



**REPUBLIC OF KENYA**

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

**Civil Appeal 34 of 2004**

**JACKSON MUSYOKA MUNYALO ..... APPELLANT**

**VERSUS**

**NDULI MUNYALO ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the judgment of E. M Makori, SRM delivered on 25/3/2004 in **Kitui PMCC 162/1998**. In that suit, the present Appellant sought orders that the mother of the present Respondent be evicted from land known as Matinyani/Kalia/11. Later, when she, Rael Mundue Munyalo died, the present Respondent was substituted as the Defendant.

2. In his judgment, the learned Magistrate dismissed the suit and allowed the Defendant's counter-claim that he and his siblings are entitled to a share of the suit land. Costs were also awarded to him and the Appellant in his Amended Memorandum of Appeal amended on 11/5/2004 has raised the following complaints that;

i. there was no evidence that he held the suit land in trust for himself and other family members;

ii. there was no evidence that his late father, Mundue Munyalo had married Rael, the Respondent's mother who therefore had nothing to pass on to the Respondent;

iii. the learned magistrate erred when he took a biased and prejudicial approach to the Appellant's case and further erred when he took into account irrelevant considerations in making his decision.

3. The Appellant in submissions handed in his detailed and impressively well thought out skeletal written submissions which I have read and which are along the lives of the issues summarized above.

4. The Respondent on the other hand, stood by the judgment of the subordinate court and said that the Appellant was intent on denying him his inheritance.

5. I have perused the evidence before the trial court which was as follows:-

The Plaintiff said that title No. Matinyani/Kalia/11 is in his name but that it was initially acquired by his mother from the Plaintiff's maternal uncles and it could not therefore be ancestral land to be inherited paternally. The land was however registered in his father's name and when he died, the Plaintiff inherited it after filing a Succession Cause in Nairobi. However, the Certificate of Confirmation of Grant had a

rider that he would hold the land in trust for himself and family members. His case was that he held a trust for himself and his immediate siblings only.

6. Regarding the Defendant, he said that the Respondent's mother was on the land as a tenant at will, which tenancy was terminated. That she was never married to the Plaintiff's father and the latter only took in her children to the land when the mother went to live in Nairobi.

7. The witness for the Plaintiff was one Justus Mulaimu Kithungu who stated that both the Plaintiff and the Defendant were sons of his elder brother. That it was the Plaintiff's mother who acquired the land from her brothers but had it registered in her husband's name. That the Defendant was born on the same parcel of land and has built a home and stays there and that his mother was a wife of Mundue Munyalo.

8. The Defendant in his evidence stated that he was born on the suit land and he knew that it was registered in his father's name. That he should not be evicted from the land and he was unaware of any succession case involving his father's estate.

9. At this stage, I am entitled to evaluate the evidence on record and reach my own decision on the merits of the case before the magistrate's court.

10. Firstly, the only issue to determine is whether the Appellant was entitled to orders that the Defendant be evicted from the suit land. It is not denied that the Appellant acquired title to "**hold the same in trust for all the family members**". His argument is that when Okubasu J (as then was) confirmed the grant in H.C.C Succession 1365/1992 on 26/4/1995, the family members referred to were the Plaintiff's immediate brothers and sisters. Neither the Certificate of Confirmation of grant nor the extract of title define who those family members are and so I must return to the evidence tendered and summarized above. The Appellant has taken the view that because his mother was the one who was given the land by her brothers, only her children can inherit it. That cannot be so because in fact the land was initially registered in the names of Mundue Munyalo and when it comes to inheritance of registered land, each family member of the deceased person has equal right to a share of it. The Defendant, it cannot be denied, was a son of Mumbue Munyalo and had as much right as the Appellant to the land.

11. Secondly, the Appellant has argued that the Respondent's mother was never married to Mundue Munyalo. However, his evidence was contradicted by his own witness, Justua Mulaimu Kithungu who said that she was indeed a wife and the Respondent has no other home or land save Munyalo's land. I have said elsewhere above that the Respondent was entitled to the land as a son of the late Munyalo. He was properly substituted by a competent court become Defendant in his mother's place and I cannot as this point purport to change that order.

12. Lastly, I think that the learned magistrate properly applied his mind to the law and the facts before him. It was the Appellant to prove his case on a balance but he failed to do so. He was merely supposed to show that the Respondent had no right of occupation or possession over the land but in fact he ended up calling evidence that confirmed that right.

13. The suit was so frivolous and vexatious, it had to be dismissed. The Appeal must suffer the same fate and is dismissed with costs to the Respondent.

14. Orders accordingly.

Dated and delivered at Machakos this 3<sup>rd</sup> day of **December** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Appellant in person**

**Respondent in person**

ISAAC LENAOLA

JUDGE