



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC SUIT NO. 34 OF 2017**

**(CONSOLIDATED WITH ELC SUIT NO. 22 OF 2018)**

**ALPHONCE NGUNGI WAMBUA.....PLAINTIFF**

**-VERSUS-**

**PATRICK NDUNDA WAMBUA.....1<sup>ST</sup> DEFENDANT**

**MAUNDU MAWEU.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MASAKU MBITHI.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR, MAKUENI COUNTY.....4<sup>TH</sup> DEFENDANT**

**THE COUNTY SURVEYOR, MAKUENI.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. This suit commenced by way of a plaint dated 16<sup>th</sup> March, 2017 and filed in court on even date wherein the Plaintiff prays for judgement against the Defendants jointly and severally for: -

**(i) An order that the title deed UKIA/KILALA/524 and UKIA/KILALA/767 be consolidated and subdivided equally between the Plaintiff and the Defendant.**

**(ii) In the alternative, an order that land equivalent to 0.75 Ha be carved out from Land Parcel No. UKIA/KILALA/524 and the same be transferred and registered in the name of the Plaintiff.**

**(iii) An order creating an easement/access road which has already been existing and closed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.**

**(iv) Costs of this suit plus interest thereon.**

**(v) Any other or further relief as this Honourable Court may deem fit and just to grant.**

2. The Plaintiff has averred in paragraphs 8, 9, 10, 11, 12, 13, 15 and 16 of his plaint that at all material times he was and still is the owner of land parcel number Ukia/Kilala/767 measuring 1.3 hectares while the 1<sup>st</sup> Defendant is the owner of land parcel number Ukia/Kilala/524 measuring 2.8 hectares, that the two parcels of land were initially one parcel held by their father as unsurveyed land, that their late father had before his demise shared out the land to him and the 1<sup>st</sup> Defendant in equal share, that the 1<sup>st</sup> Defendant was entrusted to conduct the survey and register the land between him and the Plaintiff who was away at the time of adjudication, that when he got his title deed for his portion of land measuring 1.3 hectares, he was confident that the land was equally divided and that when the 1<sup>st</sup> Defendant wanted to sell a portion of his land, the 1<sup>st</sup> Defendant informed him that his land was measuring 2.8 hectares and thus the Plaintiff discovered that the 1<sup>st</sup> Defendant had fraudulently acquired an extra 1.5 hectares.

3. The Plaintiff's claim is denied by the 1<sup>st</sup>, 2<sup>nd</sup> and he 3<sup>rd</sup> Defendants vide their joint statement of defence dated 22<sup>nd</sup> May, 2017 and filed in court on even date.

4. The 1<sup>st</sup> Defendant has averred in paragraph 4 of their joint defence that his father during his lifetime, gifted a parcel of land to each of his two sons herein i.e. the Plaintiff and the 1<sup>st</sup> Defendant individually after adjudication, and that thereafter he instructed his sons to collect their individual land certificates from the land office in Machakos in the year 1983.
5. There is no evidence of service of summons to the 4<sup>th</sup> and 5<sup>th</sup> Defendants to enter appearance and to file their defence.
6. By consent of the parties, this suit was consolidated with ELC number 22/18 on the 04<sup>th</sup> February, 2019.
7. During the hearing of the Plaintiff's case on 06<sup>th</sup> May, 2019, he adopted his statement dated 16<sup>th</sup> March, 2017 as part of his evidence. He also adopted the statement that he recorded in ELC No.22/17 as his evidence as well. He went on to produce the 12 documents in the list of documents dated 16<sup>th</sup> March, 2019 as P.Exhibit Nos.1 to 12 respectively. The Plaintiff further produced the four documents in the list of documents dated 04<sup>th</sup> December, 2018 in ELC No 22/17 as D.Exhibit Nos 13 to 16 respectively.
8. Briefly his evidence was that he is the registered owner of land parcel number Ukia/Kilala/767 while the Defendant owns land parcel number Ukia/Kilala/524.
9. According to the Plaintiff, he and the Defendant inherited their respective parcels of land from their late parents. He added that their late parents bought the property in question as unregistered land since surveying process had not commenced. He said that his brother (the Defendant) was asked to oversee the adjudication process since he (Plaintiff) was at that time based in Kisumu. He further said that he and the Defendant were to own the land in equal shares. He revealed that he was allocated 1.3 hectares of land and assumed that the Defendant got the same size of land. He said that he only came to discover that the Defendant had acquired a larger portion of land when the latter informed him that he wanted to sell a portion of his land so that he could pay hospital bill for his ailing daughter. He said that his attempts to have the Defendant share with him land that is in excessive of what the latter was supposed to get have not been successful.
10. His evidence in cross examination was that land parcels number Ukia/Kilala/524 and 767 were family land. He said that he acquired his title deed for parcel number 767 in 1983. He could not be able to tell when the Defendant acquired his (title deed). He said that adjudication in the area began between 1975 and 1976. He went on to say that he did not inspect his land in order to find out how big it was. He said that he used to reside in the house that the Defendant built on parcel number 524 before he moved out in 1986. He pointed out parcels number 524 and 767 are adjacent to each other. He said that he was not aware that his parents gave the defendant a bigger portion of land than his. He said that he lodged a caution on 10<sup>th</sup> September, 2015 as he was claiming beneficiary interest. He admitted that the Registrar gave him notice concerning the caution and added that he was sure that the Registrar did not remove the said caution. He said that parcel number 672 in ELC number 22/17 is about 10 acres and is registered in the name of the Defendant. He went on to say that his late mother started to purchase land parcel number 517 in 1874 from one Peter Ndonge. He said that it wasn't true that their mother asked him and the Defendant to buy the land in question. He revealed that land parcel number Ukia/Kilala/929 was given to him by his late mother and that the Defendant's parcel number 672 as big as his. He said that in High Court civil case No.78/08, he was claiming 3.5 acres from parcel number 672 and 6 acres from Peter Kyonda. He denied having brought this suit out of malice. He said that his late sister's children reside on the portion of land belonging to the Defendant and that he was not aware that the Defendant gave three acres to them.
11. His evidence in re-examination was that he did not see the need to confirm the size of his land and that of his brother (defendant) because he trusted that the latter had carried out the subdivision of the land equally.
12. The Defendant in his evidence adopted his statements in this suit as well as in ELC No.22/18 as his evidence. He said that he is the registered owner of land parcel Ukia/Kilala/524 in ELC number 34/17 and Ukia/Kilala/672 in ELC number 22/18. He went on to produce the nine documents in his list of documents dated 30<sup>th</sup> January, 2019 as D.Exhibit Nos.1 to 9 respectively. He produced ten documents in respect of land parcel number Ukia/Kilala/672 as D.Exhibit Nos.10 to 20 respectively. He also produced the proceedings in ELC No.15/17 as D.Exhibit No.21 and 22 respectively. He said that he did not participate in the adjudication process. He went on to say that in 1983 his mother told him to go and collect the title deed for his land parcel number Ukia/Kilala/524. He also denied being a trustee of the suitland. According to him, his parents were the ones who gave him 2.8 hectares of land and neither did he ask to be allocated the land in question. He revealed that he was not aware of any complaint by the Plaintiff who is his younger brother over the land during the lifetime of his parents. He said that he sold a portion of the land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants after the Plaintiff declined the offer to buy the same. He added that he wasn't aware that his land was bigger than that of the Plaintiff. He went on to say that he acquired land parcel number Ukia/Kilala 672 in 1974. According to him, between 1974 and 1976, he gave his mother Kshs.11,000/= towards the purchase of the land from one Kyonda. He said that Kyonda and his mother showed him the boundaries of the land in question before he went to collect its title deed in 1983. It was his evidence that he was not aware of what the Plaintiff gave his mother towards the purchase of the land. He went on to say that he allocated 3 acres out of parcel number 672 to the children of his late sister. That the Originating Summons that the Plaintiff filed against him over the said land parcel number 672 was dismissed in 2017. According to him the Plaintiff planted trees on the land in question after the latter filed a case against him.
13. The Defendant's evidence in cross-examination was that he was not aware that his land parcel number 524 was bigger than that of his brother. He said that his parents were the ones who decided what to give him and the Plaintiff. He said that the Plaintiff's land is parcel number 726 and that before demarcation, it was part of parcel of land that was being used as a whole. He said that at no time were his parents registered as owners of the bigger portion of the land. He said that the Plaintiff used to reside in his (Defendant's) house in parcel number 524 before the Plaintiff built his. He said that his land did not encompass family land and nor did his parents tell him and his brother if they had left family land to be part of his land. He revealed that his mother used to reside in the land that she gave him and added that during the adjudication process, their mother decided to have land demarcated in their respective names. He said that even though land parcel number 672 was bought from one Peter Kyonda, he had nothing to show that he gave money to his mother. He said that he sold 5 acres out of land parcel number 524. He said that he has never cultivated on land parcel number 672 and that the orange and mango trees on the land belong to the Plaintiff. He said that he was not aware that the Originating Summons had been withdrawn nor was he aware that the Plaintiff had filed an application for reinstatement of the said suit.

14. The Defendant's evidence in re-examination was that he did not direct his mother to register land parcel number 524 in his name. He said that the trees in land parcel number 672 were planted after the year 2008.

15. Stanslaus Kioko Mulatya (DW1) in his evidence in chief adopted his statement dated 30<sup>th</sup> January, 2019 as his evidence in chief. In summary, the witness told the Court that the Plaintiff and the Defendant are his uncles. He said that land parcel number 524 belongs to the Defendant. He pointed that in 1980 he, his siblings and their mother moved into the said land and lived in it until the Defendant allocated them three acres in land parcel number 672.

16. His evidence in cross-examination was that they and their grandmother used to cultivate on land parcel number 524.

17. Finally, the Defendant called Karen Nyakundi (DW2) the Land Registrar Makueni who produced a green card, a photocopy of the green card and search certificate for land parcels number Ukia/Kilala/517 as P.Exhibit Nos.5(a)(b)(c). She went on to produce similar documents for land parcels numbers 928, 929, 934, 935, as D.Exhibit Nos.6(a), (b), (c), 7(a), (b), (c), 8(a), (b), (c) and 9(a)(b) and (c) respectively.

18. Her evidence in cross-examination by Mr. Mulei for the Plaintiff was that she did not have documents in relation to Ukia/Kilala/767 and 524 for the reason that the two parcels were not mentioned in the summons served upon her.

19. In his written submissions filed in this file, the Plaintiff's Counsel framed four (4) issues for determination. These were: -

*a) Whether land parcels number UKIA/KILALA/767 and UKIA/KILALA/524 measure in equal sizes.*

*b) Whether the removal of caution by the land registrar with no evidence of either notification of the cautioner and/or participation by the cautioner in the objection proceeding is valid?*

*c) Whether land parcels number UKIA/KILALA/524 and UKIA/KILALA/767 initially existed as un-surveyed land belonging to the late mother of both the Plaintiff and the 1<sup>st</sup> Defendant.*

*d) Whether the un-surveyed land was to be equally divided between the Plaintiff and the 1<sup>st</sup> Defendant.*

20. And in his written submissions filed in ELC No.22/18, the Counsel framed three (3) issues. These were: -

*a) Whether land parcel No.UKIA/KILALA/672 is the Plaintiff's personal property?*

*b) Whether land parcel No.UKIA/KILALA/672 belonged to the late ELIZABETH MBULI WAMBUA NZEKI?*

*c) Whether the Plaintiff is entitled to orders sought in the plaint?*

21. On the other hand, the Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed one set of submissions to cover the two fields. He did not frame any issues for determination.

22. The submissions by the Plaintiff's Counsel regarding the seven issues were as follows: -

23. That from the two searches produced, it is evident that Ukia/Kilala/524 to Ukia/Kilala/767 measure 2.8 hectares and 1.3 hectares respectively. The former is registered in the name of the 1<sup>st</sup> Defendant while the latter is registered in the name of the Plaintiff. As for land parcel number Ukia/Kilala/672, the Plaintiff's Counsel submitted that although the Defendant (Plaintiff in ELC No.22/18) claimed that the suitland was his, he had failed to show that the land was bought with his money. The Counsel cited **section 107(1) of the Evidence Act chapter 80 of the Laws of Kenya** which provides that;

*"whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those allegations."*

The Counsel pointed out that the Defendant had no sale agreement between his mother and one Peter Kyonda in respect of the land in question. The Counsel went on to add that there was nothing to show that the Defendant gave money to his mother for the purchase of the land.

24. Regarding the procedure for the removal of caution, the Counsel cited **Section 73 of the Land Registration Act** that provides: -

*"(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.*

*(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.*

*(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.*

(4) *If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.*”

25. Arising from the above, the Counsel submitted that the Land Registrar, during cross-examination confirmed that there was no evidence to proof that indeed the cautioner who happens to be the Plaintiff was notified that his brother who is the 1<sup>st</sup> Defendant had requested to have the caution removed. That the Registrar admitted no objection proceedings were produced as evidence and as such there is doubt as to the legality of the entire process and urged the Court to invalidate it. The Counsel relied on the case of **Lawrence Mugambi Rutere vs. Nelly Wachira & Another; District Land Registrar Mbeere (Interested Party) [2019] eKLR** where Y.M. Angima, J remarked thus:-

*“Although the Respondents contended that the caution was lawfully removed by the Land Registrar, there is no material on record to that effect. There is no evidence on record that any notice of removal was given, that the concerned parties and the caution was removed .....*”

It will however be noted that the Plaintiff in his evidence in cross-examination admitted that he was indeed served with the notice of the caution by the Registrar, it cannot therefore be said the removal of the caution by the Registrar was unprocedural.

26. It was further submitted that both the Plaintiff and the 1<sup>st</sup> Defendant admit that land parcel number Ukia/Kilala/524 and 767 initially existed as un-surveyed land belonging to their late parents. That it was the Plaintiff’s contention that the 1<sup>st</sup> Defendant being the eldest, he was assigned the responsibility to oversee its sub division into two equal parts. That in as much as the 1<sup>st</sup> Defendant denies that he was not entrusted with such responsibility, the Plaintiff’s allegation that the suitland ended up being divided into two parcels which were unequal in size is confirmed by the certificate of search produced.

27. As for land parcel number Ukia/Kilala/672, the Plaintiff’s Counsel submitted that the Plaintiff who is the Defendant in ELC Case No.22 of 2018 contends that it was purchased by their late mother as unsurveyed land. The Counsel pointed out the Plaintiff had produced a sale agreement duly executed by both the seller and the purchaser which proves his contention.

28. Arising from the above, the Counsel was of the view that the Defendant herein (Plaintiff in ELC No.22/18) is not entitled to the prayers sought.

29. Regarding this file, the Defendant’s Counsel submitted that it was absurd, incomprehensible and untrue for the Plaintiff to state that he did not know that the 1<sup>st</sup> Defendant was issued with a larger portion of land than him since demarcation of the land belonging to their parents was acknowledged by them before titles were issued. The Counsel added that at no time during their parents’ lifetime did the Plaintiff complain about the size of his land which shares a common boundary with that of the 1<sup>st</sup> Defendant. The Counsel was of the view that the fact that the Plaintiff did not challenge his parents’ decision during their lifetime is proof that he accepted the facts as they were. The Counsel went on to submit that a proof of the Plaintiff’s knowledge of the 1<sup>st</sup> Defendant size of land is exhibited by the fact that he was a signatory to the sale transaction between the 1<sup>st</sup> and 3<sup>rd</sup> Defendant in another transaction.

30. In support of his submissions, the Counsel cited the case of **Paul Kathuni Gichunge vs. Victor Polycarp Ntwiga & 2 Others [2016] eKLR** where Mabeya, J held;

*“A person can deal with his property as he wills during his lifetime. Whoever feels aggrieved on how his/her parent has dealt with his property should at the earliest opportunity question such person during his lifetime. He cannot wait until such person dies not raise issue of discrimination/unfairness. Such issues can only validly be raised in cases of a will since wills are kept secret until the testator passes on. However, request that are given as gift intervivos openly so given and in my view whoever is dissatisfied is at liberty to question the same before the demise of the gifter.”*

31. It was also submitted that having cited his deceased parents while claiming for land from his brother, the Plaintiff would have had to contend with the law of succession and obtain letters of administration in respect of the estate of his deceased parents for his claim to be considered, however remotely after having admitted that portions of land belonged to their parents.

32. Regarding ELC 22/18, the Defendants (Plaintiff in the said suit) submitted that the Defendant had bought Ukia/Kilala/672 from one Peter Kyonda (deceased) through his late mother. The Counsel submitted that the Defendant was categorical that the portion of land was fully transferred to him after he cleared the purchase price in the year 1996. That the Plaintiff admitted having not paid for his portion of the same land and their mother could not transfer land bought by one son to the other. The Plaintiff cited the affidavit sworn by Alphonse Ndungi in support of his Originating Summons dated 18<sup>th</sup> June, 2018 (P.Exhibit No.12). The Counsel went on to submit that the Defendant (read Plaintiff) admitted to being proprietor of LR Ukia/Kilala/929 of which acreage he actively concealed from the court. The Counsel added that the Plaintiff never had any landed belonging to him in Ukia/Kilala/517.

33. The Counsel concluded by urging the Court to dismiss ELC No.34 of 2017 and allow ELC No.22 of 2018 in favour of the Defendant herein.

34. Having read the pleadings herein, the evidence adduced by the parties as well as the submissions filed by the Counsel on record, I am of the view that there are only two (2) issues for determination namely: -

**(a) Whether or not land parcel numbers Ukia/Kilala/524 and 767 should have been equally shared from unsurveyed parcel of land belonging to the parents of the parties herein.**

***(b) Whether or not the Defendant herein who is also the Plaintiff in ELC No.22/18 is entitled to the orders sought in the plaint?***

35. As regards the first issue, it is common ground that land parcel number Ukia/Kilala/672 belonging to the Plaintiff is not of the same size as Ukia/Kilala/524 owned by the Defendant. It is also common ground that the two parcels of land belonged to the parents of both the Plaintiff and the Defendant. That during the adjudication process, their mother, who was still alive, had the land subdivided between the Plaintiff and the Defendant. She also instructed the two to collect their respective title deeds from Machakos Land Registry. Even though the Plaintiff in his evidence asserted that the Defendant was the one who oversaw the adjudication process, his evidence is tenuous in view of the denial by the Defendant and lack of record of how the adjudication was conducted. I would therefore agree with the Defendant's Counsel that it was the parents and more particularly the mother of the Plaintiff and the 1<sup>st</sup> Defendant herein who decided how the unsurveyed land was to be shared. The Plaintiff is to blame for not bothering to find out the size of the two parcels of land instead of waiting to be woken up from his slumber when the Defendant started to sell his land. I would also agree with the Defendant's Counsel that a person can deal with his property as he wills during his lifetime and the authority the Counsel referred to me is relevant to the case before me. Suffice it to say, if the Plaintiff feels that the Defendant got a bigger share of his deceased parent's land, then he should have questioned the disparity in sharing the land during his parents' lifetime. In any case, his case against the Defendant is non-suited for failure to take out the appropriate letters of administration to enable him represent the estate of his late parents. The Plaintiff did not raise a finger when the Defendant sold a parcel of land to the 3<sup>rd</sup> Defendant and he only seems to have done so when the 1<sup>st</sup> Defendant indicated his intention to sell another portion to the 2<sup>nd</sup> Defendant. The only inference that I can draw is that the Plaintiff's suit is driven by malice. He was given the first chance to purchase what the 1<sup>st</sup> Defendant was out to sell but having failed to buy, he is out to stop the 1<sup>st</sup> Defendant from selling the same.

36. As for land parcel Ukia/Kilala/672, it is common ground that the same was bought from one Kyonda by their late mother. From the evidence on record, the Defendant acquired his title deed in respect of the land in question during his mother's lifetime. Going by the Plaintiff's evidence, then he ought to have challenged the gifting of the land to the Defendant during their mother's lifetime.

37. From the uncontroverted evidence by the 1<sup>st</sup> Defendant herein, he was in gainful employment when the aforementioned land parcel number Ukia/Kilala/672 was purchased by their mother and I believe him when he says that he was the one who gave their mother money for the purchase of the land. The 1<sup>st</sup> Defendant comes out as a candid witness in view of the fact that he even allowed the Plaintiff to occupy his own house built on land parcel Ukia/Kilala/524 when the latter had no house of his own.

38. From the evidence on record, it is clear that the Plaintiff comes out as a person who is indolent and is out to get that which did not belong to him in the first place.

39. I do note that the Defendant's Counsel did not make any submission on the general damages that the Defendant should be awarded and I will assume that this prayer was abandoned. In my judgement, I will not award the Plaintiff any general damages.

40. The upshot of the foregoing is that the Plaintiff has not satisfied this Court that he has a cause of action against the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. On the other hand, I am satisfied that the 1<sup>st</sup> Defendant has satisfied the Court that he has a cause of action against the Plaintiff on a balance of probabilities in ELC No.22 of 2018 which is being treated as a counterclaim. In the circumstances, I will dismiss the Plaintiff's suit with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and proceed to enter judgement for the Defendant and against the Plaintiff in the counterclaim as hereunder.

**(a) The Plaintiff has 120 days from the date hereof to vacate from the Defendant's land parcel number Ukia/Kilala/672 failure of which the Defendant will be at liberty to apply for an order of eviction.**

**(b) Costs of the suit.**

Signed, dated and delivered at Makueni via email this 28<sup>th</sup> day of May, 2020.

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Mr. G. Kwemboi