



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC CASE NO. 66 OF 2018**

**(Formerly Machakos ELC Case No. 19 of 2008)**

**JOSEPH KISILU NZAU.....PLAINTIFF**

**-VERSUS-**

**MUNYASYA NZAU KILOMO.....DEFENDANT**

**JUDGMENT**

1. Through an amended plaint dated 03<sup>rd</sup> April, 2008, the Plaintiff prays for orders against the Defendants for;

**a) A perpetual order of injunction against the Defendant, his sons, agents or servants from evicting the Plaintiff, cutting trees, selling or in any way dealing with a portion measuring approximately 2 acres in land parcel No. Mbooni/Iiani/654.**

**b) Declaration that a portion measuring approximately 2 acres in land parcel No. Mbooni/Iiani/654 belongs to the Plaintiff and an order directed to the land registrar, Makueni to excise the portion and register it under the names of the Plaintiff.**

**c) Costs of the suit.**

**d) Any other relief that this Court may deem fit and just to grant.**

2. Briefly, the Plaintiff's case is that the Defendant is his step brother and the registered proprietor of Mbooni/Iiani/654 which is approximately 4.8Ha (*suit land*). The Plaintiff avers that the suit land is family property and he has been in occupation of a portion measuring approximately 2Ha for over 45 years. He avers that despite the Defendant being the registered proprietor, he holds the suit land in trust for him. His grievance is that the Defendant is hell bent on evicting him from the suit land in total disregard of his interests. The particulars of trust are indicated as follows;

**a) The Plaintiff has been in use and control of the suit land since 1965.**

**b) The Plaintiff being the elder step brother to the Plaintiff was registered as proprietor of the entire land.**

**c) The Defendant has all along acknowledged the fact that the suit land belongs to the Plaintiff.**

3. The suit is opposed through the statement of defence and counter claim dated 17<sup>th</sup> April, 2008. He disputes the alleged 45 years occupation and avers that the Plaintiff has been in occupation of his own parcel to wit Mbooni/Iiani/656 for the said period.

4. He avers that in 2008 the land registrar visited to show the boundaries between parcel Nos. 654, 656 and 660 and immediately thereafter, the Plaintiff encroached on the suit land where he removed the fence and destroyed trees.

5. He has counter claimed for a permanent injunction against the Plaintiff/his servants/agents/relatives from interfering with the suit land in any manner.

6. The Plaintiff responded to the defence and counter claim, denied all the averments and called for strict proof. He averred that the Defendant obtained title of the suit land in January 2008, long after the other family titles had been issued.

7. The Plaintiff adopted his statement filed on 20<sup>th</sup> November, 2019 in which he stated that before survey and registration, the suit land belonged to Nzau Kilomo (*deceased*) who had three wives; Wanza, Nzisi and Nzula. The deceased had a larger portion of land which was subsequently surveyed and registered in the names of representatives of the three houses. The Plaintiff represented the house of Nzula while

the Defendant represented the house of Wanza.

8. He stated that during the survey, the Defendant caused a larger portion to be registered under his name and a title deed was issued. The family agreed that the Defendant would surrender a portion of the land which would then be registered in the Plaintiff's name to hold on behalf of the house of Nzula. The portion to be surrendered was measured as 72 steps running from parcel 656 to the suit land.

9. Further, he stated that in 2007, the Defendant obtained consent for sub division in the presence of his own son Maithya Munyasya but the sub division has never been done. He also stated that he had used the excised portion since he was born. He produced the following documents;

- a) Title deed for Mbooni/Iiani/656- P.Exhibit 1
- b) Certificate of search for Mbooni/Iiani/1021 - P.Exhibit 2
- c) Original consent to transfer dated 12/07/2007 P.Exhibit 3
- d) Minutes dated 17/11/2007 & translation P.Exhibit 4(a)&(b)
- e) Demand letter to Defendant - P.Exhibit 5
- f) Letter to land registrar dated - P.Exhibit 6

10. In his oral evidence in Court, he stated that his parcel (656) is 2.8 Ha instead of 5.8 Ha whereas the Defendant's parcel is 4.8 Ha. That initially, the land which belonged to his father Nzau Kilomo was 10 Ha and 5.5 Ha was allocated to his mother. He has one sibling just like the Defendant.

11. Further, he stated that upon realizing the anomaly in the size, he approached the family and the Defendant admitted that he had subdivided the land unequally and agreed to correct the error. The family hived off 3 acres from Wanza Nzau's portion and gave it to Nzula Nzau.

12. He also testified that the Defendant's son, Maithya took a surveyor to him and demanded to be shown his father's portion. He decried having not been served with a notice prior to the visit. The Plaintiff visited the surveyor the following day but they disagreed. He caused a demand letter to be written to the Defendant.

13. On cross examination, he recalled the meeting of 29<sup>th</sup> January, 2008 concerning land parcels Nos. 654,656 and 660 (*the three parcels*). He was in attendance together with the land registrar, land surveyor, three sons of the Defendant and a village elder. Maithya Munyasya was the complainant over the suit land. He spoke at the meeting and said that he was not there when land adjudication commenced in 1978. He agreed that he was registered as the owner of 656 at that time.

14. At the meeting, he said that in 1978, he gave authority to the Defendant and Ndeti to proceed since he had a case in Kibwezi Police Station. He also said that he called for a meeting in 1985 and demanded to know why he had a smaller parcel of land. He was directed to pursue his claim in Court. He could not remember fixing of boundaries between the three parcels. He then denied having been told to go to Court as well as being given 30 days by the registrar to appeal. He claimed 72 steps to equalize the land which he said was equal to 3 ½ acres. He agreed that he went to Court in 2008 but the problem arose in 1976.

15. On further cross examination, he said that the clan met on 17<sup>th</sup> November, 2007 and his name appears in the proceedings but that of the Defendant does not appear. He also said that he did not sign the proceedings as well as the Defendant's children who were in attendance. He also said that the Defendant had offered to sell the land to him for kshs 30,000/=. He however said that his claim was not for the portion that was being sold.

16. Further, he agreed that P. Exhibit 3 is not a transfer form but concerned *mama* Nzula's farm. He also agreed that the form has no number and did not involve the present suit. Further, he agreed that he did not appear before the land registrar with the Defendant.

17. Benjamin Musau Mbenge (PW1) adopted his statement filed on 22<sup>nd</sup> May, 2019 in which he stated that he is the chairman of Atwii clan since 2000. He stated that the late Nzau Kilomo was the father of the Plaintiff and Defendant and that Wanza, Nzisi and Nzula were his wives. He stated that after the demise of Nzau Kilomo, the Defendant took the initiative of dividing the land, which was 15.33Ha, amongst the three households without consultation. Nzisi's land was the correct size but the Defendant took 4.3 Ha and gave the Plaintiff 2.33Ha.

18. The clan called a meeting sometimes in 2001 where the Defendant agreed that the land was unequal and agreed to transfer the extra portion to the Plaintiff. The Defendant signed transfer forms but did not hand over the necessary documents to finish the transfer.

19. On cross examination he said that he had dealt with the dispute between the parties before the Defendant's death but they did not record their deliberations. He was familiar with what happened during the adjudication process. The Defendant informed them how the process was carried out. He agreed that when he recorded his statement, he could remember the events of the year 2000. He agreed not knowing the size of the parcels of land owned by the Plaintiff and Defendant or the size which their father owned. He said that the Defendant told them it was 15.33Ha.

20. He said that they had another meeting on 14<sup>th</sup> January, 2011 but was not aware of the meeting of 29<sup>th</sup> January, 2008.

21. Isaac Kitaka (PW2) adopted his statement dated 16<sup>th</sup> November, 2018 in which he stated that he is a clan elder of Tulimani Location and that on 01<sup>st</sup> September, 1985, he attended a meeting in which the Defendant admitted that he had subdivided the suit land unfairly. The Defendant also told him to witness the planting of sisal along the correct boundary. On 07<sup>th</sup> July, 2007, they corrected the boundary again after the Defendant interfered with it. However, the Defendant called the survey and showed them the wrong boundary.
22. On cross examination, he said that he listened to the dispute for the first time in 1985 and for the second time in July 2007. The disputants were Kisilu Nzau and his younger brother whose name he could not recall. They did not make any decision but told them to seek alternative ways after they failed to appear before them. They recorded some proceedings with the children but when their father opposed, they did not sign.
23. He was not aware of the numbers of the parcels belonging to the parties. The dispute involved a boundary but he did not hear that the surveyors had visited the ground. They were only concerned with what the Defendant was alleged to have allocated to himself.
24. David Maithya (DW1) testified that his father, the Defendant, died in 2017. He adopted his statement dated 29<sup>th</sup> June, 2018 in which he stated that he is the legal representative of the Defendant. He stated that the suit land was originally part of a larger piece owned by Nzau Kilomo who was his grandfather. The larger piece was then divided among his grandfather's 3 wives and the three houses decided to register the first born son of each household as the registered proprietor.
25. Further, he stated that during and after the demarcation, sub division and registration, there was no complaint whatsoever from any of the parties regarding the sizes given. He produced the title deed for the suit land as D. Exhibit 1.
26. In 2007, the Plaintiff started to complain about the size and encroached on the Defendant's land. He uprooted the sisal boundary and took possession of an area in the suit land which is approximately 2 acres where he started herding his cattle and cutting down trees. On noticing the encroachment, DW1 and his brother made a complaint to the Land Registrar.
27. On 29<sup>th</sup> January, 2008, the Land Registrar and District Surveyor visited the land and the Registrar observed that it was the Plaintiff who had encroached on the suit land. He produced the proceedings and decision of the registrar as D. Exhibit 2. The Registrar and his team planted a total of 8 sisals to mark the boundary between the suit land and parcel 656. He produced a letter by the acting District Surveyor dated 13<sup>th</sup> February, 2008 as D. Exhibit 3.
28. On cross examination, he agreed that their father was alive when they filed the complaint. He also agreed that the land belonged to their grandfather initially and he had three wives. He agreed that the land was to be subdivided among the three wives. He did not know how big his grandfather's land was but agreed that it was to be divided into three equal parts. He said that the new boundary did not give them a bigger portion of land but was aware that their land was 4.8 Ha. He did not know that the Plaintiff's land was 2.0 Ha.
29. He said that it was okay for their family to have 4.8 Ha because their father had a long standing dispute with *mbaa* mbondo clan over the family land and he had to be compensated for the expenses he incurred.
30. In re examination, he said that they complained to the surveyor because their father was old and sickly. He also reiterated that his father took a bigger portion to compensate himself for fighting for the land.
31. Relying on the case of **Alice Wairimu Macharia –vs –Kirigo Philip Macharia (2019) eKLR**, the Plaintiff submitted that the requirements of a trust are;
- a) *That the suit property was ancestral clan land,*
  - b) *During adjudication and consolidation, one member of the family was designated to hold on behalf of the family,*
  - c) *The registered persons were the designated family members who were registered to hold the parcels on behalf of the family.*
32. The Plaintiff submitted that he adduced sufficient and credible evidence to meet the requirements.
33. The Plaintiff submitted that although the suit land is currently registered in the Defendant's name, section 28 of the Land Registration Act, 2012 recognizes a customary trust as an overriding interest against registered land.
34. It is also his submission that the counter claim was never pursued at the trial and there was no justification as to why the Defendant's estate should retain 4.8 Ha.
35. The Defendant submitted that this suit is time barred as it ought to have been filed within 6 years from 1982 when the Plaintiff realized that his parcel was smaller.
36. He submitted that after the hearing of the dispute by the land registrar and fixing of the boundary, the Plaintiff did not appeal the decision.
37. He also submitted that the Defendant's bigger portion was explained and that Plaintiff's claim is an afterthought as he complained after a very long time. He relied on **Supreme Court Petition No. 10 of 2015; Isaac M'Inanga Kiebia –vs- Isaaya Theuri M'Lintary & Anor (2018) eKLR** where the Court expressed itself as follows;

“ 58...it is now clear that customary trusts as well as other trusts are overriding interests. These trusts being overriding interests, are not required to be noted in the register. However, by retaining the proviso to section 28 of the Registered Land Act (now repealed), in section 25 of the Land Registration Act, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land as previously envisaged under section 30 (g) of the Registered Land Act, have now been subsumed in the “customary trusts” under section 25 (b) of the Land Registration Act. Thus under the latter section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.”

38. The Defendant contends that no overriding interests have been shown since the Plaintiff has never lived or occupied the two acres he is claiming.

39. Having looked at the pleadings, evidence and rival submissions, it is my considered view that the following issues arise for determination;

**a. Whether the suit is time barred?**

**b. Whether the Plaintiff is entitled to the orders sought.**

40. The Defendant did not raise the issue of limitation in the defence but brought it up in the submissions. Submissions are not pleadings and it is trite that such a defense should be raised early enough so as to put the other party on notice and afford them and opportunity to respond.

41. Be that as it may, **section 20** of the Limitation of Actions Act provides as follows;

“(1) none of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:

*Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession”.*

42. The wording of the entire section seems to be giving with one hand and taking with the other. From the evidence, the Plaintiff’s claim falls under sub section 1(b). Sub section 1 removes all kinds of limitations with regard to the highlighted actions and it is my considered view that the limitation in sub section 2 is certainly a period of limitation prescribed by the Act. In the case of **Stephens & 6 Others –vs- Stephens & Anor Civil Appeal No. 18 of 1987**, it was held that: -

“the period of limitation as prescribed in the Limitation of Actions Act (Cap 22) Section 20 (1) (b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use”.

43. Accordingly, it is my considered view that there is no limitation period for actions to recover trust property.

44. The suit land is registered in the name of the Defendant while parcel 656 is registered in the Plaintiff’s name. It is not in dispute that both parcels were part of a larger parcel which belonged to the father of both Plaintiff and Defendant, the late Nzau Kilomo. It is also not in dispute that the suit land is bigger than parcel 656. Further, it is not in dispute that the late Nzau Kilomo had three wives (*Wanza, Nzisi and Nzula*) and that the portion of each house was registered in the name of the first born son of each house hold.

45. The evidence shows that the Plaintiff and Defendant were the first born sons in their respective households. The house of Nzisi did not participate in these proceedings and do not seem to have a problem with their share. According to the Plaintiff, their size is correct hence their contentment. The intriguing part however is that none of the parties knows the size of the original parcel owned by the late Nzau Kilomo. The Plaintiff said it was 10Ha and PW1 said it was 15.33Ha. Without a search certificate for the third parcel of land i.e. parcel 660, this Court has no way of knowing what the original size was. What is clear however is that the suit land is 4.8Ha and parcel 656 is 2.8Ha. Accordingly, the suit land is evidently bigger than the Plaintiff’s parcel.

46. The Plaintiff testified that during land demarcation and adjudication, he was away in Kibwezi but he authorized the Defendant to proceed with the process. PW1 testified that during the process, the Defendant took a bigger portion and gave a smaller portion to the Plaintiff. In the proceedings before the Land Registrar on 29<sup>th</sup> January, 2008, the Defendant’s son stated as follows;

“When mzee Munyasya sub divided the land and surveyed during adjudication process (demarcation)...”

47. The Defendant's son (DW1) agreed that the land belonged to his grandfather initially and was to be sub divided into three equal parts. It is therefore clear that it was the Defendant who sub divided the land that originally belonged to their father and that he did the sub division in an unequal manner.

48. This lends credence to the Plaintiff's version that indeed the Defendant had acknowledged the anomaly and had agreed to transfer the extra portion in order to equalize the suit land with parcel 656. DW1 agreed that the Defendant had a bigger portion but contended that it was compensation because he (Defendant) had fought for the family land from *mbaa* mbondo clan. The issue of compensation was never pleaded and was only introduced during cross examination. Contrary to the Defendant's submissions, it cannot be a sufficient explanation because the Plaintiff was never given a chance to rebut it.

49. Consequently, the compensation issue must be treated as an afterthought and the extra portion in the suit land must be presumed to have been held in trust for the Plaintiff. The total acreage of the suit land and parcel 656 is  $(4.8 + 2.8) = 7.6$ . Division of the result into two equal parts gives 3.8. The Defendant's estate should therefore excise 1.0Ha  $(4.8 - 3.8)$  from the suit land and transfer it to the Plaintiff forthwith.

50. In the case of **Isaac M'inanga Kieba vs. Isaaya Theuri M'Lintari & Another (2018) eKLR** that the Defendant relied upon, the Supreme Court held;

*"The rights of a person in possession or actual occupation of land, as previously envisaged under section 30(g) of the Registered Land Act, have now been subsumed in "the customary trusts" under section 25(b) of the Land Registration Act. Thus under the latter section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land."*

51. As observed elsewhere in my judgement, it is not in dispute that the suit land was family land and it ought to have been shared equally since the Defendant has not adduced any evidence to show that he incurred costs while allegedly defending family land. In my case, the Defendant did not adduce any evidence in support of his counterclaim. The defence and counterclaim must therefore fail and in the circumstances, I hereby proceed to dismiss the same with costs to the Plaintiff.

52. The upshot of the foregoing is that I am satisfied that the Plaintiff has proved the existence of customary trust and therefore is entitled to the prayers that he has sought in his plaint albeit with modification. Consequently, I hereby proceed to enter judgement for the Plaintiff and against the Defendant as hereunder: -

**(a) A perpetual order of injunction against the Defendant, his sons, agents or servants from evicting the Plaintiff, cutting trees, selling or in any way dealing with a portion measuring 1.0 hectares in land parcel No.Mbooni/Iiani/654.**

**(b) Declaration that a portion measuring approximately 1.0 hectares within Mbooni/Iiani/654 belongs to the Plaintiff and an order directed to the Land Registrar, Makueni to excise the portion and register it under the name of the Plaintiff.**

**(c) 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**