



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Civil Case 21 of 2006**

**REUBEN NZUVE ..... PLAINTIFF**

**VERSUS**

**MUKENE MUSAU .....1<sup>ST</sup> DEFENDANT**

**NDELE MUTUKU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In his Complaint dated 1/2/2006, the Plaintiff, Reuben Nzube Mwangangi avers that the Defendants and he share a common ancestry as their grandfather was one Kakuta. They also shared common ancestral land at Mutiswa Adjudication Section. The land later became known as NO.1149 during adjudication in 1978. that the said Kakuta also allocated different portions of land to two of his sons, Musau Kakuta, husband of the 1<sup>st</sup> Defendant, Mukene Musau and Kitoko Kakuta, brother-in-law of the 2<sup>nd</sup> Defendant, Ndele Mutuku but the said sons sold those parcels of land in 1974 and 1975 respectively.

2. Further that in 1976, one Samuel Kimuyu Ndolo who had bought land from Musau Kakuta and Kikoto Katuka aforesaid instituted **Nziu District Magistrate's Court Land Case Number L.15 of 1976** and sought certain orders which were not granted but in 1978 the Kakuta family met and agreed to redeem parcels numbers 1147 and 1148 from the said Ndolo. The Plaintiff agreed to do so and with agreement of the Adjudication officers responsible for Mutiswa Adjudication Section, plot numbers 1147 and 1148 were joined to become part of plot number 1149. However, in 1988 when the land was demarcated, the demarcation committee still went ahead to allocate plots nos.1147 and 1148 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without due regard to the prior arrangements detailed out above. The plots were registered as nos.1878 and 1879 respectively. He then decided to file this suit and alleges that the Defendants hold the land in trust for him and the particulars of trust at paragraph 14 of the Complaint are as follows:-

“The plaintiff claims that though the defendants are provisionally registered they hold Mutiswa Adjudication Section 1878 and 1879 in trust for the plaintiff.”

**PARTICULARS OF TRUST**

**a. “By causing fraudulent registration knowing they had no interest or right over the said portion**

as the said land had been redeemed by the plaintiff and was plaintiff's portion.

- b. **Causing registration knowing the land was not family land but land of the plaintiff by virtue of redeeming the land.**
- c. **Causing registration when not in occupation and not having any right of ownership.**
- d. **Causing registration fraudulently to defeat the plaintiff's rights.**
- e. **Colluding with clan members to be registered knowing they have no right over the plaintiff's land.**
- f. **Causing registration through fraud knowing the portion from Mutiswa 1148 and 1147 was redeemed by the plaintiff and was not family land.**
- g. **Fraudulently taking 1878 and 1879 as part of family land when it was not so and when the defendants and clan members knew it was plaintiff's land and registering the defendants wrongfully."**

3. The prayers sought are as follows:-

- a. **"A declaration that the parcel of land known as Mutiswa Adjudication Section 1878 and 1879 belongs to the plaintiff and the plaintiff is solely entitled to possession and occupation.**
- b. **An order for rectification of register directing that registration in respect of Mutiswa Adjudication Section 1878 and 1879 in favour of the defendants and/or their agents or proxy be cancelled and the portions Mutiswa 1878 and 1879 be registered in the name of the plaintiff.**
- c. **In the alternative to (b) above An order that the defendants or their agents or proxy hold the land Mutiswa Adjudication Section 1878 and 1879 in Trust for the plaintiff and the Trust be declared extinguished forthwith and the portions be freshly registered in the name of the plaintiff.**
- d. **General damages.**
- e. **Costs of this suit with interest.**
- f. **Any other relief that court may deem fit and just to meet the ends of justice."**

4. I have seen the Affidavits of Service sworn by Jacob Muthenya on 26/4/2006 and another on 26/9/2006 and it is difficult to fault the service on the Defendants. They have entered no appearance nor did they file any defence. Interlocutory judgment was entered on 4/5/2006 in any event and the matter proceeded by way of formal proof on 1/8/2008. On that day the Plaintiff produced **PExh.3**, a consent to sue from the District Land Adjudication Officer, Makueni District under Section 30 of the Land Adjudication Act, Cap 284. He also produced the judgment in **Nziu DMCC L 15/1976** as well as his diary showing the payments he made to Samuel Ndolo in redemption of the land sold by Musau and Kitoko.

5. Having heard the Plaintiff and seen the evidence produced and there being no response by the Defendants, I have to grant prayers (a) and (b) of the Plaint for reasons that in the judgment delivered on 25/6/1976 by H.N. Nzau, DM II in **Nziu DMCC No. L 15/1976**, the learned magistrate while dismissing Ndolo's claim nonetheless stated that **"if after the land is divided between those concerned the elders do not get portions of land equivalent to that they sold to the Plaintiff (Ndolo), I see no reason why they should not refund the plaintiff money he paid to them (if it is true he paid any)."** Clearly thereafter the Plaintiff took up that duty and repaid the money and there is no evidence to controvert his assertion that the Kakuta family, including the Defendants, agreed that whoever redeems the land takes it as his own. **P. Exh. 2** shows that he paid Kshs.2,800/= on various dates with witnesses present and that

document is also not challenged. There was no reason why parcels nos. 1878 and 1879 were later registered in the names of the Defendants and there is no evidence before me that in fact the Defendants are otherwise entitled to the land.

6. In the end, the Plaintiff's claim being unchallenged and the evidence tendered being in his favour, he is deserving of judgment as prayed save that he is not entitled to the alternative to prayer (c) or to damages since no basis for either has been laid.

7. Judgment is hereby entered in terms of prayers (a) (b) and (c) (save the alternative prayer in it) of the Plaintiff.

8. Costs shall be in the cause.

Dated and delivered at Machakos this 21<sup>st</sup> day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau Jnr for Plaintiff**

ISAAC LENAOLA

JUDGE