



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC SUIT NO. 46 OF 2017**

**WILFRED MUNAI KILUNGU.....1<sup>ST</sup> PLAINTIFF**

**ALFRED WANZA MUSAU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MUTAVI MUNAL.....DEFENDANT**

**JUDGEMENT**

1. By their amended plaint dated 05<sup>th</sup> May, 2017 and filed in court on 06<sup>th</sup> June, 2017 the Plaintiffs pray for judgement against the Defendant for: -

(a) A declaration that the Defendant holds the land in the title Number Mbooni/Itetani/679 in trust for himself and the Plaintiffs.

(b) An order terminating the said trust and compelling the Defendant to sign the necessary papers to effect sub-division and transfer to Plaintiffs of their shares of the land 0.623 Hactare for 2<sup>nd</sup> Plaintiff and 0.371 Hactares for 1<sup>st</sup> Plaintiff parcel Mbooni/Itetani/679 which is well defined by boundaries and in default the said papers be signed by the executive officer of this Honourable Court.

**(c) An injunction to permanently restrain the Defendant whether by himself, his servants and/or others whatsoever from entering, occupying, remaining in occupation of, or in any other manner howsoever from interfering with the Plaintiffs peaceful occupation and use of their portions of land title Number Mbooni/Itetani/679 being 0.623 Hactares for 2<sup>nd</sup> Plaintiff and 0.371 Hectares for 1<sup>st</sup> Plaintiff Mbooni/Itetani/679.**

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

2. The Plaintiffs have averred in paragraphs 4, 5, 6, 7, 8 and 9 of their amended plaint that at all material times to this suit their mother Mbula Munai Makau (deceased) owned certain piece of land in Itetani area, which parcel of land was ancestral land, that while Mbula Munai Makau was still alive, the Defendant who was her son purported to own the said piece of land alone and also purported to deny his late mother as well as the Plaintiffs from accessing the land, that as a result of the Defendant's wrongful acts, the divisional clan committee of Enzauni Mbaa Ndene clan to which the parties belong deliberated over the looming dispute on 25<sup>th</sup> March, 1982 and divided the land to the Plaintiffs, the mother of the Plaintiffs and the Defendant. The decision of the clan was reduced into writing and the District Land Adjudication Settlement Office in Makueni duly acknowledged and recognized the clan's decision. The Plaintiffs then honestly believed that the adjudication records would reflect the correct position as demonstrated in the clan's written report that each Plaintiff was to be given two portions, that on 27<sup>th</sup> August, 2013 the Plaintiffs discovered that the Defendant had in or about 02<sup>nd</sup> April, 1990 wrongfully caused the registration of the jointly owned piece of land as Mbooni/Itetani/679 in his name thus neglected and/or omitted to include the names of the Plaintiffs as co-proprietors, that it is the Plaintiffs' case that the Defendant owed a duty of care to disclose to the Land Adjudication Officer that the Plaintiffs were co-proprietors of the land parcel number Mbooni/Itetani/679 and that the registration by the Defendant of title number Mbooni/Itetani/679 in his name and in exclusion of the other co-proprietors of the title was achieved through deceit and/or by fraud and/or improper means.

3. The Plaintiffs pleaded the particulars of fraud as follows: -

**That the Defendant acts were fraudulent in that;**

*(a) He concealed to the Land Adjudication Officers the fact that the land was the property of three persons who included the Plaintiff;*

*(b) He secretly caused the registration of the suit title into his name while he perfectly knew that the title belonged to three other persons jointly.*

4. The claim is denied by the Defendant vide his statement of defence dated 28<sup>th</sup> April, 2014 and filed in court on 29<sup>th</sup> April, 2014.

5. He has averred in paragraphs 6 and 12 of his defence that the clan meeting which was also attended by the sub-chief and the Adjudication

Officer agreed and gave him parcel number Mbooni/Itetani/679 as per the agreement which was signed by all parties. That the adjudication record reflected and still reflects the agreement and wishes of the Plaintiffs and family members who agreed to give parcel number Mbooni/Itetani/679 to the Defendant as costs of defending or litigation and that no trust is either expressed or implied against the registration of Mbooni/Itetani/679 at all.

6. The facts of this case are that Mbula Munai (hereinafter referred to as the deceased), the mother of the two Plaintiffs and that Defendant owned land parcel number 676. In a clan meeting held on 25<sup>th</sup> March, 1982, Mbula Munai subdivided her land parcel number 676 amongst the two Plaintiffs and the Defendant. Each of the two Plaintiffs was allocated two (2) parcels of land while the Defendant got three (3).

7. In his evidence in chief, the 1<sup>st</sup> Plaintiff told the court after the sub division of the land, the clan directed each of one of them to move to their portions. He went on to say that after survey was carried out each one of them was allocated their respective plot number. That he obtained a title deed for one of the plots and as he was going for the second title deed, he found out that his second parcel had been amalgamated with the Defendant's parcel number 679.

8. He produced seventeen (17) documents in his three (3) lists of documents dated 27<sup>th</sup> March, 2014, 07<sup>th</sup> September, 2015 and 05<sup>th</sup> May, 2017 as P.Exhibit Nos.1 to 17 respectively.

9. His evidence in cross-examination was that the Defendant did not represent the family in a litigation process. He went on to say that their mother subdivided the land between herself and his aunt, one Mbuli. He agreed that the land had been adjudicated upon before their mother subdivided the land between him and his siblings. He went on to say that their mother summoned the clan before she subdivided the land and pointed out that their mother directed that plot number 679 be allocated to the Defendant as compensation for the costs incurred. It was also his evidence that a report was prepared and presented to the land adjudication committee which approved it.

10. The 2<sup>nd</sup> Plaintiff, Agnes Wanza Musau adopted her recorded statement dated 27<sup>th</sup> March, 2014 as her evidence.

11. Her evidence in cross-examination was that she has indicated in her statement that she got two (2) portions of land while the Defendant got three. She said that she does not know if the Defendant was given 679 by her mother or when he was registered as the owner of the land.

12. Solomon Mutinda Mboko (PW1) in his evidence in chief told the court that he was the secretary of the Anzaoni clan meeting that was chaired by the late Paul Mutuku Kilau. He said that the late Mbula informed the meeting that she had a meeting with her four children over the family land. He said that the four (4) children confirmed their mother's sentiment upon which the Chairman of the meeting led the group to the land where they confirmed the sub division that Mbula had undertaking by planting sisal plants on the boundary. He pointed out as a clan, they subdivided the land into 8 portions and that the Defendant had his own plot which was 679 which he had registered in 1975. He said that the Defendant was involved in a land dispute on behalf of the family and hence the decision by his mother to given him 679.

13. It was also his report that all the parties signed the report that he prepared. He pointed out that the Plaintiff uses his two plots. He went

on to say that in 2013, the two Plaintiffs called him to their home and on arrival, he realized that the Defendant was in occupation of the 2<sup>nd</sup> Plaintiff's land. He pointed out he informed the Defendant about it but he refused to heed hence the decision by the Plaintiffs to come to court.

14. The witness further said that in 2017 the Surveyor visited the land in his presence. According to him, he realized that the Defendant had divided his plot number 679 into two upon which one portion was joined into the 1<sup>st</sup> Plaintiff's land and the second portion to the 2<sup>nd</sup> Plaintiff's land contrary to what the clan had decided. He added that the Plaintiff registered the two portions in his name in 1990. He went on to say that he prepared a sketch plan (P.Exhibit No.4) showing the portions of land.

15. On being cross examined by Mr. Kisongo, Solomon (PW2) told the court that he did not indicate the measurements of each parcel of land. He said that the Defendant was given three portions by his mother because of a case he was involved in on behalf of the family. He pointed out in their meeting, the Defendant was given plot number 679 even though the same is not indicated in his report.

16. Daniel Loni Kithusi Munai (PW2) in his evidence in chief told the court that in 2013 he learnt that the Defendant had registered in his name a portion of land that had been allocated to the 1<sup>st</sup> Plaintiff by his (1<sup>st</sup> Plaintiff's) mother and the clan. This was after his brothers were attacked by the Defendant's son as they were harvesting crops in the portion of land in question. That on discussing the issue with the 1<sup>st</sup> Plaintiff who is his father, the latter sent him to Machakos where he bought a map and realized that the portion in question was not reflected in the map. That when he went to Makueni to carry out a search, he confirmed that the Defendant was the registered owner of the said portion. That they were forced to lodge a caution (P.Exhibit No.1) and also served the Defendant with a demand letter.

17. He went on to say that a report (P.Exhibit No.18) prepared by a surveyor pursuant to an order (P.Exhibit No.17) of this court showed that the two portions belonging to the Plaintiffs were joined into 679.

18. On being cross-examined by Mr. Kisongo, the witness told the court that he had not been born when land parcel number 679 was allocated to the Defendant in 1975.

19. Gabriel Maingi (PW3) a Survey Assistant 3 told the court in his evidence in chief he proceeded to land parcel number Mbooni/Itetani/679 to ascertain the people in its occupation and boundaries pursuant to a court order. He went on to produce a report and a copy of the map as P.Exhibit Nos 8(a) and (b) respectively.

20. His evidence in cross-examination was that he used an official map from Survey of Kenya to carry out his work. He said that he has shown in the map the people on the land and the portions that they occupy.

21. On the other hand, the Defendant in his evidence in chief told the court that he owns a parcel of land in Itetani which he inherited from his father. He went on to say that he fought for it from people who wanted to snatch it and when adjudication process commenced, he represented his father. That upon being allocated the land, he had it subdivided between his father and father's brother. He went on to say

that his brothers raised objection during adjudication process. His brothers were summonsed and his mother appeared before the Adjudication Committee. She directed that he (Defendant) be allocated the land parcel number 679. He said that the Surveyors approved his mother's request and that his brothers have their own parcels of land.

22. He produced one document in his list of documents as D.Exhibit No.1.

23. His evidence in cross-examination by Mr. Kimeu for the Plaintiffs was that in the objection proceedings dated 24<sup>th</sup> February, 1982 (D.Exhibit No.1), it was decided that the suit land be shared amongst the people indicated in the proceedings. According to him, on 25<sup>th</sup> March, 1982, they subdivided the land as per the objection proceedings and that Enzauni clan supervised the exercise and thereafter prepared a report relied upon by the Plaintiff's in their lists of documents. The Defendant went on to say that the 1<sup>st</sup> Plaintiffs were given the portions which they occupy and denied the contention that the two were given two portions each. He admitted that he was given one portion by Serah Mbuli to cater for the expenses that he incurred while fighting for the land. He pointed out that he was given only one portion but pressed further, the Defendant agreed that he was indeed given two (2) portion of land which according to him are not titled. He said that he combined the two portions that he got from his mother to the one he had so that they could become one parcel. According to him, the 1<sup>st</sup> Plaintiff was the one who encroached onto his land and that the encroachment is recent. He denied the suggestion by the Plaintiffs' Counsel that the 2<sup>nd</sup> Plaintiff began using her portion in 1982.

24. It was also his evidence that even though he saw the Surveyor on the ground, the latter only visited his land and pointed out that he did not see the Surveyor's report. He said that it is not true that it was found out that he had taken over the Plaintiffs' parcels of land. He pointed out that even though the suitland is ancestral, he cannot share it with the Plaintiffs. He admitted that he did not have a surveyor's report to show that the surveyor's report that the Plaintiffs were relying upon is not true.

25. In his evidence in re-examination, the Defendant reiterated that he did not combine parcels of land allegedly belonging to the Plaintiffs with his own land.

26. In his submissions, the Plaintiff's Counsel cited Article 40 and Section 26 of the Land Registration Act (hereinafter referred to as the Act) which protect lawfully acquired land. He also cited section 25 of the Act which provides that the rights conferred by registration of a person as proprietor of land does not relieve such proprietor from any duty or obligation to which such person is subject as a trustee. He further cited Section 28(b) of the Act which classifies customary trust as an overriding interest.

27. Arising from the above, the Plaintiffs' Counsel submitted that even though the Defendant is currently registered owner of Mbooni/Itetani/679, he holds the same in trust for himself as well as the Plaintiffs. The Counsel added that the Plaintiffs occupy and possess identified portions of land in parcel number Mbooni/Itetani/679. In support of his submissions, the Counsel relied on the case of **Joseph Githinji Gathiba vs. Charles Kingori Gathiba [2001] eKLR**.

28. The Counsel went on to submit that the two Plaintiffs had evidence which confirmed that the Defendant started laying claim over the entire suitland when their mother was still alive as a result of which the mother summoned the divisional committee of Enzauni Mbaa Ndene clan which divided the land between the Plaintiffs and the Defendant. He pointed out that the decision of the clan was reduced into writing

and produced in court as an exhibit. The Counsel further submitted that it was wrong for the Defendant to cause the jointly owned parcel of land to be registered in his name thereby excluding the Plaintiffs. He pointed out the Plaintiffs evidence was corroborated by PW1 and PW2 who are their close relatives.

29. The Counsel further submitted that **section 80 of the Land Registration Act** provides for rectification of register. The section provides as follows: -

***“80. Rectification by order of Court***

*(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”*

30. The Counsel was of the view that the above section does not include the words “*other than first registration*” and hence no registration cannot be cancelled in view of the fact that under section 106(1) of the Land Registration Act, the repealed Acts cease to apply to a parcel of land to which the Act applies. The repealed Acts include among others **The Registered Land Act chapter 300 of the Laws of Kenya** which at **section 28** provided as follows;

*“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as is provided in this Act, .....*”

31. The Counsel submitted that since the Defendant failed to include the names of the Plaintiffs as co-proprietors and secretly caused the registration of the suit title into his name, the title was fraudulently and illegally obtained and thus the Plaintiffs are entitled to challenge it under section 26(1) of the Act.

32. On the other hand, the Defendant’s Counsel submitted that land parcel number Mbooni/Itetani/679 was given to him by the clan and his mother as is shown in the agreement that the Defendant produced. He added that the Defendant denies fraud in acquiring the land in question. He pointed out that the Defendant also denies trust.

33. As for fraud, the Defendant’s Counsel submitted that there was none and that the Plaintiffs have not proved the same.

34. The Counsel further submitted that the process of adjudication was not exhausted and anyone not satisfied with the decision of the land adjudication ought to have appealed to the minister, a step the Plaintiffs never took.

35. The Counsel urged the court to dismiss the Plaintiffs' suit with costs.

36. In response to the Defendant's submissions, the Plaintiffs' Counsel submitted that the Surveyor's report filed in court pursuant to the consent by the parties confirmed that the Plaintiffs are in occupation of their parcels which are in Mboni/Itetani/679. The Counsel added that the Defendant does not have any other expert report to challenge the Surveyor's report.

37. Arising from the above, my finding is that the issues for determination are: -

***(a) Whether or not the Defendant fraudulently took over portions of land allocated to the Plaintiffs and combined the portions with his land parcel number Mbooni/Itetani/679.***

***(b) Whether or not the Defendant holds land parcel number Mbooni/Itetani/679 in trust for himself and the Plaintiffs.***

38. I will address the two issues together. There is no doubt that the Defendant was allocated land parcel number 679 to take care of the expenses he incurred while pursuing a land dispute that touched on family land. There is also no doubt that the two Plaintiffs were allocated two (2) parcels of land each. This is confirmed by PW1 who was the secretary of Enzauni clan meeting held on 25<sup>th</sup> March, 1982 when the clan ratified the decision of the Plaintiffs' and the Defendant's mother to subdivide the family land between the parties herein. The Itetani Adjudication proceedings No.95 of 1982 (D.Exhibit No.1) which the Defendant relies on clearly shows at Order number (iii) P/No.679 and 676 were to be combined and the clan was to share the land. The objection proceedings are dated 24<sup>th</sup> February, 1982 while the clan meeting was held on 25<sup>th</sup> March, 1982, a month down the line. It therefore seems to me that the Enzauni clan was doing exactly what the Plaintiffs herein and the objection proceedings No.95 of 1982 required to be done. Gabriel Maingi (PW3), a Survey Assistant 3 who visited the suitland i.e. parcel number Mbooni/Itetani/679 on 28<sup>th</sup> April, 2017 pursuant to a consent recorded by the parties herein in his evidence told the court that the parcels belonging to the two Plaintiffs which he identified by means of GPS were part of Mbooni/Itetani/679 belonging to the Defendant. The Defendant cannot therefore be heard to say that his mother gave him the land parcel number Mbooni/Itetani/679 as currently is because, in my view, the Defendant had an obligation at the time when he acquired his title document to ensure that the parcels belonging to the two Plaintiffs were left out. The attempt by the Defendant to explain why he owns the suitland in its entirety is at best tenuous and the inference I can draw is that he combined the parcels belonging to the Plaintiffs into his own parcel of land fraudulently.

39. The above would therefore call for the rectification of the register as is provided by section 80(1) of the Land Registration Act since though the Defendant's title document is first registration under the repealed Registered Land Act, it is not exempt from the provisions of aforementioned section 80.

40. Flowing from the above and in light of the evidence that the two Plaintiffs were lawfully allocated land that forms part of the larger Mbooni/Itetani/679, the Defendant who has a title document to the suitland therefore holds the same in trust for himself and the Plaintiffs. There is, therefore, no reason why he cannot relinquish that which belongs to the two Plaintiffs.

41. I wish to point out that I found the Plaintiffs and their witnesses candid and reliable as opposed to the Defendant who in my view is a liar.

42. The upshot of the foregoing is that I am satisfied that the Plaintiffs have on a balance of probabilities a cause of action against the Defendant. In the circumstances, I hereby proceed to enter judgment in their favour and against the Defendant as hereunder: -

**(a) It is declared that the Defendant holds the land in the title Number Mbooni/Itetani/679 in trust for himself and the Plaintiffs.**

**(b) An order is hereby issued terminating the said trust and compelling the Defendant to sign the necessary papers to effect sub-division and transfer to Plaintiffs of their shares of the land 0.623 Hactare for 2<sup>nd</sup> Plaintiff and 0.371 Hactares for 1<sup>st</sup> Plaintiff parcel Mbooni/Itetani/679 which is well defined by boundaries and in default the said papers be signed by the Deputy Registrar of this Honourable Court.**

**(c) An injunction is hereby issued permanently restraining the Defendant whether by himself, his servants and/or others whosoever from entering, occupying, remaining in occupation of, or in any other manner howsoever from interfering with the Plaintiffs peaceful occupation and use of their portions of land title Number Mbooni/Itetani/679 being 0.623 Hactares for 2<sup>nd</sup> Plaintiff and 0.371 Hectares for 1<sup>st</sup> Plaintiff Mbooni/Itetani/679.**

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

Signed, Dated and Delivered at Makueni via email this 21<sup>st</sup> day of May, 2020.

**MBOGO C. G.,**

**JUDGE.**

Mr. G. Kwemboi – Court Assistant