



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

**AT MACHAKOS
CIVIL SUIT NO.181 OF 1998**

MULEWA MULINGE PLAINTIFF

VERSUS

**PHILES MUTIO MUSYIMI
DEFENDANT**

JUDGEMENT

The plaintiff on 24th July, 1998 sued the defendant asking this court to declare that land parcel No.MUPUTI/KIIMA-KIMWE/526 is her property and that a caution registered against is by the defendant on 5th May, 1998 be removed. She also prayed for orders that the defendant be evicted from the suit land.

It was pleaded that the suit land was registered in the name of the plaintiff and that it was given to her by her late mother-in-law Wandia Mueke in or about 1970. That the plaintiff took possession thereof and when adjudication came, still in the lifetime of Wandia, Wandia caused the said land to be registered in the plaintiff's name since 1977. From then the defendant had entered and remained on that land without good cause or consent of the plaintiff, together with lodging against is the caution aforesaid. M/S Nzei & Co. Advocates Machakos filed the plaint and also presented it.

On or about 9th September, 1998 a defence and counter claim was filed by the defendant in person. She also resisted the suit on the basis that even if the plaintiff is the current registered owner of Plot No.526 she did so by fraud. That the adjudication register bore the name of Wandia Mueke; yet without that disclosure or that the defendant had a share in that land, the plaintiff, who it was claimed had right only to land parcel MUPUTI/KIIMA - KIMWE/527, had gotten registered over No.527. That the plaintiff did all this unknown to their greater family and that by her secretive conduct she had disinherited the defendant.

It was denied in the defence that Wandia gave this land to Mulewa, the plaintiff. That the plaintiff's rightful name lay on plot No.576 with her co-wife Mbenya. That even if the plaintiff had the title to the land, her interest in it had been extinguished by the defendant's occupation and use of the land since 1965. That she built on it in 1977. It was counter claimed that on account of long and uninterrupted occupation and use of the subject land by Philes, the defendant, the court ought to grant her a title on the basis of adverse possession. The defence and counter-claim, whose language and tenor appeared too legal for the seemingly illiterate defendant, prayed that it be declared that the plaintiff's title to parcel No.526 has been extinguished under the Limitation of Actions Act and that, she, the defendant should be declared the owner thereof with a title going to her. She also sought to permanently restrain the plaintiff from interfering with the former's enjoyment of the land in issue. Both parties prayed that their respective causes succeed with costs.

A reply to the defence and defence to the counter claim was filed on 22nd September, 1998. In essence all the defendant's claims were rejected; she was put to strict proof thereof.

The record bears the plaintiff's set of eight (8) issues for determination.

The trial herein started on 15th June, 2000 with the plaintiff in the witness box (PW1).

Mulewa told the court that while she was the wife of the late Stephen Mulinge Mueke, the elder brother of Musyimi Mueke, also dead, the defendant was the wife of Musyimi. She told the court that their mother-in-law Wandia Mueke gave her this land long ago because she, Mulewa had been kind to her and she had cooked and cared for Wandia up to the time she died. That at the time of land adjudication Wandia herself appeared before the team and gave evidence/information that led to the ultimate registration of plot No.526 in the name of Mulewa. The court heard that this was a first registration. That indeed the adjudication number was conveyed to Mulewa by Wandia in presence of one Josephine Waeni Musa and Stephen Mulinge's younger sister Mary Kiilu. That at that time Wandia had been sick in the house of Philes, seemingly where she lived, and that the two had separate fireplaces. That Wandia directed that the land in issue belonged to Mulewa and neither to her husband nor sons. After a week she died.

That the plaintiff then went, built and lived on plot No.526. But that in 1994 the defendant left the other family land where she was living and came onto the plaintiff's land and has since been living there, with some of her sons. The plaintiff produced the abstract of title No526 (Exhibit P1). She did not concede to the averments in the counter-claim that defendant had lived on this land since the 1960s.

In cross examination by the defendant Mulewa maintained that she was given the subject land as a gift by Wandia for feeding and taking care of her, while Philes every morning went to trade in Machakos town. That she, Mulewa, did not alter the name against the subject plot number. That the defendant instigated prospective buyers of plot No.526 to try to force Mulewa to withdraw this case. Further Mulewa told this court that Wandia had given one Nthenya, a co-wife, a portion of which No.526 forms a part. That the portion she retained for herself (Wandia) she gave it to the plaintiff. That Wandia left other properties to the defendant. That the plaintiff declined to submit to the clan arbitration because they were harassing her to give up her title. That these included Danson Mutuku (he is DW3 here) who gave money to the defendant to register the caution; he was a prospective buyer of plot No.526.

Kitonyi Mueke (PW2), said, that the plaintiff was his late stepbrother's (Stephen Mulinge) wife. The two men had a common father but separate mothers. That the defendant was Stephen Mulinge's younger brother's wife. The two men had the same mother. That he as the elder of the litigants (Mueke) family, he knew the land physically. That his step mother, Wandia, used to cultivate it. When she grew too old to do so, she gave it to Mulewa. That she did this because Mulewa used to give her (Wandia) food. It was a gift in appreciation. That Wandia authorized/directed that the land be registered in the plaintiff's name. That while Mulewa was cultivating this land, the defendant then went and settled there and problems begun. That, that was some seventeen or twenty years ago. Philes had been living on some other family land. That, the families of Stephen Mulinge Mueke and Musyimi Mueke will have a share of the family land when it is ultimately shared out - land No.669. Otherwise Mulewa is the owner of the subject land which Wandia gave to her. That Philes who was cultivating other farm properties that belonged to Wandia should vacate No.526. That she even sold one of those shambas.

In cross examination PW2 told the court that Mulewa used to clothe/dress and feed Wandia, while Philes was away trading. That Mulewa got her money by selling bananas at a nearby school.

The defendant then testified (DW1). She asserted that plot No.526 was hers. Wandia first gave it to Musyimi, her (defendant) late husband in or before 1962. That the land had been registered in Mulewa's name by error. She did not know when that error was made. That during adjudication Wandia directed that the subject land should go to Mbenya, Mulewa's co-wife and the defendant alone. But then Mulewa went to the registration office and changed the defendant's portion to herself. That in fact Wandia had divided her land in three (3) portions: for the defendant herself, Mulewa and Mbenya. But that instead of

Mulewa being satisfied with her own portion (registered in her name but without a number) she went on to take the defendant's too. That when Philes found out this, she reported to the family and a committee appointed to investigate the matter confirmed accordingly. That a council of elders then sat and decided that Mulewa had taken a title to land that did not belong to her. That Mulewa as well as Kitonyi (PW2) refused to attend the elders' meeting. The defendant claimed that she had settled on and used the subject land for over 28 years, and so Mulewa should leave her alone there. In cross-examination the defendant did not know when Mulewa was registered over plot No.526. She however, said that she had evidence (not produced) to show that this plot was first registered in the name of Wandia Mueke. She promised that Mutuku Muema (DW3) would table the evidence. The defendant had said that she moved onto the suit property over 28 years ago after Wandia died some time in 1973. It shall be remembered that the defence pleaded that the defendant went into possession and began to utilize the land since 1965 and that she built there in 1977. She seemed to disclaim this pleading in cross-examination.

Maria Ngali (DW2) was the next defence witness. The two litigants were her late brother's wives. She is married not far from where she was born - the location of the land in dispute. DW2 said that the land initially belonged to her mother, Wandia, who then left it to Philes, the defendant. That Wandia and Philes lived elsewhere but cultivated the subject land. That Wandia once vowed that she would never be parted from Philes. That at the adjudication period Wandia took the plot number in her name. That she divided her land between her sons Mulinge and Musyimi and since Musyimi died, Philes should have their portion. DW2 wondered why Mulewa was crossing over to interfere with Philes.

DW2 was not near when adjudication was going on but she said that her mother, Wandia and Mulinge did it. DW2 told the court that Wandia did not direct at this time that her land should go to Mulewa. She wondered how that came about.

Danson Mutuku Muema (DW3) knew the litigants and the family land in issue. He chaired the clan elders meeting which sat to solve the dispute over parcel No.526. Other than being the clan/family chairman, the two litigants are wives of his two stepbrothers. Step, brothers with whom he shares a common grand father Kimenye. The witness made to produce what he termed a copy of his proceedings before the land adjudication officers but it was not certified; neither was the original before court. It was rejected. DW3 made to argue that plot No.526 was initially adjudicated in the name of Wandia Mueke. He was going to show that even with the present registration in Mulewa's name, that was not proper or correct. However, he added that when the elders sat under his chairmanship, to consider the dispute of this land, as presented by the two litigants herein, the litigants were not present and they did not therefore have any input. A decision was however arrived at on 29th June, 2000 that the land belonged to Philes. It may be noted that this was long after this suit was filed and the parties had not agreed and got the court order to go for arbitration. DW3 told the court that their rules and regulations guided them in the deliberation that ended in the decision of 29th June, 2000 on arbitrating over KIMENYE family land matters which rules also excluded women from such proceedings.

DW3 said in cross examination that even if Kitonyi (PW2) was closer to the litigants than he was in the blood relationship, he chaired a proper family council that took a proper decision, namely, that the land belonged to Philes Musyimi. He was not aware of what Mulewa did for Wandia to be given the land. That Philes with some of her sons lived on this land and he was not eyeing to buy it from Philes at all. He maintained that this court mandated his council of elders to arbitrate in the present dispute. The court record did not bear him out on this at all. That ended the trial. The court chose not to hear submissions on account of the defendant having acted in person.

Having considered the proceedings and the evidence herein, this court was satisfied that this land is rightly Mulewa's. She was given it by her mother-in-law Wandia in appreciation of her (Mulewa) caring for the old lady. Mulewa herself said so and she was credibly supported by her brother-in-law Kitonyi Mueke. The two are closer in the family tree if Muema

(DW3) position is considered. DW3 did not know why Wandia gave this land to Mulewa, and he gave no evidence that this land was first adjudicated in Wandia's name or that Mulewa changed, by fraud, the ultimate registration into her own name. The defence case failed to prove this claim.

Maria Ngali (DW2) is married elsewhere and was not present at the time of adjudication. She seemed to talk in a biased manner against Mulewa, and in favour of Philes her other sister-in-law. Her evidence was least helpful.

The court similarly did not find the defendant's evidence as worth establishing her claim. She alleged fraud and did not establish any. Not even her own claim of adverse possession. In any case such a claim is only brought by invoking 036 Civil Procedure Rules not as it was presented here.

Second, Mulewa's is a first registration under S. 143 Registered Land Act (Cap 300). Her title is indefeasible in whatever situation. In sum the suit succeeds as per the plaint with costs while the counter claim is dismissed with costs. The defendant should vacate the suit property in the next 90 days.

Judgement accordingly. Right of appeal.

Dated, read on 31st December, 2001.

J. W. MWERA,

JUDGE.