



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. 502 OF 1994**

**WASUA MUTHAMA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**MUSEMBI MUINDI ::::::::::::::::::::::::::::::::::::::: DEFENDANT**

Coram: J. W. Mwera J.

Kakonzi Advocate for Plaintiff  
Makundi Advocate for Defendant  
C. C. Muli

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**JUDGEMENT**

This is another 1994 suit. It was filed on 27.10.94. The plaintiff pleaded that, his grandfather and another person acquired parcel of land No. WAMUNYU/KYAMATULA/132 which was registered in the name of one Kimulu Ndolo in 1968 to hold the same on trust for himself, the plaintiff and other members of respective families. That the plaintiff and the defendant Musembi Muindi were not related. That the beneficiaries/owners of plot No.132 used the land in common apparently without a problem until 1979. That then the said Kimulu Ndolo sold parts of the said land No.132 to the defendant. At this point one Ndungi Mbaluka and the plaintiff filed a suit HCCC 1439/81 claiming for a declaration of a trust. That the parties consented to arbitration of the said suit No.1439/81. An award thereof was later made a judgement of the court. That the judgement was to the effect that family land No.132 be subdivided into three portions each for the plaintiff, Ndungi Mbaluka and Kimulu Ndolo. Consequently three titles issued – WAMUNYU/KYAMATULA 820, 821 and 822 for Ndolo, Mbaluka and the plaintiff respectively. That the defendant was not a party to the suit No.1439/81 but the panel of elders (arbitrators) therein recommended that Ndolo would transfer his portion he had sold to the defendant. It was further averred that when actual registration of the said 3 parcels of land took place Mbaluka's No.821 was in error registered in the name of Ndolo. The defendant lodged a caution against that land, later he had it removed and the land given to him so that he has ended up with a purchaser's interest in land Nos. 820 and 821. That on his part on 16.9.92 the plaintiff was registered as the absolute proprietor of land No. 822 (some 3.71 ha). But then without a colour of right or authority, it was further pleaded, the defendant had moved onto the plaintiff's plot No.822 and started to cultivate portions of the same. That at some stage in 1987, the defendant sued the plaintiff claiming acquisition of plot No.132 from the plaintiff which suit (HCCC 68/98) was withdrawn on 23.7.91. So the plaintiff prayed for an eviction order against the defendant and a permanent injunction so that he does not set foot on parcel No.822 or remain there.

On 16.11.94 a defence and counterclaim was filed on behalf of the defendant. By it the defendant insisted that the plaintiff was his paternal uncle because the plaintiff was Wasua Muthama s/o Muthama Ngotho while the defendant is Musembi s/o Muindi s/o Muthama Ngotho. He conceded buying a portion of land from Kimulu Ndolo but denied that that was part of family land. He further denied lodging any

caution against any land especially parcel No. 820 and put the plaintiff to strict proof of his claims. It was again admitted that parcel No.822 was registered in the name of the plaintiff but averred that all was done by way of fraud. He pleaded that he was beneficially entitled to land No.822. In the counterclaim it was set out in the issue of fraud that the plaintiff got registered over parcel No.822 without consent/knowledge of the defendant. That he should have informed the registrar that he, the plaintiff, was getting registered over land No. 822 on trust for other family members.

It was further averred that the defendant was born on parcel No.822 in 1944 and has since lived, occupied and cultivated that land uninterrupted until 3.10.94 when the plaintiff and the said Mbaluka filed a case in court to try to restrain and evict the defendant from the land in dispute. May it be recalled that parcel No.822 was said to have been a product of subdivision of land No.132. The pleadings further claimed that the defendant's father Muthama Ngotho died in 1970 and was buried on the subject land. The defendant claimed his beneficial interest in land No.822 on the basis that the plaintiff held it on trust and on behalf of the claimant. That the register should show a subdivision of plot No.822 in two portions one for each of the two litigants.

A reply to the defence and defence to the counter-claim was put on record on 14.12.94,. The plaintiff denied claims of fraud or any rights of the defendant to parcel No.822.

Agreed issues (9 in all) were filed on or about 23.3.95. The trial herein got under way with effect from 22.3.2000 with the plaintiff who described himself as WASUA MUTHAMA NGOTHO (P.W.1) testifying. He called 2 witnesses. The defendant also testified and called two witnesses. Each side produced exhibits. Mr. Kakonzi led the plaintiff's case while Mr. Makundi appeared for the defendant.

The plaintiff said that he lived at Kyamatula village while the defendant whom he knew as a clansman (from the AKITULU clan) lived in Makueni. That the two had no other relationship and that the defendant did not have property at Kyamatula. Only his mother lived there. Probably the plaintiff meant any property in dispute because he told the court later that the defendant bought land from one Kimulu Ndolo at Kyamatula. The plaintiff told the court that the defendant's father was called MUINDI MWATHE; his uncles were KASIMU and MATHEKA who lived, died and were buried on their lands at a place called Kyaluma, Makueni. The plaintiff said that he was born at a place called MBUMBUNI also in Makueni. The family quite probably moved to Kyamatula (Machakos) later and when the plaintiff's father Muthama Ngotho died he was buried here.

That the defendant's father Musembi died and was buried at Kyamatula but on the land of Ndungi Mbaluka the step brother of Kimulu Ndolo. That both Mbaluka and Ndolo now reside in Kitui District.

That the property that the plaintiff's grandfather and defendant's father had was at a place called Muthetheni. It was shared out and the defendant owned his portion there which he sold. That that land was in the name of the defendant's mother NDINDA who now lives on the plaintiff's land at Kyamatula. He would like her to vacate it. It is not clear so far how Ndinda came onto the plaintiff's land but evidence continues.

The plaintiff produced evidence that he is registered over land No.822 (Exh.P1) and also that the defendant was registered over land No.821 (Exh.P2) as well as land No.820 (Exh.P3). That parcels No.820 and 821 bordered the plaintiff's No.822. That once the defendant bought No.820 from Kimulu Ndolo, already mentioned, and the plaintiff had no interest in it. That Ndungi Mbaluka was in fact the owner of plot No.821 but that the defendant got it registered in his name. He uses it. Mbaluka has sued him over it. That the 3 parcels of land came from the original piece No. 132 that initially was registered in the name of Ndolo. The beneficiaries disagreed over it and sued. The suit went for arbitration to the District Officer (Mwala) who gave the award (Exh.P4) that formed the basis of the court's judgement. To effect it, meant subdivision of the original No.132 into Nos. 820, 821 and 822. That the defendant took part in the proceedings before the District Officer because he had paid some money to buy part of No.132 which was in the name of Ndolo. He had no interest in land No.822 even as at the time the land control board consented to the subdivision and eventual registration. That the defendant's mother had not lived on the plaintiff's land for long. It was from the time of arbitration and she was not allowed to graze or

cultivate any part of No.822. To assert his rights over it the plaintiff opted to sue her son the defendant rather than his mother. The plaintiff reiterated his right to have the whole of parcel No.822. He spoke of his brothers Mwangangi and Mwinzi adding that Mwinzi died and was buried in Kitui. That Mwangangi also lived in Kitui. They had no land at Kyamatula and did not lay any claim to parcel No. 822. The plaintiff once again denied that he was the defendant's uncle except that they were only clansmen. That even if parcel No.822 was proved to have belonged to his grandfather still the defendant would have no valid claim over it because he was not the plaintiff's father's heir.

That the fathers of the plaintiff and Ndolo first settled at Kyamatula. Then the defendant's father followed but he came onto the land that Ndolo gave him. The defendant was an adult then. That at no time did the defendant's father settle on the portion of the plaintiff either in the original parcel No. 132 or the subsequent No.822. The portion that the defendant's father occupied in No.132 is not the same as where Ndinda, the defendant's mother now lives. The plaintiff denied registering parcel No.822 secretly without the knowledge or consent of the defendant. The two were together when the defendant went to buy the portion from Ndolo.

The plaintiff then summed up his evidence in chief calling for eviction of the defendant from land No.822, a permanent injunction and an order to pay mesne profits. After the fairly lengthy testimony an equally lengthy cross examination followed. The plaintiff maintained that he was no blood relation of the defendant. That the defendant's father was MUINDI S/O MWATHE – not Muthama. That Muindi was also called KATOKO MUTHAMA. He died. That Katoko was the brother of Kasimu and Muthama and Mwathe are the same person and could be interchanged because they were close to each other. This part of evidence is not quite clear but then the plaintiff went on to state that in the arbitration before the District Officer (Mwala) he claimed his father's (Muthama) right. That if other sons of Muthama claimed the plaintiff would give them part of the land he got. The court heard that a certain land/at (Muthetheni) which his grand father acquired was shared between him and the defendant. It belonged to NGOTHO and not MUTHAMA. Then the plaintiff went on to call the defendant's lineage as Musembi s/o Muindi s/o Mwathe s/o Ngotho, that Ngotho was his grandfather (plaintiff's). That the defendant recently brought his mother, Ndinda, onto the plaintiff's land NO.822. That in the proceedings at Mwala, the plaintiff did not deny or object to the defendant's claim to have bought Ndolo's portion which is No.821, which even the defendant's mother used to cultivate. The plaintiff further said that at Mwala he only waged his interests. He added that if Ngotho had any sons their rights lay in the land that was at Muthetheni. That the defendant's father died before the subdivision of No.132 and he was buried on a stretch of land close to the portion that went to the plaintiff – not on it. They had tilled and grazed at that point because they had nowhere else.

Further the plaintiff said that after the award, land No.132, was to be subdivided among 3 portions for himself, Ndungi Mbaluka and Ndolo – the only parties in HCCC 349/81. That the land No. 132 did not belong to their grand father NGOTHO MUNYUA and so the defendant had no right either to the original No. 132 or the plaintiff's No.822.

The next witness was Mwangangi Mulinge (P.W.2) – a retired 73 year – old assistant chief in Wamunyu Location. A villager of Kyamatula. He knew both the litigants. They came from his area. The plaintiff was his neighbour at Kikaso while the defendant had gone to settle at Makueni. His mother Ndinda lived at Kyamatula on the plaintiff's land. P.W.2 who attended before the District Officer (Mwala) in the arbitration was the plaintiff's witness. He learnt that the award directed that the piece of land, the subject of the arbitration was to be subdivided into 3 portions. That land had always been known as Ndolo's land. That the plaintiff came onto that land when he was married with a family. That Musembi Muindi's father had since died; he too had been living on Ndolo's land. P.W.2 did not know the family relationship between the 2 litigants, if they were. He knew the plaintiff's brother as well as Mbaluka and Ndolo – who lived in Kitui. That he knew the defendant's father was MUINDI MWATHE and he did not know where the defendant's lineage linked up with that of the plaintiff.

In cross examination this witness said that Muindi was also called Katoko. That P.W.2 used to issue burial permits at the time Muindi died. Shown a document of Muindi's burial P.W.2 denied issuing it in the name it appeared – KATOKO MUTHAMA. P.W.2 also knew the defendant's brothers Kasimu

Mwathe and Matheka. But the court heard that the plaintiff and the defendant belonged to the same clan. That the defendant was not an adult to live or build on Ndolo's land but that he had since moved to Makueni – long before his father died. Only his mother Ndinda, and some younger brothers remained at Kyamatula. That one of them called Mboya who died recently. P.W.2 was of the view that the defendant belonged to the Mwathe lineage and he could not claim from the plaintiff what Muthama was entitled to. Then he said that Muindi's grandmother is one MUNYWA W/O MUTHAMA.

Next to speak on the side of the plaintiff was Kioko Sila (P.W.3) aged about 77 years. P.W.3 said that he knew the plaintiff with whom they used to go dancing many years back. He also knew the defendant who was a younger man but P.W.3 did not know the defendant's parents properly and where they were living before he P.W.3 moved to Kitui in 1950. P.W.3 said that the plaintiff got the land at Kyamatula through his father Muthama who initially acquired it together with Ndolo whose son is Kimulu. That Kimulu Ndolo and Ndungi Mbaluka were P.W.3's neighbors in Kitui. P.W.3 knew the plaintiff's brothers who once lived at Kyamatula but later moved to Kitui like him. Although P.W.3 did not know the defendant's mother properly, he could and he did recognize her at the court house the day he testified. He knew that the two litigants herein were clansmen and that was all. That before this witness moved to Kitui he used to hear that the defendant's parents lived across Thwake River and later came to buy land from Kimulu Ndolo. That the P.W.3 attended the Mwala arbitration in which the plaintiff and Ndungi Mbaluka were disputing with Kimulu Ndolo about the land at Kyamatula. He did not himself see he defendant in the proceedings but the District Officer directed that the land in dispute be subdivided into three (3) portions.

In cross-examination, P.W.3 said that he never saw the defendant's father owning land at Kyamatula. That P.W.3 moved to Kitui, Musembi's (the defendant) parents bought land at Kyamatula and settled. When P.W.3 returned from Kitui, he has land at Kyamatula occupied by his brother, he found the defendant's mother's houses. He knew the plaintiff's father who had one wife. If others died P.W.3 did not know. He had heard of Matheka Mwathe – not Matheka Muthama.

P.W.3 further told the court that one NGOTHO was the plaintiff's (Wasua) grandfather. He knew that the defendant's mother lived and cultivated the suit land. She came after it was bought; he found her house there in 1961. P.W.3 heard the District Officer's award but it did not say that Wasua gets his portion on behalf of himself and other family members. To P.W.3, the plaintiff got the land for himself – after the arbitration. That closed the plaintiff's case and the defence opened.

Musembi Muindi (D.W.1) the defendant, told the court that he was now settled in Makueni since 1978. That the plaintiff, Wasua was his uncle – being the brother of his, the defendant's, father. They came from the AKITUTU clan and his grandfather was MUTHAMA s/o NGOTHO. That the plaintiff's father was also MUTHAMA s/o NGOTHO. That he knew the original land No.132 at Wamunyu where he was born in 1944 and grew up. It was registered in the name of his uncle Kiambu Ndolo from a different house. That Ndolo got so registered by family agreement – on his own behalf and on behalf of other family members. But then the defendant bought a portion of this land No. 132 from Ndolo. The defendant seems not able to say why he was buying part of the land he was a beneficiary of as a family member, but he told the court that he executed the purchase because Kimulu Ndolo had moved from that land. That the portion he bought was No.820. That the suit No. 1439/81 was resolved by arbitration before a District Officer at Mwala but the defendant was not a party in that case at all. That his uncle Wasua, the plaintiff was, for himself and as a representative of the Muthama family. He named the other disputants before the District Officer as Ndolo and Mbaluka. That the award directed subdivision of that land in 3 portions one to each litigant and that the plaintiff got the portion he did on behalf of the Muthama family. The defendant told the court that he belonged to that Muthama family and he had therefore come to court to wage the interests of himself, his mother who is settled on the land that the plaintiff got, and his brothers. That by this suit the plaintiff wants to bar the defendant and others from parcel No.822 – a matter he contested by way of counter-claim. He maintained that parcel No.822 was an inheritance which the plaintiff held in trust. That Muindi's family members were entitled to settle there also. That the plaintiff fraudulently got parcel No.822 in his name without informing the defendant. The defendant once again reiterated that he was related to the plaintiff who should now be ordered to split parcel No.822 into two parts for himself and the defendant (with those he represents). That he did not

know one Muathe. His father was MUINDI MUTHAMA who died in 1970 and was buried on portion No. 822 where the defendant's mother lives. The defendant went on to say that he had a piece of ancestral land at Muthetheni – a place they left when they migrated to Wamunyu, long before he was born. That the plaintiff Wasua had also a portion of this ancestral land at Muthetheni – a result of subdivision of ancestral land. The defendant further said that Mwangangi Mulinge (P.W.2) was a distant relation while Kioko Sila (P.W.3), now living in Kitui knew that the defendant and the plaintiff were relatives. That he lied when he denied such a tie. He asked that the prayers in the counterclaim be granted.

In cross-examination, D.W.1 denied ever knowing one Muathe. He said that he heard of that name in court. He insisted that he was the grandson of Muthama Ngotho who had 3 wives MUOTI aka Gathei, MUNYIVA and NGENEKE in that order. That his own father's mother was Munyiva, while the plaintiff came from Ngeneke's house. The court heard that his uncles – Kasimu, and Matheka were long dead. That some of his father's relatives still lived at Muthetheni.

That parcel No.820 which he bought from Kimulu Ndolo was in his name. He also claimed ownership over parcel No.821, which while hearing the defendant's case it was claimed that it ought to go to Ndungi Mbaluka (after the Mwala award). The defendant could not say in respect of what parcel of land Mbaluka had sued him over. That Ndolo showed the part the defendant had bought (from the original No.132) but he still claimed part of No.822 by virtue of trust in the name of the plaintiff. That he had represented the Muthama family in the dispute arbitrated over, although the family at no time and nowhere put such arrangement in writing. That although he did not financially help the plaintiff in that suit, as per custom whatever the plaintiff did there it was also for other family members and the defendant at the time believed so. The defendant rounded up in examination by again asserting his beneficial interest in parcel No.822 where his mother has houses and a shamba.

Then came Ndinda Muindi (D.W.2) of Kyamatula. Her husband was MUINDI MUTHAMA and the defendant Musembi is her first born son. That the plaintiff was related to Muindi as a step brother. Their father was called MUTHAMA. This old lady did not know Muthama's father. That when her husband Muindi died, he was buried where she lives at Kikaso, Kyamatula. The couple lived there since their marriage, and the two litigants here are step uncle and son. That they live close to each other as people from one ancestor. That that was the case even at Miu, Muthetheni. In cross-examination D.W.2 said that the land she lives on was acquired by her father-in-law before she got married. He was Muthama. He had neighbours. That she knew Kimulu Ndolo who once sold some land to her son, the defendant. But that is not where D.W.2 is settled. She did not know of the proceedings before the District Officer (Mwala). She did not take part in them. That in the Muthama family, the plaintiff and the defendant belonged to each of the two houses, and the land at Kyamatula belonged to them all. Her late husband did not tell D.W.2 of other family property the elders shared among the family members except cattle. D.W.2 then enumerated to the court the children of the 3 wives of Muthama, stating who belonged to who but she denied ever having heard of somebody called MUATHE. She did not know that Muthama was the son of Ngotho.

Lastly it was the turn of Elijah Mulwa Musili (D.W.3) to give evidence. Related to both litigants, this witness who hails from Makueni, told the court that as per the custom, the defendant is the son of the plaintiff. D.W.3 knew all three of Muthama's wives adding that when the defendant's father Muindi died long ago, he was buried where his wife Ndinda now lives at Kyamatula. He said that Muindi is the son of Muthama. He did not know anybody by the name of Muathe in their Mbaa Kiilu lineage. That to this clan also belong Kimulu Mbaluka and Ndolo Mbaluka.

Then came cross examination D.W.3 said that he had heard of Ngotho – their great great grandfather. He had a son called MUATHE. The witness who had just denied having heard of Muathe in their family lineage could not confirm whether Muthama was the son of Ngotho, which Ngotho was also Muathe's father.

The defendant was then recalled to produce green cards of the properties No.820, 821. He now told the court that he bought parcel No.821 from Kimulu Ndolo and that No.820 was in the name of the same Kimulu Ndolo (Exh.D 1and 2). That the plaintiff was registered over No.822 (Exh.D3 Exh.P1). This followed the apparent confusion that manifested itself when during the plaintiff's case it was put forth

than parcel No.821 which ought to have gone to Ndungi Mbaluka was in fact registered in the name of the defendant. But even this late production of a certificate of official search on parcel No. 821 does not assist at all. Parcel No.821 is in the name of KIMU MUSEMBI MUINDI of Box 30075 Nairobi and the title was issued on 10.2.94. Parcel No.820 is in the name of KIMULU NDOLO. It has a caution on it since 12.5.92 lodged by MUSEMBI MUINDI on account of a purchaser's interest. No 822 remains in the name of WASUA MUTHAMA NGOTHO since 16.7.92. By the way, does the defendant want the whole of what originally was WAMUNYU/KYAMATULA/132 or what?

The defendant denied that he lodged this caution against parcel No.820 in spite of that being manifested on the certificate of official search (Exh.D2). That he bought parcel No.821 from Kimulu Ndolo. He claimed nothing more from Ndolo, but that Mbaluka had sued him in court.

Both sides submitted. The plaintiff went over all the pleadings and the evidence including annexures and came to the conclusion that his suit must succeed. That he had shown how his family came to settle at Kyamatula on the land on which Kimulu Ndolo's father was. It is No. 132 which later was a subject of a suit that was arbitrated by the District Officer (Mwala) and the plaintiff got what was due to his father Muthama. That that there was no mention of the defendants, Muindi, or his father for that matter coming in the same area by virtue of Muthama. After going over this plus the conduct of the defendant and his witnesses the court was asked to find for the plaintiff and dismiss the defendant's counterclaim. That no claim lay and no fraud was proved as to how the plaintiff got plot No.822. The cases of **WAMBUGU VS. KIMANI (1992) 2 KAR**, **TAYEBALI ALIBHAI VS. ALIBHAI [1938] 5 EACA1**, and **GATHURE VS. PETER GATHURE VS BEVERLY [1967] EA 514** were cited.

The defendant's side on its part submitted that the litigants were connected through Ngotho and then Muthama so that the defendant was entitled to a share of No.822. which the plaintiff got through litigation on behalf of the Muthama family including Musembi Muindi, the defendant. The applicability of the Tayebali Alibhai case and Peter Wanyoike case was discounted here. Instead the defendant put forth the case of **KISEE MAWEU VS. KIU RANCHING LTD. (1982-88) 1 KAR 746**. The cited cases were perused and whichever is applicable here may be adverted to in the following determination, which maybe shorter than the pleadings and the evidence.

In this court's view the three or so broad issues to be determined may be set out thus:

1. Are the litigants herein related to a degree that when the plaintiff litigated over the original land No. 132, he did so for and on behalf of the defendant?
2. Does the defendant deserve a portion of parcel No.822 from the plaintiff on account of their family relationship?
3. What reliefs should issue?

### **ISSUE 1: The family relationship of the litigants:**

From all evidence here the litigants belong to the AKITUTU clan. There were claims and denials as to the degree of relationship in regard to the suit plot No.822 at Kikosa village, Kyamatula, Machakos. That need not be repeated here. It has been set out above, save to reproduce a piece of testimony from the plaintiff's case and that of the defendant.

In cross examination the plaintiff said of the defendant:

“This here is MUSEMBI son of MUINDI son of Mwathe son of Ngotho”

He conceded that Ngotho was his grandfather.

From the defendant's case Elijah Musili (D.W.3) claimed that both the plaintiff and the defendant were his people because they all came from Mbaa Kiilu. He knew their parents, siblings etc. and added:

“I have heard the name Ngotho mentioned. He is our great great grandfather. Muthama’s father is called Ngotho. I just hear that Ngotho had a son called Muathe. .... But I cannot confirm yet the father of Muthama is Ngotho which Ngotho was said to be Muathe’s father.”

This was in cross examination and by a close relative of the litigants. Yet in examination-in-chief. The same D.W.3 had said:

“I do not know someone called Muathe.”

From all this, this court was left with the impression that the defendant’s side was less than truthful in its testimony. The defendant, his mother (D.W.2) and now Musili (D.W.3) at one point denied having known or heard of Muathe. Now their senior relative on cross examination admits that he used to hear of Muathe as the son of Ngotho but he could not yet confirm that. What is all this except to leave the court with a view that although the litigants are clansmen as well as sharing Ngotho as a grandfather, Muthama the plaintiff’s father was Ngotho’s son while the defendant Musembi is the son of Muindi, the son of Muathe, the son of Ngotho. That is as far as their blood ties go. In this court’s view, that is quite a far removed family tie when it came to the plaintiff litigating over parcel No.132 from which he got parcel No.822. He cannot be said to have done so on behalf of Ngotho who gave the two litigants a common ancestry. Then the next issue.

**ISSUE 2: Whether the defendant is entitled to a portion of parcel No. 822 because of the family ancestry:**

This court’s answer is in the negative. The Kyamatula land was not ancestral. It appeared to the court that the clansmen from AKITUTU moved to Kyamatula from Muthetheni. Both the plaintiff and the defendant told the court that there they shared ancestral land. The plaintiff said that his entitlement remained there while the defendant’s mother Ndinda sold what was due to her son (and others). The defendant told this court that his land still existed at Muthetheni. By whatever way the plaintiff’s parents, those of Kimulu Ndolo and Ndungi Mbaluka got the land at Kyamatula, there is no evidence how the defendants came there only to claim a share via Muthama, the father of the plaintiff. Indeed when they came there the defendant bought a portion from Ndolo who had been registered over parcel No. 132 on behalf of himself and for the benefit of the plaintiff and Mbaluka. If the claim that this was also for the benefit of the defendant, then he did not have to buy a portion from Kimulu Ndolo.

He could simply have demanded his right as the plaintiff and Ndungi Ndambuki did in the civil case that was arbitrated over at Mwala. In fact the defendant neither contributed to that litigation over parcel No.132 nor staked his own beneficial interest at the arbitration that saw the District Officer conclude that land No. 132 had to be divided and apportioned among three people: Kimulu Ndolo, Ndungi Mbaluka and Wasua Muthama ( the plaintiff) who got No.822. By the way even if there was some confusion as to which land the defendant bought from Ndolo or that he bought No.821, quite probably Mbaluka’s was No.820 which evidence (Exh.D3), D2) shows that it is in the name of Kimulu Ndolo. Be that as it may, this court does not see that the defendant would be entitled to a part of No.822. He could not be an heir to Muthama Ngotho, the father of the plaintiff. Otherwise there is no evidence as to how his right would accrue via that route. The residing of the defendant’s mother on parcel No.822 appears more by licence than by right.

**ISSUE 3: What reliefs should issue?**

From the foregoing the suit succeeds with costs. In turn the defendant’s counterclaim is dismissed with costs.

Judgement accordingly.

Delivered on 7th February 2001.

**J. W. MWERA**

**JUDGE**