration of the aforesaid parcel of land in his name to the exclusion of the plaintiffs.
2. In the premises the Plaintiffs prays for a declaration that all that piece or parcel of land known as Chawia/Wusi-Kaya/240 is and has always been ancestral land belonging to both of the plaintiff and the defendant and that the defendant holds the parcel in trust for the plaintiff. The plaintiffs further prays for the rectification of the register to include the names of the plaintiffs as owners in common with the defendant. The Plaintiff prays for judgment against the defendant for;
 - a. A declaration that all that piece or parcel of land known as Plot No. Chawia/Wusi-Kaya/240 is ancestral land belonging to the plaintiff and the defendant and that the defendant holds the same in trusts of the plaintiff.
 - b. A rectification of the register to include the names of the plaintiff as owners in common with the defendant.
 - c. Costs of and incidental to this suit.



- d. Interests on (c) above at court rates.
 - e. Further or other relief as this honourable court may deem fit and expedient to grant.
3. The defendant specifically denies that Plot No. Chawia/Wusi - Kaya/240 is the plaintiff's ancestral land as alleged. Further to foregoing the defendant avers and maintains that their ancestral land on wherein the 1st plaintiff has his residence is registered in their deceased father's name Said Jumbe and is distinct from Plot No. Chawia /Wusi - Kaya/240, of which the defendant is the lawfully and rightfully registered proprietor since the 7th day of July, 1982. The defendant specifically denies that he procured the registration of the suit property fraudulently after the death of the mother in the year 2004 and the defendant avers that registration was done on July 7, 1982 when both their maternal grandmother Wakio Bombo and their mother Christina Mkoji Jumbe were alive. The defendant avers that the suit property was lawfully registered in his name as a gift from their maternal grandmother after their father disputed his paternity, disowned and disinherited him from their ancestral land. The defendant contends that the plaintiff was at all material times married initially to one Godrick Nyali, a Taita and after a divorce to John Joseph Buluma, a Luhya but upon the demise of their mother Christine Mkoji Jumbe the plaintiff deserted her husband and invaded the defendant's land whereat she commenced illegal construction works without the defendant's consent. The defendant avers and maintains that the plaintiff have no interest as alleged or at all in the suit property but are out to unlawfully acquire the same through abuse of court process. The defendant he counterclaims against the Plaintiffs for:
- a. A permanent injunction to issue against the defendants restraining them either by themselves, their servants and/ or agents from trespassing into cultivating carrying out construction works, logging timbers, selling, offering for sale, letting and/or in any other manner dealing with all that property known as Plot No. Chawia / Wusi - Kaya/240 until this suit is heard and determined.
 - b. A mandatory injunction to issue against the 2nd defendant compelling her to demolish all the illegal constructions carried out by her on the aforesaid Plot No. Chawia /Wusi - Kaya/240.
 - c. General damages for trespass and mesne profits.
 - d. Costs of and/or incidental to this suit.
4. This court has analyzed the pleadings, evidence and submissions therein. It is the plaintiff's case that Land Parcel No. Chawia/Wusi-Keya/240 which is registered in the name of the defendant is ancestral land. The plaintiff has pleaded that the suit land initially belonged to their maternal grandmother the late Wakio Bombo and later their mother Christine Mkoji Jumbe who died in 2004. The Plaintiff maintained that the suit land ought to have been inherited by herself, the defendant and Adam Said Jumbe (deceased). That the registration of the defendant as the sole owner is fraudulent and is out to disinherit herself and her late brother Adam Said Jumbe.
5. The defendant has denied that the suit land is ancestral land and that it lawfully belongs to him having been gifted by his maternal grandmother and subsequently being registered on July 7, 1982. He maintained that Mercelene Kishaga Buluma and Adam Said Jumbe are his half siblings, sharing the same mother Christine Mkoji Jumbe but not of the same father. He claimed that the two have been allocated land within the lands parental side of their deceased father Saidi Jumbe and they ought not demand land from their maternal side. He claimed that his maternal grandmother Wakio Bombo gifted him the suit land after Saidi Jumbe disputed his paternity, disowned him claiming he was an illegitimate child and disinherited him from their ancestral land. The defendant maintained that his maternal grandmother directed the adjudication officer to register him as the owner of the suit land in



place of his late grandfather Bombo Kituri. It was the defendant's case that his maternal grandparents Bombo Kituri and Wakio Bombo saw it fit to bequeath the suit land to him since they had no son, and they had brought him up as their son.

6. Bombo Katambo and Wakio Bombo had three daughters; Wakio Kituri, Furo Nyambu and Christine Mkoji Jumbe aka Rehema Said Jumbe. Christine Mkoji Jumbe had three children, Adam Said Jumbe, Merceline Kishagha Buluma and Priston Mwakio Jumbe. The Defendant has claimed that he does not share a father with the siblings, Merceline Buluma and Adam Said and that they share a father Saidi Jumbe. He maintained that his mother Christine Mkoji returned to his maternal grandparents after Saidi Jumbe divorced her on account of her infidelity and his birth as the product of the extramarital affair. He was then brought up by his maternal grandparents who took him in as the only son since they had three daughters (his aunties). The defendant maintained that it is on this premise that the suit land was adjudicated to him following the demise of his grandfather. He maintained that his grandmother intimidated the adjudication officer on October 15, 1976 when the adjudication process was going on that she wanted the suit land to be registered in his name.
7. It is in evidence that the plaintiff and defendant are siblings. The defendant has maintained that they only share a mother making them half-siblings however this fact has not been confirmed. The defendant has not proved that Mercelene Jumbe and Adam Jumbe grew up on their paternal side of the family, while he grew up alone with his mother on her maternal side of the family. What is certain is that the suit land was adjudicated to their maternal grandfather Bombo Katambo, who died on 1st June 1971 before the adjudication process could be completed (PEX-1). His wife Wakio Bombo took over the process of adjudication and elected to give the suit land to the Defendant and have it registered in his name.
8. The defendant's title is the first registration, which is absolute and indefeasible however, section 28 of the [Land Registration Act](#) No 3 of 2012 provides overriding interests as exemptions to indefeasibility of title. The evidence shows that both the plaintiff and defendant were put in possession of the suit land by their deceased maternal grandparents. It is not in dispute that the suit land belonged to their maternal grandfather Bombo Katambo. The plaintiff has built a house on the suit land after returning from her matrimonial home, the defendant has confirmed this but has denied her a share in the land stating that she has inherited land from her paternal family.
9. The suit land was given to the defendant by his grandmother, it was not land he purchased. Land in the traditional African setting is patriarchal and in the 1970s when land was being adjudicated upon a majority of it was vested upon the male figures in the household irrespective of their ages. Women were not being given land and therefore the defendant being a male child at that time was the one qualified to be registered as the owner for the suit land. I find that the suit land was held by the defendant in trust of the family of his grandfather Bombo Katambo. The fact that the plaintiff moved to Bungoma where her husband lived is really of no consequence because that itself did not amount to relinquishing her right in the suit land. The Supreme Court in [Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another](#) (2018) eKLR set out the elements that would qualify a claimant as a trustee holding in trust for the benefit of other members of the family;

1. "the land in question was before registration family, clan or group land,
2. the claimant belongs to such family, clan or group,
3. the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous,



4. the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances,
5. the claim is directed against the registered proprietor who is a member of the family, clan or group.

We also declare that rights of a person in possession or actual occupation under section 30 (g) of the *Registered Land Act*, are customary rights...

In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that to prove a trust in land one need not be in actual possession and occupation of the land."

10. The defendant claimed that he was viewed as a son by his maternal grandparents since they only had daughters i.e. his mother and two of her sisters. It is therefore clear that as the son in that home, he inherited the land to hold in trust for himself and the other heirs. The registration of the defendant as the proprietor of the suit land did not extinguish rights under customary law or relieve him from his duties as a trustee. It is clear to the court that the defendant holds the suit land in trust of himself, the plaintiff and anyone else claiming title under their maternal grandfather. The plaintiff's son Mike Mwakio placed a caution on the title for the suit land on April 22, 2005, which is within the law and in the protection of his beneficial interest as well as that of his mother. The plaintiff cannot be ordered to stay out of the suit land as she has a beneficial interest, the defendant's counterclaim is therefore devoid of merit and must be dismissed which I hereby do. On the other hand, the Plaintiff has proved on a balance of probabilities that the defendant holds the suit land in trust for the plaintiff and grant the following orders;

1. A declaration that all that piece or parcel of land known as Plot No. Chawia/Wusi-Kaya/240 is ancestral land belonging to the plaintiff and the defendant and that the defendant holds the same in trust for the plaintiff.
2. A rectification of the register to include the name of the plaintiff as owners in common with the defendant.
3. No orders as to Costs as the parties are siblings.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

