



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL SUIT NO. 51 OF 2007**

**KALUA MUTEMA.....PLAINTIFF**

**VERSUS**

**MUIA KISUNZA.....DEFENDANT**

**JUDGEMENT**

The Plaintiff filed this suit on 26th April, 2007 seeking judgement against the Defendant for:

- a) A declaration that the Plaintiff's title to land parcel number LR. Mutonguni/Kauwi/2168 is absolute and his rights are not liable to be defeated.
- b) A declaration that the Defendant in lodging any claim against the Plaintiff's title before the Land Disputes Tribunal is being a nuisance to the Plaintiff.
- c) A permanent injunction restraining the Defendant, either by herself, her servants, agents, and/or by whomsoever else from in any manner interfering with the Plaintiff's quiet enjoyment, possession, occupation and/or proprietorship of land parcel number LR. Mutonguni/Kauwi/2168.
- d) Costs of this suit with interest

The Defendant entered appearance and filed a Defence on 18th September, 2006. The Defendant denied the allegations in the Plaintiff and stated that land known as LR No. Mutonguni/Kauwi/2168 (suit land) is registered in the name of the Plaintiff as trustee of the family for three sons of Mutema Mwinza namely Kithuka Mutema, Kalua Mutema and Kisunza Mutema.

The Defendant filed an application dated 4th April, 2014 seeking for orders that the title LR Mutonguni/Kauwi/2168 be declared null and void and the Land Registrar Kitui to register her as its owner claiming the Kitui Land Disputes Tribunal and the Akamba Elders had determined that the said suit parcel was hers. However the Court notes the said application was never set down for hearing nor finally determined.

On 24th May, 2017 the matter proceeded for hearing, however the Defendant who was acting in person, was duly served as evident in the affidavit of service but failed to attend court. The Plaintiff made an oral application to amend prayer (a) in the Plaintiff to read Mutonguni/Kauwi/2168, which application was allowed. The Plaintiff's case proceeded with one witness who was the Plaintiff and thereafter closed his case including the Defendant's.

The Plaintiff **KALUA MUTEMA as PW1** stated that they were three brothers namely Kithuka Mutema, Joseph Kalua Mutema and Kisunza Mutema who were born on the land in Muthale while the suit land in

dispute is situated in Mutanda location. He averred that the Defendant who was the wife to his younger brother Kisunza Mutema resides in Muthale while the family of his eldest brother Kithuka Mutema also reside in Muthale. He further stated that each of the brothers have their piece of land that is separate from each other which they inherited from their late father while the suit land in Mutanda did not belong to their late father but he got the same after their father's demise. He averred that he got the suit land in Mutanda which initially belonged to the government on his own, through first registration after an adjudication process and has occupied it since 1955. Further that there was no dispute over the suit land during the land adjudication process. PW1 could not remember the exact year of the adjudication but stated that the land was registered in his name Kalua Mutema in 1989 but after baptism he was given the name Joseph and was issued with a new identity card to include it. He had to go to the Land Control Board afresh to enable him get consent to include his new name Joseph in the title deed which was later issued to him on the 12th December, 2007 as Joseph Kalua Mutema. He produced the title deed as Plaintiff Exhibit 'P1'. He averred that he undertook the search before the name Joseph was included in the title deed and produced the Certificate of Official Search as Plaintiff Exhibit 'P2". He testified that in the Green Card there was a second entry to include his name Joseph Kalua Mutema in accordance with the new Identity Card, and the final entry therein indicates when he was issued with the title deed. He produced the extract of the Green Card as Plaintiff Exhibit 'P3'. He further stated that he was issued with the second generation identity card on 23rd April, 1996 after baptism and produced it as Plaintiff Exhibit 'P4". He averred that he was never registered as a trustee over the suit parcel of land, as the land in question is his own farm land which he does not share with anyone except his immediate family. Further that the letter from the Chief of Mithiani Location dated 24th February, 2014 was never sent to him but he has seen the same in court. He further stated that he was not aware of the Defendant's application dated 4th April, 2014 nor was he served with it and does not understand it. He further averred that he did not participate at the Land Disputes Tribunal of Mutongoni Division vide LDT case no. 26/06 and just heard about it. PW 1 intimated that he has never participated in any dispute resolution process over the suit land but was called to the DOs office vide letter dated 20th June 2007 to attend a meeting on 4th July, 2007, when he went to the said office, he was advised to go home as the suit land was his. This was because the Defendant failed to produce any documentation to prove her claim. He produced the letter dated the 20th June, 2007 from the DOs office as Plaintiff Exhibit 'P4'. He denied seeing the letter dated the 28th June, 2005 from the Akamba Amwei Clan Confederation and stated that he was seeing the letter in court for the first time. He reiterated that when he got the suit land in 1955, the Defendant had not been married in their home, his father had already died in 1951, and the Defendant was later married in 1956. He described the suit land as having a sisal fence and beacons which borders his late elder brother Kithuka Mutema's land and yet he has not had a dispute with his family. He stated that he has four(4) sons and (4) daughters while the Defendant was using the clansmen to get the suit parcel of land; and the clansmen are interfering with him as they feel he is more prosperous than them. He said he did not inherit the suit land from his grandfather but acquired land after retiring since 1954 from peacekeeping in Egypt. He disclosed that he has sold 5 acres out of 20 acres of the suit land. Further that he gone twice to the local D O's office for a meeting where each party was advised to furnish proof of ownership of the suit land and the second time they were told seek the court's intervention to prove ownership. He said Kisunza died around 1969 and wants the Defendant to be restrained from interfering with the suit land, the Court to declare him its absolute proprietor and to be awarded costs.

There was no cross examination as the Defendant was absent. The Plaintiff's Counsel Mr. Musyoki thereafter closed the Plaintiffs' case including the Defendant's.

The Plaintiff in support of his case filed his Witness Statement and List of Documents including Certificate of Official Search for Mutonguni/Kauwi/2168; Title Deed for Mutonguni/Kauwi/2168 and Extract Copy of the register to parcel number Mutonguni/Kauwi/2168. The Defendant however did not file any documents or witness statements.

### **Analysis and determination**

Upon hearing the evidence from the Plaintiff and analyzing the documents presented by both parties, I find the following issues are for determination:

- Whether the Plaintiff's title to land parcel number LR. Mutonguni/Kauwi/2168 is absolute.
- Whether the Defendant has a right over the suit land.
- Whether the Defendant, her servants, agents or whomsoever else should be permanently restrained from interfering with the Plaintiff's quiet enjoyment, possession, occupation of the suit land.

It is not in dispute that the parties in this suit are brother in law and sister in law respectively and that the plaintiff is the first registered owner of the suit land. What is in dispute is that the Defendant claims the Plaintiff was holding the land in trust for the family of her father in law. The Defendant does not explain why they did not object to the registration of the Plaintiff as the proprietor of the suit land during the adjudication process. Further, the Defendant though duly served failed to attend court to rebut the Plaintiff's claim. In the Plaintiff's evidence he stated that he obtained the suit land through first registration in 1955 during the adjudication process and was registered as its owner from 1989 and has even sold five (5) acres out of it. Further that they were both summoned to the local DOs office vide letter dated 20th June 2007 to attend a meeting on 4th July, 2007 and when they did so, the Defendant failed to produce any documentation to prove her claim and he was advised to go home as he had proved the suit land was his.

Section 24 (a) of the Land Registration Act stipulates that **'Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

Based on the evidence adduced above, and in relying on section 24(a) of the Land Registration Act, the Court finds that the Plaintiff has indeed satisfied the legal proviso that he is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it.

Further in relying on Section 26(1) of the Land Registration Act which provides that:

**'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. '**

The Court takes cognizance of the fact that is the Plaintiff who is the first registered owner of the suit land and has produced a title deed to prove this. The Defendant has not adduced any evidence to rebut this position.

In the Defendant's Defence, she claims that the suit parcel Mutonguni/Kauwi/2168 was registered in the name of the Plaintiff as trustee of the family for three sons of Mutema Mwinza namely Kithuka Mutema, Kalua Mutema and Kisunza Mutema. However these allegations were not proved at the hearing of the main suit. There was no rebuttal of the Plaintiff's evidence where he claimed that he was the first registered owner of the suit land after an adjudication process in 1955. The Plaintiff stated in court that his late brother Kisunza who is the husband to the Defendant died in 1969. However, no evidence has been adduced nor pleadings filed to intimate that the late Kisunza had objected to the registration of the Plaintiff as the first registered owner of the suit land during the adjudication process prior to his death.

Copies of the title deed and Green Card produced in court as Plaintiff's exhibits do not indicate whether the Plaintiff was holding land in trust for the family nor is there any other overriding interest subsisting

over the suit land. It is the Plaintiff's evidence that all the three brothers namely Kithuka Mutema, Joseph Kalua Mutema and Kisunza Mutema got land from their father in Muthale while the suit land is situated in Mutanda location. Section 28 (b) of the Land Registration Act stipulates 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 being noted in the register - trusts including customary trust***','

Further in the case of **Salesio M' itonga v. M'ithara & 3 Others (2015)eKLR** the Court of Appeal stated that:

***“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust. See also Mumo -vs- Makau - Civil Appeal No. 56 of 2001.***

Relying on these observations, it is my finding that even though the provisions of Section 28 (b) are couched in mandatory terms, it is clear that requisite evidence should be adduced to prove customary trust and mere allegations in the pleadings do not suffice.

In the circumstances I find that the Plaintiff has proved his case on a balance of probability and enter judgement in his favour as prayed. I further make the following order:

- a) The Plaintiff is the absolute proprietor of land parcel Mutonguni/Kauwi/2168
- b) A permanent injunction be and is hereby issued against the Defendant, either by herself, her servants, agents, and/or by whomsoever else restraining them from interfering with the Plaintiff's quiet enjoyment, possession, occupation and/or proprietorship of land parcel number LR. Mutonguni/Kauwi/2168.
- c) *This being a family dispute, each party shall bear his/her own costs.*

**Dated signed and delivered in open court at Kajiado this 29th day of September, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**