



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO.201 OF 2017

(formerly machakos hcc no.75 of 2006)

SIMEON MWATU

TABITHA MWATU.....PLAINTIFFS

VERSUS

REBECCA KALUNGU KILIKU

MARY NDWALE MUNUVE

MBINDU MICHAEL

SCHOLASTICA MUIA

KINYAMBU KEESI.....DEFENDANTS

JUDGEMENT

1. By his plaint dated 15th August, 2006 and filed in court on even date, the Plaintiffs pray for judgement against the Defendants for: -
 - (a) **An order of injunction to permanently restrain the defendants, their agents and/or servants from entering, using or in any other way interfering with the Plaintiff's right of use and possession of parcel Nos.390 and 296 within Kaumoni Adjudication section in Makueni District.**
 - (b) **Costs and interest.**
2. The Plaintiffs have averred in paragraphs 3, 4, 5 and 6 of their plaint that they are the legal administrators of the estate of Mwatu Ngunzi Tama (deceased) who was the owner of land parcel Nos.390 and 296 in Kaumoni Adjudication Section in Makueni District, that on 02nd May, 1986 the then Machakos District Commissioner acting under powers conferred upon him by the Minister of Lands and Settlements by legal notice No.191 of 30th August, 1985 vide the Minister's appeal No.956 of 1986 in his judgement ordered land parcel Nos.390 and 917 to be combined together and shared equally between the deceased Mwatu Ngunzi Tama and Savali Munuve Ngunzi (who is also deceased) and retain parcels Nos.390 and 917 respectively, that in his said judgement the District Commissioner directed the District Lands Adjudication Settlement Officer and the District Surveyor to implement the order and see to it that parties get their respective title deeds and that the Plaintiffs' claim against the Defendants is for an order of injunction to permanently restrain them from entering, using and/or in any other way interfering with the Plaintiffs' right of uses (sic) and possession of P/Nos.390 and 296.
3. The Plaintiffs' claim is denied by the 1st and 4th Defendant vide their statement of defence dated 24th August, 2006 and filed in court on 25th August, 2006. The Defendants pray that the Plaintiff's claim be dismissed with costs. Equally, the 5th Defendant has opposed the Plaintiff's claim vide his statement of defence dated 06th September, 2006.
4. During the hearing of the Plaintiff's case on 05th April, 2018 the 1st Plaintiff testified on his own behalf as well as on behalf of his aged mother who is the second Plaintiff herein. The 1st Plaintiff proceeded to adopt his statement dated 27th March, 2018 and filed in court on 04th April, 2018 as his evidence. He went on to produce the District Commissioner's decision dated 02nd May, 1986 and which decision is in his list of documents dated 27th March, 2018 and filed in Court on 04th April, 2018 as P.Exhibit No.1.
5. The Plaintiffs' statement is to the effect that the 1st Defendant is his cousin while the 2nd, 3rd and 4th Defendants are sisters to the 1st

Defendant. That the 5th Defendant is a neighbour to the 2nd and the 3rd Defendants. That the 2nd and 4th Defendants have since then been deceased while one Savali Munuve Ngunzi (now deceased) is the mother of the Defendants. That Mwatu Ngunzi Tama is his deceased father while his co-Plaintiff is his mother. That he is the legal administrator of the estate of the estate of his deceased father. That his father was the registered owner of land parcel number 390 Kaumoni Adjudication Section in Makueni District from which plot number 917 was curved. That the 1st to 4th Defendant's mother, Savali Munuve Ngunzi, the widow of Munuve Ngunzi lodged appeal number 756 of 1986 before the Minister. Munuve Ngunzi was the elder brother of the 1st Plaintiff's father. That on 25th May, 1986, the then Machakos District Commissioner constituted a special committee vide legal notice number 191 of 30th August, 1991, sitting under the powers conferred upon him by the Minister for Lands and Settlement to preside over the Minister's appeal No.756 of 1986 whereupon in his judgement, ordered that land parcels numbers 390 and 917 measuring 28 acres be combined then shared in two equal acreage between Mwatu Ngunzi Tama and Savali Munuve Ngunzi who are both deceased and represented by the parties herein. That in the said judgement, the District Commissioner directed the Lands Adjudication and Settlement officer and the District Surveyor in the presence of the area chief and the parties to implement the decision and observe that the two parties obtain their respective title deeds.

6. The Plaintiff was not cross-examined since Mr. Hassan who held brief for Mr. A. M. Mbindyo walked out of the court room while the Plaintiff was testifying. Earlier, Mr. Hassan had told the court that he had no instructions to proceed with the hearing.

7. At the close of the Plaintiff's case, the 1st Defendant successfully applied for adjournment to enable him to appear in court to testify. The matter was fixed for defence hearing on 07th May, 2018 when the court was informed that the 1st, 2nd, 3rd and 4th Defendants had appointed Ndeda & Company Advocates alongside Kimani Kimondo & Co. advocates to act for them in place of A. M. Mbindyo & Co. Advocates. Ndeda & Company Advocates filed a notice of change of advocates on the 07th May, 2018, the same being dated 04th May, 2018.

8. The new advocates sought for adjournment to enable them to prepare upon which they were granted the last adjournment and the matter was fixed for defence hearing on 12th July, 2018. Come the 12th July, 2018, neither the Defendants nor their advocate appeared in court and their case was deemed as closed. Later on the same day, Mr. Mutinda who held brief for Ndeda & Co. Advocates appeared in court and indicated the Defendants' intention to file an application to re-open defence upon which they were granted 14 days to do so. On the 30th July, 2018 the Defendants filed the Notice of Motion application dated 25th July, 2018. The application sought the following orders:

1) THAT there be a stay of proceedings herein pending the hearing and determination of this application.

2) THAT the Honourable Court be pleased to set aside the evidentiary proceedings conducted on 23rd November, 2017 and that taking of evidence or recording of evidence do start de novo.

3) ALTERNATIVELY, THAT the Honourable Court be pleased to recall the witnesses who testified in support of the Plaintiffs/Respondents' case and the Defendants/Applicants be given an opportunity to cross examine such witnesses, to present their evidence and to testify in support of their case.

4) THAT the draft witness statement annexed to the Application herein be deemed as duly filed, served and properly on record.

5) THAT costs be in the cause.

9. The application was allowed on 13th November, 2018 after the Plaintiffs failed to file a replying affidavit.

10. On the 04th December, 2019 Mr. Makundi sought for directions that the parties be directed to file their submissions so that the court can proceed to fix a date for judgement. Consequently, parties were directed to file their submissions and the matter was fixed for judgement on 20th March, 2020. The Plaintiffs were directed to serve the Defendants with judgement notice.

11. The Plaintiff filed their submission on 06th January, 2020 and at the time of writing this judgement, the Defendants were yet to file theirs.

12. In his submissions, Mr. Makundi for the Plaintiffs cited **Section 29 of the Land Adjudication Act** which provides that: -

“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

13. The Counsel went on to submit that the 1st Plaintiff had in his testimony testified that the dispute relating to plot numbers 390 and 296 was long finalized by the decision of the appeal to the Minister. The Counsel pointed out that the Minister's decision was produced in evidence and as such, he urged the court to order that plot numbers 390 and 917 be combined and shared between the parties herein as the Minister ordered in his judgement dated 02nd May, 1986.

14. From the evidence on record, there is a copy of the Minister's judgement in appeal No.756 of 1986. The same is marked as P.Exhibit No.1. Needless to say under Section 29(b) of the Land Adjudication Act, once the Minister makes his/her determination, the same becomes

final. There is no evidence to show if the said Minister's judgement was ever quashed in judicial review proceeding and as such, I would agree with the Plaintiffs' Counsel that the Plaintiffs have on a balance of probabilities satisfied this Court that they have a cause of action against the Defendants. In the circumstances, I therefore proceed to enter judgement in their favour and against the Defendants jointly and severally as hereunder: -

a) An order of injunction to permanently restrain the defendants, their agents and/or servants from entering, using or in any other ways interfering with the Plaintiff's right of use and possession of parcel Nos.390 and 296 within Kaumoni Adjudication section in Makueni District.

b) Costs and interest.

Signed, dated and delivered at Makueni via email this **29th** day of **April, 2020**.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi

MBOGO C.G, JUDGE,

29/04/2020.