



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 1 OF 2016

REBECCA M WIKALI JACOB..... PLAINTIFF

VERSUS

PETER NICHOLAS MUTUKU.....1ST DEFENDANT

STELLAMARIS NZILANI MUTUKU2ND DEFENDANT

LAND REGISTRAR MACHAKOS COUNTY.....3RD DEFENDANT

JUDGMENT

Introduction:

1. In the Complaint dated 8th January, 2016, the Plaintiff averred that the deceased, Jacob Kathuka, was at all material times the owner of land measuring 56.33 acres which he had purchased from Kioko Makau in 1983 and that the deceased took possession of the said land immediately.
2. The Plaintiff averred that in the year 2016, the Defendants colluded and fraudulently transferred the suit property from Kangundo Farming Ranch Limited to the 1st and 2nd Defendants; that the Defendants have since sub-divided the suit property into five portions of land and that title to parcel of land known as Ndithini/Mananja Block 5/44 registered in favour of the 1st and 2nd Defendants should be revoked.
3. In the Amended Defence and Counter-claim, the 1st and 2nd Defendants (*the Defendants*) averred that the suit property was lawfully and regularly acquired by them; that the late Jacob Kathuka was not the owner of the suit property and that the land belonged to Kangundo Farming and Ranching Company (*Ithanga*) Limited (*the Company*).
4. According to the Defendants, the alleged transaction between the deceased and one Kioko Makau was fraudulent; that the said transaction was never sanctioned by the Company; that the deceased moved onto the suit property in the year 2003 after filing HCCC No. 92 of 2003 (*subsequently Machakos HCCC No. 188 of 2008*) and that the said suit abated when the deceased died.
5. The Defendants averred that the suit property has never been surveyed; that the deceased fraudulently carried out a purported survey without the approval of the Company and that in its Resolution of 8th October, 2003, the Company nullified the Beacon Certificate issued in favour of the deceased.
6. According to the Defendants, the sub-division of the suit property is being done pursuant to the implementation of the Company's Resolution dated 13th March, 2015 and that the Plaintiff owns plot numbers 56 and 58 in the Company's scheme.
7. In the Counter-claim, the Defendants averred that the company purchased land previously known as Land Reference number 11931/2, Ndithini Division, Masinga, Machakos comprising 3,472 acres; that the deceased, who was the husband of the Plaintiff, was allocated plot numbers 56 and 58 comprising 42.9 acres and 15 acres respectively and that the 1st Defendant was allocated Plot No. 39 measuring 22.5 acres.
8. According to the Defendants, the suit property (*originally Plot No. 44*) has had various disputes because the original owner could not be traced; that the Company passed a resolution that the deceased and the 1st Defendant should share the land equally, including liabilities and that the 1st Defendant, whose property is adjacent to the suit property, moved into his portion of land in 1983 and carried out development.
9. The Defendants deponed that the deceased developed selfish interests and purported to lay claim to the entire land and upon objection by the 1st Defendant, he filed Machakos HCCC No. 92 of 2003 against the Company and the 1st Defendant.

10. According to the 1st and 2nd Defendants, while Machakos HCCC No. 188 of 2008 was pending, one Francis Mutuku Kioko, the 2nd Defendant's husband, was enjoined in the suit claiming to be the *bona fide* owner of the suit property; that the suit abated upon the demise of the Plaintiff's husband and that the Title Deeds have since been issued in favour of the 1st and 2nd Defendants.

The Plaintiff's evidence:

11. The Plaintiff, PW1, informed the court that she is the owner of the suit property which measures 56 acres; that her late husband, Jacob Kathuka, bought the land from the original owner, one Kioko Makau and that she witnessed the signing of the Agreement between the two. According to PW1, Kioko Makau purchased the land from Nzioka Kithuva and that at some time, the 1st Defendant had proposed to her that they share the suit land in equal shares but she declined.

12. According to PW1, after her husband purchased the suit land in 1983, a dispute arose between him and Muthuku Ng'ang'a which was finalized; that the 1st and 2nd Defendants have acquired a Title Deed belonging to her husband's land and that the land was owned by her late husband, Paul Maingi and Grace Thenya and that she has occupied the suit land with her children since 1983.

13. In cross-examination, PW1 stated that the suit land was initially sold to Nzioka together with two other people; that it is Joel Ngao who sold the land to the three and that the original receipt for the suit property is in the name of the said Joel Ngao.

14. PW1 stated that her late husband only purchased the share of Kioko; that it is Kioko who gave to her husband the receipt which was in the name of Joel together with the Share Certificate and that her late husband was the Chairman of Kangundo Farming Society.

15. According to PW1, the Society allocated her late husband plot numbers 56 and 58, which are far away from the suit property; that the 1st Defendant was allocated plot number 39 which is separated by the road from Plot No. 44 (the suit property); that he has since developed plot number 44 and that plot number 44 was sub-divided into three portions and her late husband took a share thereof.

16. PW1 denied that the suit property belongs to Francis Mutuku Kioko. PW1 further denied that her late husband obtained the original certificate from Joseph Kioko and that Joseph Kioko never lived on the suit land as claimed. PW1 produced in evidence the Grant, the Sale Agreement dated 12th January, 1983, the receipt for Kshs. 4,670 and the copy of the Share Certificate.

Defence case:

17. Joseph King'oo Kioko, DW1, informed the court that he is the brother of the late Francis Mutuku Kioko who died in the year 2013; that the 2nd Defendant is the wife of the late Francis Mutuku and that Francis Mutuku Kioko purchased plot number 44 from Elijah Nzioka Kithuva on 15th August, 1980 and obtained Share Certificate No. 176.

18. According to DW1, his brother engaged him to take care of the suit land in the year 1981; that he gave him the original Share Certificate number 176 which was still in the name of the original owner, Elijah Nzioka Kithuva and that the land had a temporary dwelling structure which had been constructed by Mr. Nzioka Kithuva.

19. It was the evidence of DW1 that the late Jacob Kathuka, accompanied by two gentlemen, found him on the suit land and enquired why he was tilling the land; that he gave them the original Share Certificate to show that the land belonged to his brother Francis Mutuku Kioko and that they refused to return to him the original Share Certificate.

20. According to DW1, Kioko Makau, who was his late father could not have sold the suit land to the late Jacob Kathuka because the land belonged to his brother Francis Mutuku Kioko and not his father; that Jacob Kathuka was the Chairman of the Society and that he took the Share Certificate from him.

21. In cross-examination, DW1 stated that he was chased away from the land by the Plaintiff's late husband in 1982; that the Share Certificate that was taken away from him by the Plaintiff's late husband was number 176 and that it is his brother Francis who bought the land in 1980.

22. The 2nd Defendant, DW2, informed the court that she is the widow of the late Francis Mutuku Kioko; that her late husband purchased Plot No. 44 from Elijah Nzioka Kithuva vide an Agreement dated 15th August, 1980 and that the seller surrendered to her late husband Share Certificate number 33/175 dated 3rd August, 1972. It was the evidence of DW2 that her late husband sent his younger brother, DW1, to take possession of the suit land and gave him the original Share Certificate.

23. According to DW2, the Plaintiff's late husband, in the company of one Ngenya Makena and Kasyoki Muola snatched from DW1 the original Share Certificate and chased him out of the suit land.

24. Although the husband of the Plaintiff sued the 1st Defendant and her late husband in Machakos HCCC No. 188 of 2008, it was the evidence of DW1 that the said suit abated; that later on, the Company resolved to have the suit property registered in the names of the 1st Defendant and herself and that the issue has been settled and a Title Deed issued.

25. In cross-examination, DW2 stated that she was present when her late husband bought the suit land from Elijah Nzioka Kithuva and so was Elijah's wife. According to DW2, the Share Certificate that Elijah handed over to her husband was number 175 and not 176 and that her father-in-law never sold the suit land to the Plaintiff's husband. DW1 stated that her late husband agreed to share the land with the 1st Defendant and that the Company agreed to that arrangement.

26. Elijah Nzioka Kithuva, DW3, informed the court that he was a member of Kangundo Farming and Ranching Company (*Ithanga*) Limited and held Share Certificate number 33/175 dated 3rd August, 1972; that he was allocated plot number 44 by the Company and that he sold the said plot to one Francis Mutuku Kioko vide an Agreement dated 15th August, 1980.

27. According to DW3, he surrendered the original Share Certificate to the said Francis Mutuku Kioko. It was the evidence of DW3 that he is 84 years old and that he does not know Jacob Kathuka- the Plaintiff's late husband. It was the evidence of DW3 that he sold plot number 44 to Francis Mutuku Kioko and not to Kioko Makau.

28. On his part, DW4 stated that he is one of the founder members of the Company which they formed in 1968; that they contributed money and bought parcel number 11931/2; that Jacob Kathuka was allocated two parcels of land by the company being Plot numbers 58 and 56 measuring 42.9 and 15 acres respectively and that he never owned plot number 44.

29. DW4 stated that the suit land belongs to Mutuku Kioko who disappeared from the area for a long time and that Mutuku Kioko had bought the land from Kituku Nzioka.

30. According to DW4, the Company allowed Jacob and Peter Ng'ang'a (1st Defendant) to utilize the suit land and that when the owner of the land resurfaced, he was told to compensate Jacob and Peter Kshs 5,500 each for taking care of the land. However, Jacob, deceased, later on informed the officials of the Company that he had traced the owner of the land in Kangundo and bought the land from him for Kshs. 11,000. It was the evidence of DW4 that the late Jacob and Peter never purchased plot number 44 and that the land belongs to Francis Mutuku Kioko.

31. The 1st Defendant, DW5, informed the court that he is a member of Kangundo Farming and Ranching Company (*Ithanga*) Limited ("*the Company*"); that he owns plot number 39 which he was allocated by the Company and that he is also the Secretary of the Company.

32. According to the 1st Defendant, plot number 44 was idle for many years and that the owner's whereabouts were not known. It was the evidence of DW5 that during the absence of the owner of plot number 44, the land accrued liabilities to the tune of Kshs. 15,000 and that the Company allowed him and Jacob, who was the then the Chairman of the company, to pay off the liabilities and utilize the land.

33. It was the evidence of DW5 that he paid off a portion of the liabilities and started utilizing half a portion of the suit land; that the late Jacob never utilized the other half of the portion of the land and that later on, the late Jacob purported to refund him the 5,000 he had paid and purported to claim the entire parcel of land. When he refused, the late Jacob sued him in HCCC No. 92 of 2003 (*Machakos HCCC No. 188 of 2008*) and that Francis Mutuku Kioko reappeared and was joined in the suit.

34. It was the evidence of DW5 that due to the developments that he had made on a portion of the suit property, he bought off Francis Mutuku by paying him Kshs. 194,000; that the suit by Jacob abated and that it is not true that Jacob bought the suit property from Kioko Wambua Kwilunga in 1983. It was the evidence of DW5 they later agreed with the 2nd Defendant and the company that plot number 44 is to be shared amongst four people, namely, himself, the 2nd Defendant, Virginia Ngita and Paul M. Malu.

Submissions:

35. The Plaintiff's advocate submitted that the Plaintiff owns parcel of land known as Ndithini/Mananja Block 5/44; that she has been in possession of the said land since 1982 and that the land was purchased by her late husband Jacob Kathuka, vide an Agreement dated 12th February, 1983.

36. According to the Plaintiff's counsel, the Plaintiff filed this suit when she learnt that the suit property had been registered in favour of the 1st Defendant; that the 2nd Defendant cannot purport to enforce the Agreement of 15th August, 1980 because she does not have the Letters of Administration and that share number 176 dated 3rd August, 1972 alluded in the Agreement of 15th August, 1980 was never produced in evidence.

37. The Plaintiff's advocate submitted that the share certificate that the 2nd Defendant is relying on is different from the share certificate that the Plaintiff holds; that the Agreement between the 1st and 2nd Defendants on how they will share out the suit property was made so as to target the Plaintiff's husband's interest in the land and that the suit property is being shared amongst people who are not beneficiaries of the Estate of Francis Mutuku Kioko.

38. In his Further Submissions, the Plaintiff's advocate submitted that the Defendants did not formally produce their documents as exhibits; that documents marked for identification cannot form part of the evidence and that it is a fatal error not to call a witness to produce documents as exhibits. Counsel relied on numerous authorities which I have considered.

39. The Defendants' advocates submitted that HCCC No. 188 of 2008 was a suit between the same parties or person claiming under them concerning the same suit property and the same relief; that the suit abated after Jacob Kathuka died and that once a suit abates, a party cannot file a competent suit in respect of the same cause of action. Counsel relied on numerous authorities to support this argument.

40. Counsel submitted that the Plaintiff did not discharge her burden of proof; that the averment by the Plaintiff that her late husband purchased the suit property from Kioko Makau vide an Agreement of 12th January, 1983 was rebutted by the defence and that Kioko Makau never owned the suit property.

41. The Defendants' advocate submitted that the Plaintiff did not call any witness to corroborate her story and did not call the persons who

allegedly sold the suit property to her husband or witnessed the said sale. The Defendants' counsel submitted that the suit property was transferred to the 1st Defendant on 1st July, 2015 after Machakos ELC No. 188 of 2008 abated.

Analysis and findings

42. The Plaintiff's case is that her husband, Jacob Kathuka (*now deceased*) was at all times the owner of the suit property measuring about 56.33 acres having purchased it in the year 1983 from one Kioko Makau. According to the Plaintiff, her late husband took possession of the land immediately and developed it substantially, including constructing permanent residential houses, and was given a Beacon Certificate by the company.

43. The Plaintiff claimed that she filed Machakos Succession Cause No. 283 of 2012 in respect of her husband's Estate and was awaiting issuance of the Grant in order to obtain a title to the suit property. She maintained that the suit property is part of the assets listed in the Succession Cause.

44. The Plaintiff claimed that on or about 8th November, 2012, the 1st Defendant applied to revoke the Grant on the ground that the suit property was wrongly listed as part of the assets of Jacob Kathuka's Estate. She further contends that the 1st Defendant alleged that he was representing Kangundo Farming and Ranching Company (*Ithanga*) Limited ("*the Company*") and that his Application was declined.

45. The Plaintiff contended that she lodged a caution against the suit property but the 1st and 2nd Defendant allegedly colluded and fraudulently transferred the suit property to themselves. The acts of fraud are particularized in paragraph 18 of the Plaint as follows:

a. Changing and transferring Title when there was a Caution;

b. Forging Minutes of the Board;

c. Tendering false Board Minutes;

d. Changing Title when there is a pending dispute in court;

e. Obtaining a consent from the Land Control Board without following due process.

46. The Plaintiff produced in evidence the Certificate of Confirmation of Grant dated 24th November, 2016, the Agreement for Sale dated 12th January, 1983 between Kioko Makau and Kathuka, a receipt dated 3rd August, 1972 for Kshs. 4,760 for monies paid by Joel Nzioka Ngao on account of refund for shares in the Company and a copy of the Share Certificate of 175 shares in the name of Nzioka Kithuva in the Company dated 15th April, 1975.

47. The Plaintiff was categorical that she owns 56 acres in the suit property and acknowledged that the 1st Defendant had a dispute with her late husband and that 1st Defendant had also filed an objection in Succession Cause No. 283 of 2012 contesting the inclusion of the suit property in Kathuka's Estate. The objection was stayed pending the outcome of this suit.

48. Although the Defendants' advocate submitted that once a suit abates, a party cannot file a competent suit in respect of the same cause of action, the Defendants did not exhibit the proceedings of HCCC No. 188 of 2008 which is said to have abated after the demise of the Plaintiff's husband.

49. Having not availed the proceedings of Machakos HCCC No. 188 of 2008, this court is unable to arrive at a conclusion that this suit is incompetent on account of it being in respect of the same cause of action as Machakos HCCC No. 188 of 2008 which abated. The Defendants should have either called for the production of the court file or should have produced the copies of the pleadings in that matter.

50. I will now address the issue of whether the Plaintiff is entitled to parcel of land known as Ndithini/Mananja Block 5/44. As I have already stated above, the testimony of the Plaintiff is that her late husband, Jacob Kathuka, purchased plot number 44 from Kioko Makau. The Plaintiff produced in evidence the Sale Agreement dated 12th January, 1985 between Jacob Kathuka and Kioko Makau.

51. The Agreement shows that the parcel of land that Jacob Kathuka bought was owned by Kioko Makau and Nzioka Kithuva, and was in respect of Share Certificate number 33/175 dated 3rd August, 1972. The said Agreement provided as follows:

"I, Kioko Makau ID No. 0699094-069906/63 I have sold my parcel of land which I bought with Nzioka Kithuva to Jacob Kathuka ID. No. 0435071. The said parcel of land is known as "Kangundo Farming and Ranching Company Limited. (Ithanga)" Share Certificate No. 33/175 dated 3rd August, 1972 and issued on 15th April, 1975 (He has given me the said Certificate together with the receipt which Thyaka Ngao was given by Alai showing Kshs. 4,760 which is for Alai which he was given by Thyaka Ngao.

I, Jacob Kathuka we have agreed with Kioko Makau that I give him money so that he may buy the said parcel of land as follow:

On 12th January, 1983 – I gave him Kshs. 5,000

On 17th January, 1983 – I gave him Kshs. 5,000

On 10th February, 1983 – I gave him Kshs. 5,000

There is a balance of Kshs. 500 which I will give him on completion date (good will).

Seller; Kioko Makau – signed

Buyer; Kathuka – signed

Witness; Ndumi Kiivo – signed

Mwikali - ID. No. 6267631/69 – signed.”

52. The Plaintiff also produced in evidence the receipt dated 3rd August, 1972 issued in the name of Joel Nzioka Ngao for Kshs. 4,700. The other document that the Plaintiff produced in evidence is the Share Certificate issued by Kangundo Farming and Ranching Company (*Ithanga*) Limited. The said Certificate shows that it was issued to Mr. Nzioka Kithuva, being the registered proprietor of “one hundred and seventy five (175) shares on 15th April, 1975”.

53. The evidence of the Plaintiff was that the suit land was originally owned by Joel Ngao, who then sold the same land to three people, including Nzioka Kithuva, and that Nzioka Kithuva sold his portion of land to Kioko Makau who then sold the same to her late husband, the late Jacob Kathuka.

54. This narration by the Plaintiff was denied by the 1st and 2nd Defendants, together with their witness. According to the 2nd Defendant, who is the wife of the late Francis Mutuku Kioko, it is her late husband who bought plot number 44 from Elijah Nzioka Kithuva (*Nzioka Kithuva*) pursuant to an Agreement dated 15th August, 1980.

55. It was the evidence of the 2nd Defendant that upon purchasing the land, her husband was given the Share Certificate No. 33/175 dated 3rd August, 1972. As correctly argued by the Plaintiff’s advocate, the Defendants did not produce these documents as exhibits during the hearing.

56. From the evidence of both the Plaintiff and the 2nd Defendant, they have both agreed that Nzioka Kithuva *alias* Elijah Nzioka Kithuva, was the owner of Plot No. 44 and held a Share Certificate number 33/175 dated 3rd August, 1972 which I have perused.

57. Although the Plaintiff’s version is that Nzioka Kithuva sold the same land to Kioko Makau, who then sold it to her late husband, the Defendants called Elijah Nzioka Kithuva who denied the Plaintiff’s version. According to the evidence of Elijah Nzioka Kithuva, he sold the suit land to Francis Mutuku and not Kioko Makau as alleged by the Plaintiff.

58. The Plaintiff’s late husband, Jacob Kathuka, being the Chairman of the Company, together with the 1st Defendant, who was, and still is, an official of the Company, seem to have conspired to take the suit property when the owner of the land, Elijah Nzioka Kithuva, and the subsequent purchaser Francis Mutuku Kioko, abandoned the suit land. Unfortunately, they fell out of favour and late Jacob filed a suit claiming for the entire land. That is when Francis Mutuku, the 2nd Defendant’s husband, showed up and was enjoined in the suit filed by the Plaintiff’s late husband.

59. Considering that the person in whose name the Share Certificate was registered has denied ever selling the suit land to one Kioko Makau, the Plaintiff’s claim in respect to the same land collapses. Indeed, the Plaintiff did not call any evidence to collaborate her evidence that her late husband purchased the suit land from Kioko Makau, or to show that the said Kioko Makau owned any land.

60. The Plaintiff did not also produce any evidence to show that the Defendants changed and transferred the Title when there was a Caution; forged the Minutes of the Board; tendered false Board Minutes and obtained a consent from the Land Control Board without following due process. The Plaintiff has therefore not proved her case on a balance of probabilities.

61. Although the Defendants did not produce any exhibits to show that they own the suit land, the evidence by DW3 (*Elijah Nzioka Kivuva*), who was the shareholder of Share Certificate number 33/175 testified that he sold the suit land to the 2nd Defendant’s husband. Therefore, it is the 2nd Defendant, on behalf of her late husband, who is entitled to the land.

62. Indeed, the issue of whether the 2nd Defendant has the *locus standi* in this matter cannot arise because it is the Plaintiff who sued her “seeking for an order revoking the Title Deed registered in favour of the 1st and 2nd Defendants”. Consequently, she had the right to defend herself, with, or without the Letters of Administration.

63. Finally, the issue of the sharing of the suit property amongst people who are not beneficiaries of the Estate of the late Francis Mutuku can only be raised by the said beneficiaries, and not the Plaintiff. Having found that the entire suit land belongs to the late Francis Mutuku Kioko, and not the Plaintiff’s late husband, it is not in the province of this court to determine how the Estate of the late Francis should be shared, save to say that the Plaintiff’s late husband is not entitled to any portion of the land.

64. For the reasons I have given above, I dismiss the Plaintiff’s Plaint dated 8th January, 2016 with costs and allow the Defendants’ Counter-

claim dated 15th February, 2016 as follows:

a. An order be and is hereby issued that the Plaintiff and anyone claiming under her do vacate the property known as Title No. Ndithini/Mananja Block 5/44 and remove all the structures erected and being on the said property within sixty (60) days of the date of this Judgment, failing which she should be evicted and the structures erected thereon be demolished.

b. The Plaintiff to pay the costs of the suit and the Counter-claim.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE