



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

HCCC NO.12 OF 2000

HUDSON WANYONYI WASIKE & 2 OTHERS.....PLAINTIFFS

~VRS~

**PETER WANYONYI SIMWELO & 6
OTHERS.....DEFENDANTS**

JUDGMENT

The Plaintiffs Hudson Wanyonyi Wasike *alias* William Kundu, David Makhakha Wanyonyi and Benson Murunga Wanyonyi sue the Defendants for orders of cancellation of title and declaration of trust in respect of land reference number NDIVISI/MIHUU/15. In the undated plaint filed on 04/02/2000, the Plaintiffs aver that the suit premises is ancestral land originally belonging to their grandfather and which was registered in the name of their father the first Defendant. A declaration of trust in favour of the Plaintiffs is sought and subsequent sharing of the land measuring 7.34 hectares resulting in distribution in equal shares among all the sons of the 1st Defendant.

The defendants deny the claim with the 1st Defendant stating that no trust exists in favour of the Plaintiffs in respect of the suit premises and that he has no obligation under customary law to share out the land to his sons in equal shares.

The Plaintiffs testified that they are sons of the first Defendant's first wife Melam Nabangala while the 2nd to 7th Defendants are the sons of the second wife Ziphora Khisa. Their late grandfather Ngome Simwelo owned land which was later registered in the name of their father Harrison Wanyonyi the 1st Defendant as Ndivisi/Mihuu/15. The 1st Defendant subdivided the land into seven parcels namely NDIVISI/MIHUU/2131, 2132, 2133, 2134, 2135, 2136 AND 2137. The first Defendant was registered proprietor of parcel number 2137 while the 2nd to 7th Defendant became the registered proprietors of the other parcels as follows:

LR. NO	SIZE	NAME
2131	0.87 HA.	WYCLIFFE WAMBAYA WANYONYI
2132	0.78 HA.	ISAAC MUNYASIA WANYONYI
2133	0.78 HA.	FRED MAKHAKHA WANYONYI
2134	0.55 HA.	JANE NAKHUMICHA WANYONYI
2135	1.35 HA.	DAVID MASINDE SHAMALLA
2136	2.36 HA.	JOSEPH S. SIMWELO
2137	1.2 HA.	HARRISON WANYONYI SIMWELO

It is the Plaintiffs' case that since they were denied shares as children of the 1st Defendant, the title ought to be cancelled and reversed to the original one namely NDIVISI/MIHUU/15 so that the land can be shared in equal shares among all the nine (9) sons of the deceased. Being ancestral land, the Plaintiffs argue that the land is held in trust for them and they ought to be given equal shares with their brothers.

The Plaintiffs' witness PW3 testified that he is a brother to the 1st defendant and the chairman of the clan. It was reported to him by the Plaintiffs that their father had shared out the ancestral land among the six (6) sons of the 2nd wife thus denying the Plaintiffs their rightful share. PW3 then summoned the 1st Defendant and asked him to come up with a solution to the problem by including all his children in the sharing out of the land. The first Defendant refused to co-operate. PW3 testified that the land in question originally belonged to the father of the 1st Defendant. It was later inherited by the first Defendant who is under a duty to distribute the land to his children.

PW4 testified that he is a younger brother to the first Defendant and both are children of same parents. It was his testimony that their father, the late Ngome Simwelo left a big parcel of land measuring about 100 acres. It was registered in the name of the 1st Defendant who was the elder son. The land was later shared out among the sons with the 1st Defendant retaining the lion's share of the land. It is that same land inherited by the first Defendant that was shared out to the sons of the second wife in exclusion of the sons of the first wife, now the Plaintiffs.

The 1st Defendant testified that he bought two parcels of land from one Solomon Wangwe in 1949 and the other from one Samson Wekesa in 1950. He inherited three acres from his father which was consolidated with the other two parcels during land consolidation period. The parcel was later registered in 1st Defendant's name as NDIVISI/MIHUU/15.

The Defendant said that he called all his sons to come so that he could share out the land to them. The Plaintiffs and especially the first Plaintiff failed to co-operate. As a result he shared out the land giving all the sons of the second wife their shares. One parcel number 2137 measuring three acres was registered in his name to hold in trust for the Plaintiffs. Each of the Plaintiffs is entitled to one acre each. The 1st Defendant is ready and willing to transfer to the Plaintiff their respective share when they are ready.

DW2 and DW3 are the 2nd and 3rd Defendants. The two testified on how their father the 1st Defendant shared out the land to them. The Plaintiffs were notified of the relevant meeting but failed to attend. It is their testimony that parcel no.2137 in the name of the 1st Defendant was reserved for the Plaintiffs. DW2 was given 3.2 acres while DW3 got 5.3 acres. Other beneficiaries got lesser shares measuring between 1.3 and 2 acres.

DW4 testified that he was the village elder in 1998 when the first Defendant called him and requested

him to attend a meeting and witness the sharing out of 1st Defendant's land among his children. DW4 was sent to call the 1st and 2nd Plaintiff to attend the meeting but the two refused to attend. The 1st Plaintiff had earlier been given two (2) acres by his father but he later misbehaved forcing his father to change his mind. The 1st and 2nd Plaintiffs live and cultivate on the land of the 1st Defendant.

The issues for determination in this suit are:

- a) whether land reference number NDIVISI/MIHUU/15 was ancestral land or absolutely owned by the Defendants;**
- b) whether the Plaintiffs are entitled to equal shares of the land NDIVISI/MIHUU/15 alongside the 2nd to 7th Defendants;**
- c) whether the titles of the new parcel nos.2131 – 2137 should be cancelled.**

Initially, the issue of whether the 1st Plaintiff Hudson Wasike Wanyonyi was a son of the deceased arose. This was later settled when the 1st Defendant aged 86 years pointed out the 1st Plaintiff in open court and said he is his son being the first born by his first wife. He knew him as William Kundu but the 1st Plaintiff had used different names of Hudson Wasike in this case. DW2, DW3 and DW4 all positively identified the 1st Plaintiff as the first born son of the first Defendant in their testimonies.

The Plaintiffs claimed that the original parcel NDIVISI/MIHUU/15 was inherited by the 1st Defendant from their late grandfather Ngome Simwelo. This was long before land consolidation and registration. The Plaintiffs could of course not produce any documents in support of their case. The Plaintiffs' two witnesses PW3 and PW4 told the court that the land was inherited from their father Ngome Simwelo. None of them gave the exact or approximate acreage that the first Defendant inherited from his late father. PW4 said their father left about 100 acres but did not state how many acres out of the whole the first Defendant inherited. No documentary evidence as to the details of the land was produced. PW4 was only heard to complain that the first Defendant got the biggest share while he gave PW4 the smallest share. In my considered opinion, this kind of evidence is vague and does not establish the size of the land which the first Defendant inherited from his father to guide this court in deciding whether the whole land NDIVISI/MIHUU/15 or part thereof was ancestral land. The Plaintiffs had a duty to present cogent evidence on the allegation that the suit premises was ancestral land which they failed to do. The first Defendant was more specific than the Plaintiffs when he said that he inherited only three (3) acres from his father which he consolidated with two other parcels he had bought from other people. Although the Defendant in his advanced age could not remember the acreage of the two parcels he bought, his evidence was uncontroverted that he inherited about three (3) acres. The Defendants' testimony was the only reference to the acreage of the ancestral portion of the land.

It is my finding that the Plaintiff has failed to prove that the original parcel NDIVISI/MIHUU/15 was wholly ancestral land. Similarly it follows that the Plaintiffs have not proved that any trust exists in their favour in respect of the suit premises.

The first Defendant was therefore the absolute proprietor of NDIVISI/MIHUU/15 with all the rights and privileges pertaining thereto as provided for by section 27 and 28 of the Land Registered Act Cap.300. In his capacity as the absolute proprietor, the first Defendant is entitled to deal with his land as he wishes during his lifetime. He may give the whole of the land or part of it to any person of his choice. There is no legal requirement that a parent shares out his land to his children during his lifetime. The first Defendant was within his rights to give the 2nd to 7th Defendants shares of his land. It is important to note that the Defendants got different sizes of land. The decision to give unequal shares may have been influenced by the support and co-operation the first Defendant got from his respective sons. The first Defendant has not denied the sons of his first wife shares in his land. He has reserved for them three acres in parcel number 2137 registered in his name. This translates to one acre for each son. The Plaintiffs have no choice but to

accept what their father has in store for them. It is important that the Plaintiffs and first Defendant move without delay to sub-divide the said land and causing the registration in their own names of their respective shares. I find that the Plaintiffs have failed to prove that they are entitled to equal shares with the 2nd to 7th Defendants on their father's land.

The Plaintiffs produced a court order dated 15th October 1999 in HC Misc. Civil Application No.33 of 1999 in which the award of Ndivisi Land Disputes Tribunal was adopted as judgment. The tribunal declared land reference number NDIVISI/MIHUU/15 as ancestral land and distributed the land among the children of deceased.

The award of the tribunal has challenges of lack of jurisdiction and I find it not useful to the Plaintiffs' case. Under section 143 of the registered Land Act, title to land of the first registered owner can only be cancelled on grounds of mistake, fraud or misinterpretation. There is no evidence that the first Defendant got himself registered as proprietor of land reference number NDIVISI/MIHUU/15 through fraud or mistake. For this reason, I find that the Plaintiffs have not laid any legal basis for cancellation of the titles of the new parcels nos.1231 – 1237.

It is my finding that the Plaintiffs have failed to prove their case to the standards required, I therefore dismiss the case accordingly. Being members of one family, I will not condemn the Plaintiffs to pay costs. Each party will meet their own costs of this suit.

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F. N. MUCHEMI

JUDGE

Judgment dated and delivered on the 9th day of March, 2011 in the presence of Mr. Kituyi for the Defendants.

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F. N. MUCHEMI

JUDGE