



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC NO. 238 OF 2018**

**FORMERLY MACHAKOS HCCC No. 300 OF 2009 (O.S)**

**WILLIAM MAITHYA NDOLO.....1<sup>ST</sup> PLAINTIFF**

**JOSHUA MUSYIMI NDOLO.....2<sup>ND</sup> PLAINTIFF**

**(Both Suing as Personal Representatives of the estate of the Late NDOLO MUSYIMI)**

**VERSUS**

**WILLIAM MUINDE..... 1<sup>ST</sup> DEFENDANT**

**(Sued as the personal representative of the estate of the late Kilundo Nzivo)**

**LUKENYA RANCHING & FARMING**

**CO-OPERATIVE SOCIETY LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced by way of Originating Summons dated 2<sup>nd</sup> October 2009 under **Order 36 Rule 1(a), 3 and 3F** of the **Civil Procedure Rules**. In the said Originating Summons, the Plaintiffs sought for the following orders:

*a. That this Honourable Court be pleased to declare that the Plaintiffs are entitled to half share of share membership number 430 and other shares related thereto or stemming therefrom at Lukenya Ranching & Farming Co-operative Society Limited.*

*b. That in the alternative this Honourable Court be pleased to declare that the Plaintiffs are entitled to half of Mavoko Town Block 3/1932, Mavoko Town Block 3/3264 and Mavoko Town Block 3/530.*

*c. That this Honourable Court be pleased to order rectification of the register in Mavoko Town Block 3/1932, Mavoko Town Block 3/3264, Mavoko Town Block 3/530 under Section 143 of the Registered Land Act Cap 300 by amending the same to include the Plaintiffs' interest herein.*

*d. That the Defendants be condemned to pay costs of this suit.*

2. The Plaintiffs' case is based on the grounds on the face of the application and the Supporting Affidavit sworn by the 2<sup>nd</sup> Plaintiff, Joshua Musyimi Ndolo on 12<sup>th</sup> October 2009. The Plaintiffs have deponed that they are the administrators of the Estate of the late Ndolo Musyimi; that between 1973 and 1978, the Late Ndolo Musyimi and the Late Kilundo Nzivo entered into an agreement and contributed money equally for membership and purchase of share membership No. 430 in Lukenya Ranch and that this share was held by the Late Kilundo Nzivo, in trust for the Late Ndolo Musyimi.

3. The Plaintiffs plead that stemming from the issuance of Share Membership No. 430, the Late Kilundo Nzivo was allocated the following plots by the 2<sup>nd</sup> Defendant, which he also held in trust for the late Ndolo Musyimi: plot no. 121 measuring 20 acres; plot no. 462 measuring 40 acres; plot no. 741 measuring 5 acres and a commercial plot.

4. The Plaintiffs have deponed that the late Nzivo received other benefits from the 2<sup>nd</sup> Defendant which he did not share with the Late Musyimi, but such benefits are within the records and knowledge of the 2<sup>nd</sup> Defendant; that the family of the late Ndolo Musyimi moved into and settled on plot no. 121 in 1976 and have lived there to date; that the Late Kilundo Nzivo and his family moved into and settled on plot

no. 462 and that in 1992, the late Nzivo sold part of the plot to Mr. Maiso Mbugua.

5. It is the Plaintiffs' deposition that the 1<sup>st</sup> Defendant fraudulently failed to enter the Estate of the late Ndolo Musyimi as co-owners and beneficiaries of Share No. 430 when he applied for letters of administration in Succession cause No. 916 of 1996 and thus fraudulently obtained title deeds between the years 2006 and 2007 emanating from Share no. 430. The Plaintiffs particularized fraud perpetrated by the Plaintiffs to include: failing to notify the 2<sup>nd</sup> Defendant of the late Ndolo Musyimi's interest in Membership Share No. 430; failing to declare the late Musyimi's interest and that of his estate in Membership Share No. 430 while obtaining letters of administration; failing to declare interests of the estate of the late Musyimi in Plot no. 121, having lived there for more than 30 years and causing such plots to be registered to the exclusion of the Estate of the late Ndolo Musyimi.

6. The Plaintiffs deposed that the 1<sup>st</sup> Defendant caused Plot numbers 121, 462 and the commercial plot to be registered and issued with title deeds to the Plaintiffs' exclusion as follows: Plot no. 121 measuring 20 acres, and now known as Mavoko Town Block 3/3264, Plot no. 462 measuring 40 acres and now known as Mavoko Town Block 3/1932 and the commercial plot now known as Mavoko Town Block 3/530.

7. They add that the dependents of the late Ndolo Musyimi are in occupation of Plot number. 121 also known as Mavoko Town Block 3/3264 and that if the prayed orders are not granted, the 1<sup>st</sup> Defendant is likely to interfere with their enjoyment and use of the same. The Plaintiffs averred that the estate of the late Ndolo Musyimi is thus entitled to half share in membership no. 430 and beneficial ownership of land allocated out of the said membership.

8. The 1<sup>st</sup> Defendant filed a Replying Affidavit dated 25<sup>th</sup> January 2010, in which he deposed that he is the administrator of the estate of the late Kilundo Nzivo. The 1<sup>st</sup> Defendant denied that Ndolo Mutisya contributed any money for purchase of shares in Lukenya Ranch; that share certificate number 430 was solely purchased by his late father; that any subsequent allocation of the land out of such shareholding was exclusively to his father, Kilundo Nzivo and that the said share is not held in trust for any other person other than the late Kilundo Nzivo's beneficiaries.

9. The 1<sup>st</sup> Defendant deposed that the annexed agreement was unknown to the estate of Kilundo Nzivo; that the late Kilundo did not sign the agreement; that the witnesses in the agreement were not from the family of Kilundo Nzivo and no such information had ever been received from such witnesses and that to the extent that the claim is based on the agreement, the same was statute barred as it ought to have been instituted six years from the last date of execution.

10. The 1<sup>st</sup> Defendant deposed that the fact that Kilundo Nzivo was able to sell some land shows that he was exercising his sole proprietorship rights over the parcels of land listed by the Plaintiffs; that the listed parcels of land are under his sole administration and that the occupation of plot number 121 by the family of Ndolo Musyimi since 1976 does not give them proprietorship rights over the land. The 1<sup>st</sup> Defendant challenged the jurisdiction of this court. According to the 1<sup>st</sup> Defendant, the suit should have first been filed at the Co-operative Tribunal.

11. The 1<sup>st</sup> Defendant also filed a Notice of Preliminary Objection on a point of law, in which he sought to have the suit dismissed on the ground that the purported sale agreements dated 18<sup>th</sup> March 1973 and 2<sup>nd</sup> April 1978, forming the basis of the suit, are null and void and unenforceable as they have been caught up by the limitations of time, pursuant to the provisions of **section 4(1) (a) of the Limitation of Actions Act**. According to the 1<sup>st</sup> Defendant, the court lacks jurisdiction to hear and determine this suit, the same being time barred.

#### **The Plaintiffs' case**

12. The suit proceeded by way of oral evidence. The 2<sup>nd</sup> Plaintiff, PW1, informed the court that he is a son to the deceased Nicholas Ndolo Musyimi. PW1 reiterated the deposition in support of the Originating Summons which I have summarised above. According to PW1, the late Ndolo Musyimi and Kilundo Nzivo entered into agreements in 1973 and 1978 for joint purchase of a share in Lukenya Farming and Ranching Co-operative society (the 2<sup>nd</sup> Defendant) and that after the purchase of the said share, Kilundo Nzivo was allocated Membership Share No. 430 which he held in trust for Ndolo Musyimi.

13. PW1 informed the court that from the share, the late Nzivo was allocated plot numbers 121, 462, 741 and a commercial plot as well as other benefits, which he failed to share with the late Ndolo; that Ndolo Musyimi's family settled on Plot number 121 in 1976 to date, while Kilundo Nzivo's family settled on plot number 462 and that the late Nzivo fraudulently sold plot no. 741 and the commercial to Maiso Mbugua in 1992.

14. PW1 reiterated the particulars of fraud set out in his supporting affidavit as elaborated above. PW1 added that the Plaintiffs made several efforts, albeit unsuccessfully, to resolve the matter through family and clan interventions, the Land Tribunal and through the Provincial administration. In cross-examination, PW1 stated that he was not present during the agreement that was entered into between the late Nzivo and Musyimi; that he did not object to the succession of the estate of the late Kilundo Nzivo because he did not know about the existence of the succession case and that he was aware that although the 2<sup>nd</sup> Defendant was liquidated, they had not sued the liquidator.

15. The 1<sup>st</sup> Plaintiff, PW2, reiterated the evidence of PW1 and the depositions in the supporting affidavit. According to PW1, he is a son of the late Nicholas Ndolo Musyimi and that his grandmother relocated to Plot no. 121 in 1976, while his mother relocated to the same plot in 1980 and himself in 1993. PW1 stated that his entire family has occupied the land openly and with the knowledge of the 1<sup>st</sup> Defendant's family since 1976 to date and that he was thus surprised to learn that the land had been registered in the name of the late Nzivo's estate to the exclusion of his father's interest in the land.

16. He states that they had made various efforts to resolve the issue to no avail, including through family intervention, the Land Tribunal, the Land's department and provincial administration.

17. In cross-examination, PW2 stated that he did not witness the signing of the 1973 agreement and that his father paid Kshs 1000 out of the Kshs 6000 that members were required to pay for the share. In re-examination, PW1 stated that his father contributed a total of Kshs. 3000, being Kshs. 1000 in 1973 and Kshs. 2000 in 1978 which he gave to Kilundo Nzivo to purchase the share from Lukenya. According to PW 2, the estate of Musyimi was entitled to half the share of the land that emanated from the share that was purchased by the two from Lukenya Ranching and Farming C-operative Society Limited.

18. PW3 testified that he was a friend to the late Ndolo Musyimi; that he was a witness to the agreement of 18<sup>th</sup> March 1973 between the late Ndolo and the late Nzivo and that the agreement took place within Mitaboni market, Machakos and involved himself, the late King'oo Kyungu, the late Kitung'u Muinde, the late Nzioka Mwilu, the late Kilundo Nzivo and the late Nicholas Ndolo Musyimi.

19. According to PW 3, In the meeting where the agreement was signed, Kilundo Nzivo stated that he had purchased a joint share with Nicholas Ndolo and that that they had each paid Kshs. 1000 to Lukenya Ranching and Farming C-operative Society Limited towards the value of the share, making a total of Kshs. 2000 at that time. PW 2 stated that both parties were equal beneficiaries of all the proceeds and benefits from the share.

20. PW 3 stated that he was aware that Nicholas Ndolo's widow, Esther Mbenyi Ndolo and her two sons, William Maithya Ndolo and Samuel Mbila Ndolo, occupy one of the parcels allocated to both Ndolo Musyimi and Kilundo Nzivo by the 2<sup>nd</sup> Defendant and that he was thus surprised to learn that the late Kilundo Nzivo and his family have been claiming that the late Ndolo Musyimi and his family are not beneficiaries of the joint share at Lukenya Ranch.

21. In cross-examination, PW3 testified that the land in issue was owned by the 2<sup>nd</sup> Defendant; that he was a witness in the 1973 agreement but not in the 1978 agreement and that the agreement was recorded by Munyao, who was an employee of the late Kilundo. PW 3 informed the court that he was 86 years old.

### **The 1<sup>st</sup> Defendant's case**

22. The 1<sup>st</sup> Defendant, DW1, relied on the Replying Affidavit filed on 25<sup>th</sup> January 2010 and his statement filed on 16<sup>th</sup> January 2020, both of which have been summarized above. In cross-examination, DW 1 asserted that he did not have the receipts that were issued when the share was bought for Kshs. 6000 and that the late Kilundo Nzivo told him that he paid the entire Kshs. 6000.

23. According to DW 1, share number 430 gave rise to four plots being numbers 121, 462, 741 and a commercial plot; that plot number 121 does not have a title to date; that his father signed for the other plots, excluding plot number 121, and was issued with titles for those properties; that he has never seen the agreement of 1973 and that his father neither signed for the payment of Kshs. 1000 by the Plaintiffs' father nor did he sign an acknowledgment for the said amount.

24. In re-examination, DW1 stated that he did not know the persons who signed the 1973 agreement and that he did not inform the Plaintiffs about the succession of his father's estate as they were not members of that family.

### **The Submissions**

25. In their submissions dated 10<sup>th</sup> August 2021, the Plaintiffs' advocate restated the Plaintiffs' claim as set out in the Originating Summons. Counsel submitted that it was the intention of Ndolo Musyimi and Kilundo Nzivo to jointly purchase and equally hold a membership number from the 2<sup>nd</sup> Defendant; that while DW1 stated that all the plots emanating from the shareholding were held by his father, he did not prove that his father did not receive money from Ndolo Musyimi and that it is only just that the interests emanating from share number 430, being the four plots, be jointly shared between the estates of Ndolo Musyimi and Kilundo Nzivo.

26. In response to the 1<sup>st</sup> Defendant's preliminary objection that this suit is time barred as it was based on the sale agreements dated 18<sup>th</sup> March 1973 and 2<sup>nd</sup> April 1978, the Plaintiffs' counsel submitted that the agreements were for the purchase of a share from the 2<sup>nd</sup> Defendant and that the suit seeks a declaration that the benefits from the share be shared equally. Counsel relied on the case of **Gathoni vs Kenya Co-operative Creameries Ltd (1982) eKLR** where Potter JA articulated the rationale of the law of limitations:

***“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”***

27. Counsel relied on the provisions of **section 7 of the Limitation of Actions Act** which provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued; that the 1<sup>st</sup> Defendant obtained the title deeds for the two parcels of land in 2006 and that where the subject of a contract involves land, time begins to run once the vendor obtains a certificate of title, as stated in the case of **John Muthus Mweke vs Mosoi P. Parkut (2020) eKLR**.

### **Analysis and Determination**

28. The issue for determination in this matter is whether the Plaintiffs have established a claim for half share of membership number 430 and the plots that ensued from the said share. While opposing the suit, the 1<sup>st</sup> Defendant has averred that this suit is statute barred because it is based on contracts that were made in 1973 and 1978.

29. The Plaintiff's suit, as I understand it, is to recover half of land known as Mavoko Town Block 3/ 1932, 3264 and 530 (the suit

properties), the same having been registered in favour of the late Kilundo Nzivo fraudulently. According to the Plaintiffs, their father, the late Ndolo Musyimi contributed equally to the purchase of share number 430 from the 2<sup>nd</sup> Defendant, which gave rise to the suit properties.

30. The law governing the limitation of time for recovery of land is **section 7** of the **Limitation of Actions Act** which provides as follows:

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

31. The evidence produced in court shows that the 1<sup>st</sup> Defendant obtained titles in respect of land known as Mavoko Town Block 3/ 1932 and 530 were issued to the late Kilundo Nzivo on 23<sup>rd</sup> January, 2006. A period of twelve years had not lapsed as between when the said titles were issued and when this suit was filed in the year 2012.

32. In respect to the other parcels of land that have not been registered, and which arose from the share number 430, the Plaintiffs have averred that the 1<sup>st</sup> Defendant failed to declare while conducting the succession proceedings in respect of the Estate of the late Kilundo Nzivo, that the said share was jointly owned by Kilundo Nzivo and Musyimi.

33. The impugned succession proceedings in respect of the Estate of Kilundo Nzivo were commenced in Nairobi High court succession cause number 916 of 1996. Although the letters of administration were issued in respect to that Estate on 5<sup>th</sup> September, 1996, it is not clear when the same were confirmed by the court. **Section 26** of the **Limitation of Actions Act** sets out the exceptions where an action based on fraud may not be caught up with limitation of time as follows:

**“Where, in the case of an action for which a period of limitation is prescribed, either—**

**(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**

**(b) the right of action is concealed by the fraud of any such person as aforesaid; or**

**(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:**

34. In this case, the period of limitation could not begin to run until the Plaintiffs discovered the alleged fraud, which could only have been post the succession proceedings in respect of the Estate of the late Kilundo Nzivo, in which the letters of administration were issued on 5<sup>th</sup> September, 1996. The said letters of administration could only have been confirmed by the court upon the expiry of six months after the issuance, which would not have been before 5<sup>th</sup> March, 1997. Between 1997 and 2009 when this suit was filed, a period of 12 years had not lapsed. Consequently, it cannot be true as alleged by the 1<sup>st</sup> Defendant that this suit is time barred.

35. The Plaintiffs' suit is based on agreements that existed between the late Ndolo Mutisya, whose estate is represented by the Plaintiffs, and the late Kilundo Nzivo, whose estate is represented by the 1<sup>st</sup> Defendant. The Plaintiffs claim that between the years 1973 and 1978, these two parties made equal contributions towards the purchase of a share in the 2<sup>nd</sup> Defendant, Lukenya Ranching and Farming Cooperative Society. The Plaintiffs tendered written evidence of these agreements. PW3 informed the court that he witnessed the signing of the first agreement.

36. In the agreement dated 18<sup>th</sup> March, 1973, the two parties allegedly agreed that they had each contributed Kshs. 1,000. The agreement does not state why the two parties were contributing the said amount. The agreement, although signed by witnesses, it was not signed by the two parties. The same scenario applies to the agreement dated 2<sup>nd</sup> April, 1978. To the extent that the two documents were not signed by the two, the same cannot pass as enforceable agreements.

37. The evidence before this court shows that the late Kilundo Nzivo was issued with share No. 430 dated 9<sup>th</sup> March, 1975 by the 2<sup>nd</sup> Defendant, which the Plaintiffs. Stemming from this membership share, the late Kilundo was allocated four (4) plots: Plot No. 121 measuring 20 acres, Plot No. 462 measuring 40 acres, Plot No. 741 measuring 5 acres, and a commercial plot. It is not disputed that the family of the late Ndolo Mutisya settled on Plot No. 121 in 1976 and remain in occupation to date. It is also not contested that the family of the late Kilundo Nzivo settled on Plot No. 462. Further, both parties agree that the late Kilundo sold plot number 741 to Mr. Maiso Mbugua in 1992 as well as the commercial plot.

38. The evidence before this court shows that the 1<sup>st</sup> Defendant obtained titles for plot number 462 being Mavoko Town Block 3/1932 and the commercial plot being Mavoko Town Block 3/530. The contribution by the late Ndolo Mutisya to the purchase of Share No. 430 was proved by the testimony of PW3, who witnessed the authoring of the 1973 agreement and the peaceful and open occupation of the late Ndolo Mutisya and his family on Plot No. 121 since 1976. Indeed, the reluctance by the deceased Kilundo to obtain the title over plot number 121 yet the other plots have titles, as admitted by the 1<sup>st</sup> Defendant, is a clear indication that the late Musyimi contributed in the purchase of share number 430.

39. The 1<sup>st</sup> Defendant did not tender any evidence of an alternative arrangement that existed between the late Kilundo and Ndolo that allowed his occupation of plot number 121 measuring approximately 20 acres, and which was one of the portions of land that was allocated pursuant to share number 430.

40. The occupation of plot number 121 by the late Musyimi and his family since 1976 shows that the late Musyimi did contribute to the

purchase of share number 430. However, there was no evidence to show that the contribution in the purchase of the said share was done equally. The contribution of the late Ndolo to the late Kilundo for Share No. 430, in whichever proportion, and the occupation of the land by the late Musyimi in 1996 created a constructive trust, which is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention of the parties.

41. The Court of Appeal discussed the issue of constructive trust in *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014] eKLR* as follows:

*“a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention”.*

42. In *William Kipsoi Sigei vs Kipkoech Arusei & another [2019] eKLR* the Court of Appeal stated:

*“We agree with the English decision Yaxley v Gotts & Another, (2000) Ch 162, where it was held that an oral agreement for sale of property, created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in Macharia Mwangi Maina decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.”*

43. As a trust was created by the late Kilundo Nzivo in favor of Ndolo Mutisya with respect to share number 430, it follows that the plots and benefits received under such share were also held in trust for Ndolo Mutisya and his estate. However, the Plaintiffs having failed to prove that the contribution to the purchase of the share was done equally, and having being in possession of plot number 121 since 1976 without claiming for the other portions of land until when they filed the suit in the year 2009, it is my finding that the Plaintiffs are only entitled to plot number 121, now known as Mavoko Town Block 3/3264.

44. For those reasons, the Plaintiffs’ Originating Summons is partially allowed as follows:

- a) **The Plaintiffs are hereby declared to be the beneficial owners of plot number 121 also known as Mavoko Town Block 3/3264 measuring approximately 20 acres.**
- b) **The Machakos Land Registrar to register the Plaintiffs, on behalf of the estate of Ndolo Musyimi, as proprietors of land known as Mavoko Town Block 3/3264 measuring approximately 20 acres.**
- c) **The 1<sup>st</sup> Defendant to pay the costs of the suit.**

**DATED, SIGNED AND DELIVERED IN MACHAKOS VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2022**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

No appearance for the Plaintiffs

No appearance for the Defendants

Court Assistant: Okumu