



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL CASE NO. 514 OF 1995**

**MATHITU MUTINGE NZYOKI.....PLAINTIFF**

**VERSUS**

**JAMES MUIA MATHITU &**

**GERAND KISYULA MATHITU.....DEFENDANTS**

**J U D G E M E N T**

By an amended plaint dated 20.2.1996 the plaintiff Mathitu Mutinge Nzyoki brought this suit against his two sons James Muia Mathitu and Gerald Kisyula Mathitu praying for a declaration that the defendants are bound under kamba customary law to maintain the plaintiff. He also sought costs of the suit and interest.

The defendants filed a defence dated 12.2.1996 in which they denied the allegations made by the plaintiff in the plaint that the defendants had failed to maintain the plaintiff and put the plaintiff to strict proof.

The plaintiff testified along with PW2 Solomon Kitati who claimed to be a cousin to the plaintiff. The plaintiff's case is that he is old and ailing and can no longer work hard as he used to. That his two sons whom he educated are now working as a teacher and in the armed forces respectively but they have refused to assist him. He said that the sons do not give him any money, do not take him to hospital when sick, do not care for his welfare, he fetches his own water, cooks his food and that his son and daughter have taken away his wife. He tried to sell his land Kimundi 733 which he purchased and which is not ancestral land but the sons blocked the said sale. That members of his clan deliberated the issue and the sons were asked to care for him but they refused to comply. Later he received letter Exhibit No. 2 and 3 ordering that all transactions on the land do cease. He needed to sell the land to buy medication and take care of himself and since the said sale has been blocked that is why he filed this suit that they should be ordered to take care of him. PW2 who testified that he is a neighbour and relative of PW1 said that he was aware the plaintiff's sons do not take care of him as he cooks by himself, fetches his own water, looks after his cattle and that the sons had been ordered by the clan to care for their father which they had declined.

In their evidence the defendants said that the plaintiff is a difficult person who has refused to be cooked for as he suspects that he will be poisoned and that they have seen him cook for himself even when PW1's mother was still alive. They also said that the plaintiff is not a peaceable person and has not lived in peace with even his wives whom he occasionally beat and even sent away the 1st wife till her death when at her parent home. They both claim to assist the plaintiff, they have educated their siblings they built plaintiff's house, take him for treatment when necessary, sometimes their children fetch his water when he allows them or he draws from DW1's water tank if there is rain. Sometimes their wives cook for him if he accepts their food because he fears that somebody will poison him. The two defendants do accept that they blocked the plaintiff from selling his land in Kimundi because the land on which the 4 brothers live in Kaumoni is only 4 acres whereas the one in Kimundi is 10 acres, the land was bought with the assistance of the 1st wife 1st defendant's mother who is now deceased and who invested a lot in the land. They hope to share the land. DW3 who describes himself as a neighbour and cousin to the plaintiff corroborated DW1 and 2's evidence. He was part of the elders who dealt with plaintiff's complainant that the children were not assisting him. At first they were not assisting him in 1986 but later in 1991 it was found that they assist him but it is the plaintiff who is difficult and does not accept their assistance.

After the case was heard the counsels agreed to file their submissions by 31.8.2004. Only the defendant filed their submissions on 31.8.2004. The plaintiff's counsel did not. In his submissions counsel for the defence contents that the amended plaint is improperly before the court as it was filed without leave of the court. The first plaint was filed on 19.12.1995. An appearance and defence were filed on 12.2.1996. The amended plaint was then filed on 20.2.1996, 8 days after the defence. The issue of the plaint being irregularly on record was considered by the court and on 6.12.1996 the Judge found that the amended plaint was filed on 20.2.1996 and pleadings were supposed to close on 26.2.1996. The defence counsel was asked to consider filing an application to strike out the plaint if he felt that it revealed no cause of action but it seems that he did not. That is why the matter has lasted this time and has proceeded to full hearing. The amended plaint is properly on record.

No reply to defence was filed by the plaintiff. Under order IV Rule 9, any allegation of fact in a party's pleading that is not traversed by the opposite party is deemed to be admitted. At paragraph 5 of the defence the defendants pleaded that it is the plaintiff who has refused to take care of his family and that they had paid fees for their brothers and sisters which was his duty. There being no reply to that pleading, the court deems it to be admitted.

The plaintiff's claim is brought under the Kamba customary law. Kamba customary law is applicable since the parties are kamba by tribe and so long as it will not be repugnant to justice and morality or inconsistent with any written law and the court would have to decide it in accordance with substantial justice. It was upto the plaintiff to adduce evidence to the effect that his children were bound to maintain him under the kamba customary law. A part from his evidence the plaintiff only called a friend or cousin to tell court how the plaintiff lives. He did not call any expert in kamba customary law and the court has not had the benefit of an expert in this law.

I had a chance to see the plaintiff in court. He is a healthy looking, smart old man. He does not look like a desperate man who is not cared for or who has nothing to eat. The court was told that he has cows and indeed he accepted looking after cows himself. Of an average old man in the village, he is not poor and not in need. It is most probable that he is taken care of.

The court has been told that the plaintiff does not want anybody to cook for him for fear of being poisoned and this is what his children DW1 and 2 have been used to. Infact DW2's mother is still alive, lives in the same house with the plaintiff but is fed by her sons. It is most probable that the plaintiff is a difficult man who has not been good to his family and has therefore created a lot animosity in his family. It seems he is a problematic old man as described by DW1-3 so that he does not appreciate what the children do for him. The children may have a moral obligation to look after their father but the plaintiff has to reciprocate by showing love and respect for them. Respect is supposed to be mutual. This moral obligation is enshrined in the bible which says that children should honour their parents and the parents to love their children and respect them. The plaintiff should try out that.

In the meantime I find that the plaintiff has not proved on a balance of probability that the children are bound to maintain him under customary law or that they have not been doing it. If he is able to take care of himself, why not. After all his sons have young families to take care of. The court was not even told the extent of the maintenance. The plaintiff has not proved his claim on a balance of probability. I have no option but dismiss the plaintiffs claim. Each party bears their own costs.

Dated, read and delivered at Machakos this 27th day of October, 2004.

Signed in the presence of:-

**R. WENDOH**

**JUDGE**