



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**E.L.C CASE NO.125 OF 2017**

**PETER KITIVI MALINDA.....PLAINTIFF**

**VERSUS**

**FRANCIS KIMEU MBULU.....DEFENDANT**

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

1. By his plaint dated 05<sup>th</sup> March, 2012 and filed in court on 12<sup>th</sup> March, 2012 the Plaintiff prays for Judgement against the Defendant for: -
  - a) **An order of permanent injunction restraining the defendant, his agent, servants and or employees from entering, constructing, cultivating, depositing any building or in any other way interfering with the Plaintiff's land known as MachakosKonza North Block 1/717.**
  - b) **An order of eviction to remove the defendant and all illegal structures constructed on the parcels of land known as MachakosKonza North Block 1/717.**
  - c) **General damages for trespass and for loss of mesne profits.**
  - d) **Cost and interest of this suit.**
2. The Plaintiff has averred in paragraphs 3, 4 and 5 that he is the registered owner of all that parcel of land known as Machakos Konza North Block 1/717 situated in Konza Ranch in Machakos, that the land is clean and has no encumbrances and that the defendant who is his nephew, has trespassed into the said parcel of land and proceeded to construct temporary structures threatening to completely restrain the Plaintiff from accessing his land.
3. The Plaintiff's claim is denied by the Defendant vide his statement of defence and counterclaim dated 26<sup>th</sup> March, 2012 and filed in court on even date.
4. In paragraphs 1, 2 and 3 of his counterclaim, the Defendant has averred that land parcel No.Machakos Konza North Block 1/717 is a dividend of share No.965 which the Plaintiff owned together with the Defendant's father and as such, the Land Registrar Machakos should be directed to rectify the Register to include the Defendant's name, that the Defendant has lived on the land in question for more than 30 years and has acquired the same by way of adverse possession and that the Plaintiff registered that land by way of fraud. The Defendant has pleaded the particulars of fraud.
5. On the 25<sup>th</sup> April, 2012, the Plaintiff filed a reply to the Defendant's defence and counterclaim the same being dated 25<sup>th</sup> April, 2012. In paragraph 16 of his reply to the defence and counterclaim, the Plaintiff has averred that it is the Defendant who is guilty of fraud particulars of which have been pleaded.
6. The Plaintiff's case was that he is the registered owner of land parcel No. Machakos Konza North Block 1/717. He produced its title deed and certificate of official search in respect of the land as P.Exhibit No.1 and 2. He went on to produce his membership card No.506, bundle of receipts for payment of the shares, bundle of photos and demand letter as P.Exhibit Nos. 3, 4, 5 and 6 respectively.
7. The Plaintiff went on to say that the Defendant is his nephew. That the Defendant's father has his own parcel of land in Konza. He revealed that the plot in question was bought jointly by him and the Defendant's father. That he later voluntarily surrendered the plot to the Defendant's father upon which he bought the said land parcel No.Machakos Konza North Block 1/717 (hereinafter referred to as the suit property). It was also his case that the suit property does not belong to the clan as he bought it himself and that the Defendant resides in it. According to the Plaintiff, the Defendant entered into the suit property and refused to vacate it. He went on to say that he did not allow the

Defendant to move into his property. He revealed that the Defendant did not enter into the land during his father's lifetime.

8. He said that the signature in the 2<sup>nd</sup> Defendant's supplementary list of documents is not his and revealed that there are times when he signs or thump prints. That he used to sign documents in 1979.

9. The Plaintiff further said that the Defendant used to work for Konza Ranch before he retired. He added that he would have generated a lot of money had he been working on the land. He said that he could not be able to give estimates but it would be in the thousands.

10. The Plaintiff's evidence in cross-examination by Mr. Langalanga for the Defendant was that he and one Mbulu are cousins. That the latter had his own shares in Konza. He reiterated that he too had his own shares. That he surrendered his share to Mbulu in the land that the two owned jointly. He said that the land that he surrendered cannot be Machakos Konza North Block 1/717. That Mbulu never gave him Kshs.1,000/= towards purchase of shares. He said that is about 5 years since he started demanding that the Defendant should vacate the suitland. He denied the suggestion that Mbulu had been in possession for over 38 years even though he could not be able to tell the number of years the latter has been in occupation. He said that the land used to be vacant before the Defendant occupied it and that the dispute arose after the death of the Defendant's father. He said that the witnesses that are in the agreement relied upon by the Defendant are relatives of the Defendant.

11. The Plaintiff's evidence in re-examination by Mr. Kivuva was that Mbulu Munyeki never gave him Kshs.1,000/= to purchase shares in Konza Ranch. He said that the suitland is his.

12. Gabriel Munyoi Kitivi's (PW1) evidence in chief was that the Plaintiff is his father while the Defendant is his cousin. That the Plaintiff bought Machakos Konza North Block 1/717. He revealed that he assisted the Plaintiff to purchase the suitland as he was by then working. That the Plaintiff did not buy the suitland jointly with the Defendant's father. That the Defendant's father has his own parcel of land within the Ranch. The witness denied the contention by the Defendant that the Plaintiff holds the suitland in trust for him. That the Defendant's father died in the year 2002 while the Defendant entered into the suitland in the year 2000. The witness revealed that it was the Plaintiff who allowed the Defendant to occupy the suitland so as to forestall invasion by other people. That the Defendant started to build on it despite the Plaintiff's protestations. He said that it is not true that the Defendant entered into the suitland in the year 1979 as the latter has claimed. He said that the Defendant is a former employee of Konza Ranch. That he does not know if the Defendant has letters of administration in respect of his father's estate. The witness revealed that the land that is owned by the defendant's father is occupied by children of his second wife. That the Defendant's father had two parcels of land whose size is 10 acres each.

13. The witness said that he has never seen the document dated 27<sup>th</sup> January, 1979 that the defendant has included in his supplementary list of documents. He said that he was 29 years old in 1979. That he attended the Amutei clan meeting referred to in the document but the clan did not resolve the matter since the land in question did not fall under clan land.

14. Finally the witness said that they would be harvesting 250 bags of maize per season had they been using the land and that a bag of maize costs Kshs.3,000/=. That an acre of land is leased at Kshs.5,000/= per season thus in a year, they would get Kshs.600,000/=.

15. On being cross-examined by Mr. Hassan for the Defendant, Kitivi (PW1) told the court that an acre of land yields 25 bags of maize. He said that he has never farmed in the suitland. He said that his estimates are based on the rate of harvest per acres in Konza area. He reiterated that his father had initially allowed the Defendant to farm on the suitland. That in the year 2002, they demanded that the Defendant should vacate the farm. The witness said that although the Defendant and the Plaintiff are related, the latter did not seek contribution from the father of the Defendant towards the purchase of the suitland. He reiterated that the Defendant has his own parcel of land. He said that the signature in the agreement dated 27<sup>th</sup> January, 1979 does not belong to his father. That the Defendant began claiming for a share in the suitland after the death of his (defendant's) father. He said that there was no dispute in the year 1989.

16. The Defendant's case was that in the year 1979, the Plaintiff went to see his father so that they could buy land together. That the Plaintiff produced Kshs.600/= while the Defendant's father gave out Kshs.1,000/=. He went on to say that his father and the Plaintiff entered into an agreement dated 27<sup>th</sup> January, 1979 (D.Exhibit No.1(a)). It's translation was produced as D.Exhibit No.1(b). According to the Defendant, the suitland should be shared equally between himself and the Plaintiff.

17. The Defendant's evidence in cross-examination was that his father died in the year 2008. That he has seven siblings none of whom reside on the suitland. He said that his father has a separate parcel of land in Konza which is occupied by the children of his stepmother. That they obtained the letters of administration for the estate of their father and revealed that he was the administrator. He said that he was yet to file a succession cause over the suitland. He admitted that he was not present when his father procured the paperwork towards the purchase of the suitland. He denied the Plaintiff's contention that he and the Defendant's father purchased the 12 acre farm that belongs to his (defendant's) father. He said that the Plaintiff was what he termed as a quiet member under the Defendant's father. That the Plaintiff acquired his title deed in the year 1991 and that it's share was acquired in 1979. On being shown a receipt (D.Exhibit No.4), the Defendant said that the same was issued in 1971 and is in the name of the Plaintiff. He agreed that he never opposed the Plaintiff when he acquired the title deed.

18. His evidence in re-examination was that his father and the Plaintiff purchased the suitland in 1979.

19. Stephen Nzioka Kavita (DW1) in his evidence in chief told the court that the Plaintiff is his cousin. That in 1979, the Plaintiff asked him to go and see Mzee Mbulu. That when he went to see Mzee Mbulu, he (DW1) was designated as a secretary in a meeting where there were six people in attendance. That he was the one who prepared the agreement marked as D.Exhibit No.1(a).

20. Kavita's (DW1) evidence in cross-examination was that he is older than Kitivi (PW1) by three years. He went on to say that he knew that the Plaintiff knew how to write and admitted that he (DW1) had not signed the agreement (D.Exhibit No.1(a)) in question. He pointed out that the other persons in the agreement had been invited by the late Mbulu. That in the said meeting, Mbulu gave the Plaintiff

KShs.1,000/= which was meant for the purchase of a share in land. That the money was to be refunded. He said that he did not forge the Plaintiff's signature and that his relationship with the latter was cordial.

21. His evidence in re-examination by Mr. Mutune was that he was the one who recorded the agreement which was signed by both the Plaintiff and the late Mbulu.

22. Martin Maweu Mulandi's (DW2) evidence in chief was that he attended a meeting in 1979 where Kavita (DW1) was the secretary. That the plaintiff and the late Mbulu were in attendance. That after the meeting he offered a goat that was slaughtered and they all ate it.

23. His evidence in cross-examination by Mr. Kivuva was that the agemates of the Plaintiff did not attend the meeting of 1979 where the agreement was made. He said that three of the witnesses to the agreement were Mbulu's sons while no son of the Plaintiff was present. He said that he was not able to know the particular number of shares that were to be bought. He agreed that the agreement does not indicate the share number.

24. Wambua Munyeke's (DW3) evidence is similar to that of Kavita (DW1) and Mulandi (DW2). His evidence in cross-examination by Mr. Kivuva for the Plaintiff was that by the time that he retired in 1993, Konza Ranch had been subdivided. The witness used to work as a cashier at the Ranch. He said that the Plaintiff paid for his share and he was issued with a receipt. He said that he heard of a dispute involving the Plaintiff and that the disputants appeared before the Ranch Committee. He however admitted that he had no minutes of such a meeting. He pointed out that the Plaintiff was member number 965 while Mbulu was member number 76. He revealed that he was the one who used to keep the members register. That the plaintiff was the one who used to pay for the share. That he only came to learn of the joint share from Mbulu in 1986.

25. In his submissions, the Plaintiff's Counsel submitted that the title in dispute was issued under the repealed Registered Land Act (cap 300). That this being a first registration, under Section 27(a) of the repealed Act, the proprietor is vested with absolute ownership with rights and privileges belonging or appurtenant therefore. That under Section 143 of the repealed Act, a first registration could not be challenged and the title could not be annulled on account of fraud or mistake. That nevertheless, the title was subject to overriding rights under Section 30 of the repealed Act. That those overriding rights have been interpreted by courts to incorporate customary trust. That in the suit herein, parties have confirmed that the dispute does not involve customary trust since the property was purchased through shares held in a separate legal entity.

26. The Counsel further submitted that under Sections 24 and 25 of Land Registration Act (No.3 of 2012), a proprietor of land enjoys absolute ownership of the property. Section 28 of the same Act specifically names trusts, including customary trust as an overriding interest in land. That in this suit, there is no claim for customary trust in the defence and counterclaim.

27. The Plaintiff's Counsel framed the four (4) issues for determination. These were:-

- 1. Whether the Defendant has trespassed in the Plaintiff's land.**
- 2. Whether the defendant is entitled to be registered as joint owner of the property.**
- 3. Is the plaintiff entitled to loss of mesne profits?**
- 4. What orders should be issued.**

28. On the other hand, the Defendant's Counsel framed only one issue namely:-

- 1. Whether the Plaintiff, and Mbulu Munyeke entered into a valid agreement to purchase shares in Konza?**

I will however adopt the issues as framed by the Plaintiff's Counsel.

**Whether the defendant has trespassed into the Plaintiff's land**

29. The Plaintiff's Counsel submitted that the Defendant has not disputed that the Plaintiff is the registered owner of Machakos Konza North Block 1/717. The Counsel pointed out that the Defendant amended his defence and counter claim without seeking leave as is required under Order 8 Rule 3 of the Civil Procedure Rules. The Counsel added that the amended defence and counterclaim is in breach of Order 8 Rule 7 of the Civil Procedure Rules for its failure to highlight or delete the amendments in red. The Counsel urged the Court to strike out the amended defence and counterclaim dated 14<sup>th</sup> May, 2012 and filed in court on 15<sup>th</sup> May, 2015 for violating the aforementioned provisions of the Civil Procedure Rules.

30. The Defendant's Counsel did not make any reply on the issue of the amendment.

31. I have perused the pleadings herein and I have not seen the amended defence and counterclaim said to be dated 14<sup>th</sup> May, 2012 and filed in court on 15<sup>th</sup> May, 2012. I will therefore say nothing more on this issue save that both parties ought to have shed more light on the same. Be that as it may, the Plaintiff's Counsel submitted that the Plaintiff and his witness have established that he is the registered owner of the suitland. That the plaintiff denied the signature on D.Exhibit No.1(a) as not belonging to him. The Counsel further submitted that the Defendant admitted the Plaintiff's registration as the owner of the suit property. The submissions by the Defendant's Counsel are silent on this issue.

### Whether the Defendant is entitled to be registered as joint owner of the property

32. The Counsel submitted that the Defendant has neither challenged the Plaintiff's evidence nor has he demonstrated that he is a joint owner of the suit property due to the following reasons: -

1. *The defendant is not the administrator of the estate of his deceased father and has no capacity to enforce any rights on behalf of the estate. No letters of administration were produced in court. The defendant admitted that he comes from a polygamous family of 8 brothers who have not taken possession of the suit land.*
2. *The defendant's father did not file any claim during his lifetime to enforce any contractual arrangements he might have had with the plaintiff. At any event, even if the court finds that the alleged agreement produced as D.Exhibit 1 was validly executed, the same was only enforceable within 6 years from 1979 as per Section 7 of the Limitation of Action Act. The claim for fraud is equally time barred. It should have been filed within 3 years from 2001 when the title was issued. The claims should have been filed by 1985. The court cannot enforce a claim filed outside the limitation period.*
3. *Under Section 119 of the Companies Act Cap 486 Laws of Kenya, (repealed) and Section 104 of The Companies Act, 2015 members are expressly prohibited from holding shares in trust for others. The defendant cannot claim that the defendant was registered as a shareholder in trust for his father. A court of law cannot enforce an illegality.*
4. *The Plaintiff has not pleaded holding the property under adverse possession in his defence and counter claim. No evidence was led towards that claim. The court cannot make that finding since it is not pleaded. Parties are bound by their pleadings. The defendant has not established that he has adversely possessed the property. He admitted that he was allowed into the property by consent and as a nephew of the plaintiff.*
5. *None of the defence witness testified whether the shares bought by the plaintiff and the Mbulo Munyeke were in relation to the 12 acres plot registered in the name of the Mbulo Munyeke or the 10 acres owned by the plaintiff. On his part the plaintiff and PW1 were clear that the joint shares were in relation to the 12 acre plot owned by the father of the defendant which the plaintiff decided to relinquish to his brother before purchasing his own shares.*
6. *The issue of customary trust is foreign to Companies Act. The property in issue does not arise out of the family property. It was purchased by the plaintiff. The receipts produced as exhibit 4 indicated that the plaintiff paid a total of Kshs.4,660/= which is far more than the Kshs.2,000/= stated by the defendant. Furthermore, the defendant did not produce any documents to show the value of a single share at Konza Ranch was Kshs.2,000/=.*
7. *Konza Ranch is public company. No challenge has been filed by the defendant against the plaintiff at Konza Ranch in regard the Plaintiff's shares. The defendant claimed to have worked at Konza for many years. Surely he should have challenged the shares held by the plaintiff before the directors of Konza Ranch Limited.*
8. *The defendant admitted receiving the Plaintiff's demand dated 24/1/2012 to move from the property and confirmed that he has failed to heed to that demand.*

33. On the other hand the defendant's Counsel submitted that the defendant has adduced evidence to show that there exists a constructive trust and, therefore, the court should make a finding for him. The Counsel relied on the case of **NWK v JKM & Another [2013] eKLR**.

### Whether the Plaintiff is entitled to mesne profits

34. The Plaintiff's Counsel cited **Section 2 of the Civil Procedure Act** which defines what constitutes mesne profits. He also cited the case of **Rajan S. Shah & Partioners vs. Bipin P. Shah [2016] eKLR** where Mativo, J held as follows: -

*'The Black's Law Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." The Concise Oxford English Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord."*

*The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.*

*Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.'*

Arising from the above, the Counsel submitted that the Plaintiff testified that had he been farming on his land, he would have realized 250 bags of maize per year for the entire 10 acres. That had he rented the suit property, he would have been paid Kshs.600,000/= per year. The Counsel added that assessment of mesne profit is general damages based on discretion of the trial court and cited the case of **Ministry Valji vs. Janendra Rachand & 2 others [2016] eKLR** where the Court of Appeal held:-

*‘An award of damages or mesne profits is an exercise of discretion. This Court will not ordinarily interfere with that discretion unless the judge took into account irrelevant factor, or left out of account a relevant one or that the award was so inordinately low or high that it must be wholly erroneous estimate’*

The Counsel pointed out that the Defendant who was allowed into the suit property by the Plaintiff became a trespasser when he refused to move out of the property despite notice from the Plaintiff. Thus the Plaintiff has lost use of his farm for a period of 6 years. Based on the sum of Kshs.600,000/= per year, monthly rent would be Kshs.50,000/= thus the outstanding rent from 24<sup>th</sup> January, 2018 is kshs.3,850,000/= for a period of 6 years and 7 months. As for the maize, the same would translate to Kshs.4,500,000/=. The Counsel was of the view that considering that the Defendant and the Plaintiff are relatives, it would be reasonable if the Defendant were condemned to pay the Plaintiff Kshs.3,500,000/= for loss of mesne profits.

35. The Counsel urged the court to grant prayers (a) and (b) of the plaint as well as Kshs.3,500,000/= together with costs and interest.

36. From the evidence on record, there is no doubt that the suit property is registered in the name of the Plaintiff herein. Although the Defendant has averred in paragraph 3 of his counterclaim that the Plaintiff acquired the title deed by way of fraud, the Defendant did not adduce any evidence to support the particulars of the alleged fraud that he has pleaded in his counterclaim. The defendant seems to base his claim on the agreement dated the 27<sup>th</sup> January, 1979 (D.Exhibit No.1(a) said to have been entered into by the Plaintiff and the Defendant’s father. However there is no evidence to show that the agreement was ever brought to the attention of Konza Ranching & Farming Co-operative Society Ltd. so that the intention of the two be effected by the Society. Whether or not Konza Ranching & Farming is a company within the meaning of Companies Act as the Plaintiff’s Counsel has submitted is neither here nor there in the absence of evidence by the Plaintiff. In any case, the Plaintiff is bound by his pleadings. There is no pleading in the plaint that the entity is indeed a company. Be that as it may, a perusal of the receipts produced by the Plaintiff as P.Exhibit No.4 shows that the entity that issued them is Konza Ranching and Farming Co-op Society Ltd. Such an entity would therefore fall under the category of a Co-operative Society governed under the provisions of Co-operative Societies Act.

37. There is no evidence to suggest constructive trust and as such I hold that the same does not exist.

38. It is also clear from the evidence on record that the Plaintiff was a member number 965 of Konza Ranching and Farming Co-operative Society Ltd. He therefore cannot be said to have been a silent member as the Defendant would want this court to believe. It came out clearly from the evidence on record that the Defendant though claiming to have letters of administration in respect of the estate of the late Mbulu, he did not produce the letters in question as evidence. As it were, the Defendant did not have the legal basis to file the counterclaim. In any case, the Defendant did not adduce any evidence to show that he has been in occupation of the suit property for more than 30 years as he has averred in paragraph 2 of his counterclaim. If anything, the Plaintiff’s evidence shows that the Defendant entered into the suitland in the year 2000 with express permission from the plaintiff. As such, time would begin running from the date when the plaintiff withdrew his permission. A claim of adverse possession by the Defendant cannot hold against the Plaintiff. The Defendant was and is essentially a trespasser into the Plaintiff’s parcel of land number Konza North Block 1/717.

39. Having found the Defendant to be a trespasser, I do note that the Plaintiff is entitled to mesne profits. According to the Plaintiff’s Counsel Kshs.3,500,000/= would be adequate compensation. The Defendant’s Counsel is silent on the issue. Given the circumstances of this case, I am of the view that a global sum of Kshs.100,000/= per year would be suffice as mesne profits. Thus for 6 years and 7 months, this would add up to Kshs.658,333/=.

40. Being satisfied that the Defendant has on a balance of probabilities failed to satisfy this court that he has a cause of action against the Plaintiff, his claim must therefore fail. I proceed to dismiss the defence and counterclaim with costs to the Plaintiff. As for the Plaintiff’s suit, I am satisfied that the Plaintiff has a cause of action against the Defendant on a balance of probabilities. In the circumstances, I hereby proceed to enter judgment for him and against the Defendant in terms of prayers: -

- (a)
- (b)
- (c) Kshs.658,333/= being mesne profits
- (d)

**Signed, dated and delivered at Makueni this 10<sup>th</sup> day of July, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Kiluva holding brief for Mr. Kivuva for the Plaintiff

Ms. Kyalo holding brief for Mr. D. M. Mutinda for the Defendant

Ms. C. Nzioka – Court Assistant

**MBOGO C. G. (JUDGE),**

**10/07/2019.**