



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC NO. 3 OF 1988**

**JOSEPH MUTISO MAUKI.....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF MACHAKOS.....1<sup>ST</sup> DEFENDANT**

**JACINTA MUENI MUIA..... 2<sup>ND</sup> DEFENDANT**

**WILSON MASILA MUEMA..... 3<sup>RD</sup> DEFENDANT**

**MUTHIANI NGAYAL.....4<sup>TH</sup> DEFENDANT**

**MBITHI NDUNDA.....5<sup>TH</sup> DEFENDANT**

**BENET KENYA MBUVI.....6<sup>TH</sup> DEFENDANT**

**PATRICK MUTINDA MULINGE.....7<sup>TH</sup> DEFENDANT**

**JAMES MUTUA MULINGE.....8<sup>TH</sup> DEFENDANT**

**MUTINDA KANYAMBU.....9<sup>TH</sup> DEFENDANT**

**KIILU MBUVI.....10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, vide an Amended Complaint dated 2<sup>nd</sup> May 2019, has averred that he has at all material times been the beneficiary of the estate of Jackson Mauki Ndolo, who died in 1944 and that the late Jackson Mauki Ndolo bought land now adjacent to Mutituni market in Machakos, which was held in trust by his brother Kikoi Ndolo who died in 1982.

2. The Plaintiff averred that the 1<sup>st</sup> Defendant erroneously and or intentionally allocated his father's land to the Defendants, depriving the Plaintiff and the members of his family the use of the said land and that all the other Defendants are the tenants of the 1<sup>st</sup> Defendant.

3. In the Amended Complaint, the Plaintiff has prayed for an order that the 1<sup>st</sup> Defendant be directed to move the other Defendants to alternative plots; that the registration of freed plots to be allocated to him; special and general damages for the duration that he had been deprived the land and the costs of the suit.

4. The 1<sup>st</sup> Defendant, then the Town Municipal Council of Machakos, filed an Amended Defence dated 22<sup>nd</sup> September 2008. The 1<sup>st</sup> Defendant averred that the area where Mutituni Market is located and all the adjacent land was initially under the jurisdiction of the Masaku County Council and was handed over to the Town Council of Machakos in 1973, long after the establishment of the market and allocation of the plots therein.

5. It was averred by the 1<sup>st</sup> Defendant that the then Town Municipal Council of Machakos later became the Municipal Council of Machakos; that it was wrongly enjoined to the suit and that the suit was bad in law for want of particulars and was barred by the provisions of the **Limitation of Actions Act**.

6. The 2<sup>nd</sup> Defendant filed a Statement of Defence dated 25<sup>th</sup> July 2019 in which she denied that she is a tenant of the 1<sup>st</sup> Defendant and stated that she lawfully acquired the land. The 2<sup>nd</sup> Defendant averred that the Plaintiff's suit is res judicata in view of **Civil case no. 61 of 1980 Kikoi Ndolo vs Muia Musila, Mbuvi Ngusu, Masila Muomo, Muthiani Ngayai and Ndunda Muyanga**, where Kikoi Ndolo litigated with the present Defendants and that the said case was dismissed with costs.

7. She averred that the Plaintiff in this suit is a nephew of Kikoi Ndolo; that in the suit that was dismissed 1980, Kikoi Ndolo had alleged that he was holding the suit land in trust for the Plaintiff's father, which is the same claim the Plaintiff is making in the current suit and that the suit is vague because the suit land has not been disclosed.

8. The 4<sup>th</sup> Defendant in his Statement of Defence dated 14<sup>th</sup> December 2005, averred that the Plaintiff did not seek for letters of administration with respect to the estate of the late Jackson Ndolo or the late Kikoi Ndolo as at the time of filing the suit and the suit is therefore incompetent and that he was legally allocated Plot no. 102 Mutituni Market by the 1<sup>st</sup> Defendant in 1968, which was then known as the Masaku County Council.

9. The 4<sup>th</sup> Defendant averred that he has been in occupation of the land since it was allocated to him and would rely on the doctrine of adverse possession and that the suit was res judicata in view of **Civil Case No. 61 of 1980** filed by Kikoi Ndolo at the Machakos Resident Magistrate's Court, which was conclusively heard and determined in favor of the Defendants.

10. The 7<sup>th</sup> and 8<sup>th</sup> Defendants filed a Statement of Defence dated 14<sup>th</sup> March 2019. In their Defence, they stated that they are the administrators of the Estate of the late Major General Jackson Kimeu Mulinge. They denied the allegation that the Plaintiff is a beneficiary of the estate of Jackson Mauki Ndolo or that the late Jackson Mauki Ndolo bought a parcel of land adjacent to Mutituni Market.

11. The 7<sup>th</sup> and 8<sup>th</sup> Defendants averred that the late Major General Mulinge is and has been the owner of Parcel Nos. Mutituni 107A and Mutituni 107B, which it acquired from the 1<sup>st</sup> Defendant and that the estate of the late Major General Mulinge has developed the aforementioned properties and has been paying rent to the 1<sup>st</sup> Defendant.

#### **The Plaintiff's case**

12. The Plaintiff, PW1, adopted his witness statement dated 6<sup>th</sup> March 2018, where he reiterated that his claim was for the land adjacent to Mutituni Market; that he is the administrator of the Estate of Jackson Mauki Ndolo, his late father; that his father bought the land on 6<sup>th</sup> April 1943 from Maingi Syeni and Mbyuvi Mbithi at the cost of 2 sheep and an unknown amount of money and that there were two witnesses to the agreement, John Katilu Maati and Mutuku Ngoongoo.

13. PW1 testified that in 1973, the Mutituni area was declared a land adjudication section; that he approached the demarcation officers to register his father's land in his name; that due to fraud and pressure, the then Town Councillor, the Late Daniel Ngewa Muasa, together with the other Defendants herein misled or deceived the said officers and that the demarcation officers refused to register the land in his favour on the basis that the land belonged to the council.

14. The Plaintiff stated that in contravention of **Sections 15 and 155 of the Demarcation Act**, (sic) his land was incorporated to form part of Mutituni Market Plot No. 2086; that the demarcation was secret, illegal and unconstitutional and contrary to **Section 23 of the Land Adjudication Act** and **Sections 101 and 127 of the Penal Code** and that between 1974 and 1976, there were meetings between his uncle Kikoi Ndolo and the Defendants over the disputed land, organized by the 1<sup>st</sup> Defendant.

15. PW1 informed the court that his uncle had sued Major Peter Muia Masila, Daniel Mbuvi Ngusu, Wilson Masila Muema, Muthiani Ngayai and Major Ndunda Muyanga over the suit land in Machakos Civil Case no.61 of 1980; that the claim was disallowed with costs and that Kikoi Ndolo appealed against the judgement but was time barred.

16. PW1 asserted that Plot no. Mutituni/103 was allocated to his late uncle by the then Machakos Local Native Council which was within Plot no. 2086; that the Defendants were allocated their plots in Mutituni Market itself and that Plot No. 2086 was set apart by the then Machakos Local Native Council in 1946. He argued that the 1<sup>st</sup> Defendant conspired with the Defendants and the demarcation officers to deprive him of the disputed land.

17. It was the evidence of PW1 that in line with **Section 288 of the Trust Land Act (repealed)**, he was entitled to a notification of the setting apart of his land and joining it with the Mutituni Market, which the 1<sup>st</sup> Defendant did not publish and that the court should treat the said demarcation and registration as null and void.

18. In cross-examination, PW1 stated that he filed the initial Plaintiff in this matter in 1988; that he has not indicated the parcel number in the Plaintiff because the suit property has not been registered to date and that the Defendants took his land in 1973. PW1 insisted that his land never belonged to the Town Council; that when he filed the suit on his father's behalf, he did not have the letters of administration until the year 2006 and that his father died in 1944. According to the Plaintiff, he was born in 1942 and that all the witnesses to the 1943 agreement were dead.

19. PW1 admitted that Civil Case No. 61 of 1980 relates to the suit property herein; that the issues in the two cases are the same; that the Registrar declined to register the appeal regarding the decision in Civil Case No. 61 of 1980 because the same was time barred and that after the demarcation, they never filed an objection with the demarcation officer.

#### **The Defendants' case**

20. DW1, the 4<sup>th</sup> Defendant, adopted his Witness Statement which was filed on 14<sup>th</sup> March 2017. The 4<sup>th</sup> Defendant stated that he was allocated plot no. 102, Mutituni Market in 1968 by the then Machakos County Council after paying KShs. 30; that he was given the plot plan and constructed a shop on the land and that to date, he has been paying land rates for the plot.

21. It was the evidence of the 4<sup>th</sup> Defendant that the plot was vacant when he bought it and that he developed the land without any interruptions by the County Council or the Plaintiff. According to the 4<sup>th</sup> Defendant, in 1980, the Plaintiff's uncle, Kikoi Ndolo, claimed that the land belonged to him and sued him together with the other Defendants and that the case was dismissed.

22. The 2<sup>nd</sup> Defendant, DW2, adopted her witness statement dated 25<sup>th</sup> July 2019 in which she stated that she is the wife of Peter Muia Musila (deceased); that she is the administrator of her late husband's estate and that her husband was sued by Kikoi Ndolo, through whom the Plaintiff brings this suit, in Machakos Chief Magistrate's Court in Civil Suit No. 61 of 1980, claiming for the suit property.

23. The 2<sup>nd</sup> Defendant testified that her husband was allocated Plot no. 147 by the County Council of Machakos, which land she remains in possession of and has developed it. She denied knowing the land that the Plaintiff is pursuing.

24. DW3, the 6<sup>th</sup> Defendant, adopted his witness statement filed on 30<sup>th</sup> March 2017. It was the evidence of DW3 that he is the administrator of the Estate of the late David Mbuvi Ngusu, who died in 1996; that the late Daniel Ngusu was allocated Plot No. 104 in Mutituni Market by the then Town Council of Machakos and that the deceased at all material times paid the land rates and fees that arose with respect of the land.

25. It was the evidence of DW3 that while the Plaintiff was known to him, the late Jackson Mauki Ndolo was never allocated the land held by the late Daniel Ngusu; that the Plaintiff has not identified the land that the late Jackson Mauki Ndolo bought or that the said land was within Mutituni market, and that the Plaintiff has failed to demonstrate why the estate of Daniel Ngusu was enjoined in this suit.

26. The 7<sup>th</sup> Defendant, DW4, adopted his witness statement sworn on 14<sup>th</sup> March 2019. DW4 informed the court that he is one of the administrators of the Estate of the late Major Jackson Kimeu Mulinge; that the late Major Mulinge bought two properties, Mutituni/107A and 107B from the 1<sup>st</sup> Defendant and that he developed the two plots with the permission of the 1<sup>st</sup> Defendant.

27. DW4 stated that the Estate of the late Major Mulinge has been paying the requisite land rates for the two properties, confirming that they are the bona fide owners of the property and that the Plaintiff lacks the capacity to institute this suit as he did not obtain letters of administration in respect of the Estate of Jackson Mauki Ndolo, in whose name this suit has been brought.

28. In cross-examination, DW4 denied that his father took the Plaintiff's land by force and that he was not aware why his father was not one of those sued in the 1980 case. It was the evidence of DW4 that plot numbers 107A and 107B were not part of the earlier claim.

### **The Plaintiff's Submissions**

29. The Plaintiff submitted that his land was not procedurally set apart to form part of the Mutituni Market, contrary to the Trust Land Act; that the Defendants did not produce evidence of the gazette notice and a notification to him to prove that his land was set apart for the Mutituni Market and that the defendants hatched a conspiracy in 1973 to defraud him by invading his land and grabbing it.

### **The Defendants' submissions**

30. The 2<sup>nd</sup> Defendant submitted that the doctrine of *res judicata* applies in this case; that the subject matter herein was litigated by the Plaintiff's uncle in Civil Case no. 61 of 1980 and that the court in civil case no. 61 of 1980 gave its determination by dismissing the suit.

31. The 2<sup>nd</sup> Defendant submitted that the Plaintiff failed to tender documentary evidence to show that he acquired the suit land corruptly and that he also failed to establish any element of fraud or even the size of the land he claimed. He consequently, it was submitted, the Plaintiff failed to discharge the burden of proof placed upon him by the law.

32. The 5<sup>th</sup> and 6<sup>th</sup> Defendants submitted that the Plaintiff, by his own admission, was not the legal representative of his late father's estate as at the time of filing the suit in 1988, and that the suit was incompetent for want of jurisdiction. They relied on the case of **Julian Adoyo Ongunga & another vs Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased) (2016) eKLR** as well as **Hawo Shanko vs Mohamed Uta Shanko (2018)eKLR**, where it was held that:

***“The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased's estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit.***

***... Without a limited grant being issued allowing the filing of the suit, the plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the suit. The suit as initiated becomes void ab initio and***

cannot be resuscitated by the issuance of a subsequent limited grant.

*... The mere fact that one is a son, daughter, wife or husband of the deceased is not sufficient. That relationship does not give the locus standi to the deceased's relatives to file suits before obtaining limited grants. One's relationship to the deceased does not clothe such a party with the locus standi. It is the limited grant which does."*

33. They further submitted that the suit was *res judicata* as per **Section 7** of the **Civil Procedure Act** and time barred as per **Section 7** of the **Limitation of Actions Act**. They relied on the case of *Rawal vs Rawal (1990) eKLR*. While relying on the case of *Koinange & 13 others vs Charles Karuga Koinange (1986) KLR 23*, they submitted that the Plaintiff also failed to prove the fraud he alleged. They asserted that they, the 5<sup>th</sup> and 6<sup>th</sup> Defendants, had genuine ownership documents of the land and that the Plaintiff had not produced any evidence to challenge the authenticity of their documents. They relied on Section 107 of the Evidence Act and the case of *Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another (2005) 1 EA 334*.

34. The 7<sup>th</sup> and 8<sup>th</sup> Defendants submitted that this suit was *res judicata* based on the proceedings in Civil Suit no. 61 of 1980. They submitted that the suit was a non-starter as the Plaintiff failed to describe the suit property and that the Plaintiff did not produce any title deeds or any other form of proof to show that the deceased was the owner of the suit property.

35. It was submitted that the Plaintiff failed to plead the particularities of the irregular allocation of the suit property. The 7<sup>th</sup> and 8<sup>th</sup> Defendants relied on the case of *Laban Omuhaka vs Truphosa Okutoyi (2019) eKLR* where the court held that:

*"In the case of Koinange & 13 Others vs Charles Karuga Koinange 1986 KLR at page 23 Justice Amin citing the case of Ratilal Patel Makanji (1957) EA 314 observed as follows:*

*"When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required"*

20. Furthermore, in *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:*

*"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." (Emphasis ours)*

21. *I have looked at the Respondent's Plaintiff. At paragraph 5 of the said Plaintiff it is stated that the Defendant unlawfully and fraudulently transferred the plot to Eli Okutoyi instead of the Plaintiff as the administrator. The said allegations of fraud have not been specifically pleaded and the particulars of the alleged fraud have not been stated on the face of the pleading. See. Vijay Morjaria v Nansingh Madhusingh Darbar (supra). I also note that the Respondent having failed to produce the document in her list of documents as exhibits, her case remained shaky and unproved. The Respondent having failed to prove her case on a balance of probabilities could not meet the threshold of proving allegation of fraud since the standard of proof in fraud matters is something more than a balance of probabilities."*

### **Analysis and Determination**

36. The issues for determination in this matter are follows:

- a. Whether the Plaintiff had locus to institute this suit.
- b. Whether this suit is *res judicata*.
- c. Whether this is suit is time barred.
- d. Whether the Plaintiff has proved his case against the Defendants.

37. This suit was filed by the Plaintiff in 1988, 33 years ago. In the Plaintiff, the Plaintiff averred as follows:

*"The Plaintiff at all material times was the beneficiary of the estate of Jackson Mauki Ndolo who died in 1944 while in active service in Burma. The said Mauki Ndolo had bought land which is now adjacent Mutituni market in Machakos District and was held in trust by his brother Kikoi Ndolo who died in 1982 and which land is valued at KShs. 5,000,000 only."*

38. From the averment of the Plaintiff, it is obvious that the Plaintiff has brought this suit on behalf of the estate of his late father, Jackson Mauki Ndolo. Indeed, the Plaintiff reiterated this position while testifying. While this suit was filed in 1988, the Plaintiff only obtained limited letters of grant on 29<sup>th</sup> December, 2006.

39. **Section 82 (a)** of the **Law of Succession Act** provides that personal representatives shall, subject to any limitation imposed by their

grant, have the powers to enforce, by suit or otherwise all causes of action which by virtue of any law survive the deceased or arising out of his death for his personal representative.

40. In *Hawo Shanko vs Mohamed Uta Shanko (2018) eKLR*, the court held that it is only upon obtaining letters of grant that a person obtains locus to act on behalf of the deceased's estate:

*“The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased's estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit.*

*... Without a limited grant being issued allowing the filing of the suit, the plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the suit. The suit as initiated becomes void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant.*

*... The mere fact that one is a son, daughter, wife or husband of the deceased is not sufficient. That relationship does not give the locus standi to the deceased's relatives to file suits before obtaining limited grants. One's relationship to the deceased does not clothe such a party with the locus standi. It is the limited grant which does.”*

41. A similar position was stated by the Court of Appeal in *Trouistik Union International & another vs Jane Mbeyu & another [1993] eKLR*, when it quoted with approval its own decision in *Otieno vs Joash Ochieng Ougo & another (1987) eKLR*:

*“The administrator is not entitled to bring an action as administrator before he has taken Letters of Administration. If he does, the action is incompetent at the date of its inception”.*

42. The Plaintiff was not entitled to file this suit before the letters of administration have been issued. Having done so, it does not matter that he obtained the limited letters of administration in the year 2006. Having realized that the suit was incompetent *ab initio*, the Plaintiff should have withdrawn the suit and filed a fresh suit upon obtaining the limited grant ad litem. Instead, he obtained the limited grant ad litem and continued prosecuting the suit, which act is contrary to the provisions of the **Law of Succession Act**. On that ground alone, it is the finding of this court that the Plaintiff's suit is a non-starter, bad in law and incompetent.

43. The doctrine of *res judicata* is prescribed in **Section 7** of the **Civil Procedure Act**, which provides as follows:

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

44. The court in *Invesco Assurance Company Limited & 2 others vs Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties) [2020] eKLR* broke down the 5 essential elements for a party to establish that a matter is *res judicata*:

*“...the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:*

- i. The suit or issue raised was directly and substantially in issue in the former suit.*
- ii. That the former suit was between the same party or parties under whom they or any of them claim.*
- iii. That those parties were litigating under the same title.*
- iv. That the issue in question was heard and finally determined in the former suit.*
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”*

45. Similarly, the Supreme Court in *John Florence Maritime Services Limited & another vs Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR* stated that for *res judicata* to be invoked in a civil matter, the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;*

- b) *The Judgment or order was on merit;*
- c) *The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and*
- d) *There must be between the first and the second action identical parties, subject matter and cause of action.*

46. In *Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & another Motion No. 42 of 2014 [2016] eKLR* the Supreme Court set out the rationale of the doctrine of *res judicata*:

*“The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”*

47. The Court of Appeal in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR* also pronounced itself on the rationale behind the doctrine of *res judicata* as follows:

*“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”*

48. The matter before this court was commenced by the Plaintiff in 1988, on behalf of his father’s estate, who died in 1944. According to the Plaintiff, the claim is for the land that is opposite Mutituni Market, which his father bought in 1943. The Plaintiff asserts that following the demise of Jackson Mauki Ndolo, his father, the land was held in trust by his uncle, Kikoi Ndolo.

49. It is the Plaintiff’s case that the cause of action arose in 1973, when during the land adjudication exercise, the demarcation officers set apart the disputed land and allocated it to the then Town Council of Machakos, the 1<sup>st</sup> Defendant.

50. It is not disputed that the Plaintiff’s uncle, Kikoi Ndolo, instituted Civil Case No 61 of 1980 at the District Magistrate’s Court at Machakos against the Defendants herein. A review of the proceedings and Judgement of the 1980 case reveal that Kikoi Ndolo acted in his personal capacity and did not purport to act on behalf of the late Jackson Mauki Ndolo.

51. In the 1980 case, Mr. Kikoi Ndolo asserted that he bought the land in 1940 from Mbyuvi at a price of Kshs. 500 and 4 goats. Following oral hearing, the court rendered its decision on 31<sup>st</sup> January 1981 and disallowed the claim.

52. The Plaintiff in his testimony conceded that the issues he has raised in the current suit were adjudicated in court 1980. Indeed, the facts as outlined above satisfy some of the elements set out in **Section 7 of the Civil Procedure Act**: both suits involve the same subject matter; they both arose out of the same cause of action and the first suit was against some of the Defendants herein. The Plaintiffs in the two suits are however different. As I have stated above, Kikoi Ndolo initiated the suit on his own behalf while Joseph Mutiso Mauki brought this suit on behalf of his father’s estate. That being the case, it is the finding of this court that this suit is not *res judicata*.

53. **Section 7 of the Limitation of Actions Act** prescribes that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

54. The claim by the Plaintiff is that his father bought the suit property in 1973, and that the said land was fraudulently obtained by the Defendants during the adjudication process in 1973. From the Plaintiff and the testimony of the Plaintiff, the fraud is said to have occurred in 1973. The right of action therefore accrued in 1973. This suit was instituted in 1988, 15 years after time had begun to run.

55. The Plaintiff did not tell this court why since 1973, he waited until the year 1988 to institute this suit for recovery of land. Indeed, considering that none of the Defendants have titles to the land, it is the finding of this court that the Plaintiff should have filed a suit for the recovery of the suit within 12 years, which he failed to do. That being the case, the Defendant’s objection that these proceedings are time barred is upheld.

56. This suit has dragged through this court for the last thirty-three years. It is undeniable that the ravages of time have rendered this suit weak and compromised the evidence brought by the parties. Most of the original defendants are since deceased, and their estates are represented herein by their kin.

57. Despite the challenges presented by the prolonged litigation, it is apparent that this matter, from inception, suffers the fatal challenge of lack of particulars. The Plaintiff has failed, both in his pleadings and documents, to identify the particulars of the land he is claiming, its acreage and its location. The Plaintiff admitted in evidence that he did not know the acreage of the land he was claiming and only referred to it as “the land opposite Mutituni Market”. This cannot suffice as a proper identification of the suit land because since 1973, the size of Mutituni market must have grown.

58. It is key to note that this suit arose pursuant to a land adjudication process. The law governing the adjudication process is the **Land Adjudication Act**. It sets out in detail the process of dispute resolution. **Section 26** of the Act provides that where a person affected by an adjudication register, who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing.

59. The Plaintiff testified that he never registered an objection in respect of the adjudication that took place in 1973, or at all. In fact, the Plaintiff did not produce any evidence to show that the land that he claims his father purchased was within an area that was declared an adjudication section, and that the said land was set apart contrary to the provisions of the **Trust Land Act**. The Plaintiff's claim from the outset is speculative and full of conjecture. The claim is neither specific nor elaborate to enable this court to make a determination.

60. For those reasons, I dismiss the Plaintiff's suit with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 18TH DAY OF FEBRUARY, 2022.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

No appearance for the Plaintiff

Mr. Munyao and Mr. Kimani for the Defendants

Court Assistant: Okumu