



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 97 OF 2015

JOSEPH MUTHIANI KIVINDU.....1ST PLAINTIFF

WAYUA KIVINDU2ND PLAINTIFF

VERSUS

FREDRICK MWANIKI MUSAU.....1ST DEFENDANT

AUGUSTINE NZUKI MULI.....2ND DEFENDANT

BONIFACE MAKAU.....3RD DEFENDANT

THE REGISTRAR OF LANDS, AND THE ATTORNEY GENERAL....4TH DEFENDANT

KENYA UNION OF SAVINGS AND CREDIT

CO-OPERATIVES LIMITED (KUSCCO).....5TH DEFENDANT

JUDGMENT

Introduction:

1. In the Amended Plaint dated 15th March, 2017, the Plaintiffs averred that in the year 1996, Pius Kivindu King'oo, who is the father and husband to the Plaintiffs respectively, was approached by Musau Mwaniki, the father of the 1st Defendant to sell him his share at Ngelani Ranching Unity, Athi River.
2. The Plaintiffs have averred that at the time, the 1st Defendant's father was still paying for his share contribution which he had acquired in partnership with four (4) other persons being Mulinge Ikwava, Kasuli Nthenge, Musembi Nzivu and Muli Nzuki and that the five partners had been allocated plot number 13 which was then sub-divided into plots 13A to 13E.
3. The Plaintiffs averred that part of the consideration for the sale of the share was done by releasing one cow to Musau Mwaniki and that the balance was agreed to be paid by instalments; that there was a common intention and implied trust by the parties to sell and buy the share in land.
4. According to the Plaintiffs, after Pius Kivindu King'oo made the final payment of Kshs. 500, his name was entered in a book of the shareholders held by the principal shareholder, Muli Nzuki and the seller's name was cancelled; that the entry of the 1st Plaintiffs' father was entered in the register of the five shareholders in 1968 and that Pius Kivindu was then put into possession of the suit land, which had not been sub-divided.
5. The Plaintiffs have averred that upon taking possession of the suit land, the 1st Plaintiff's late father constructed a home and started assisting in school construction projects; that his children went to school within the Ngelani Ranching land and that at the time of his death, he was still the owner and in possession of the suit land that he purchased.
6. It is the Plaintiffs' case that during the process of sub-division of the suit land, the 2nd and 3rd Defendants connived and un procedurally transferred that 2nd Plaintiff's late husband share into the name of the 1st Defendant; that the land that the 2nd Plaintiff's husband bought was

delineated as plot number 13A of Block 8914 -Ngelani Ranching Unity, Athi River and that the 1st Defendant has since been issued with a title for land known as L.R. No. 8914/43.

7. The Plaintiffs averred that the 1st Defendant has since transferred the suit land to the 5th Defendant; that a declaratory order should issue that it is the Plaintiffs who are the legal and or beneficial owners of land known as L.R. No. 8914/43 and that an order for the cancellation, revocation and rectification of any titles, entries or rights in respect of the suit land should issue.

8. In their Amended Defence, the 1st, 2nd and 3rd Defendants averred that the record held at the Ngelani Ranching Unity does not have the name of Pius Kivindu King'oo; that the late Pius Kivindu King'oo never settled on the suit land as alleged and that the Plaintiffs' suit is time barred.

9. In its Defence, the 5th Defendant averred that it is the legally registered owner of the suit land for value without notice; that the Plaintiff does not disclose any reasonable cause of action as against it and that the suit should be dismissed.

The Plaintiffs' case:

10. PW1 informed the court that he is 82 years old; that his late father, Kathuma Kimii, was among the first twenty principal shareholders of Ngelani Ranching Unity (*Ngelani Ranch*) which is situated in Athi River, Machakos and that he started living on the Ranch in 1938 way before it was sold to the first twenty principal members.

11. PW1 stated that he knew the late Pius Kivindu King'oo, the 1st Plaintiff's father, and the late Musau Mwaniki, the 1st Defendant's father; that the late Musau Mwaniki became a shareholder of the Ranch under one of the principal members known as Muli Nzuki in 1964; that the said Musau left and his place was taken up by Kivindu King'oo together with his mother, Syokau, and that the two took possession of the Ranch by farming and grazing alongside the other members of the Ranch.

12. It was the evidence of PW1 that he came to learn later that Musau Mwaniki sold his share in the Ranch to Pius Kivindu King'oo before moving to Shimba Hills in Kwale and that he never came back to the Ranch. It was the evidence of PW1 that in the year 1976, the members of Ngelani Ranch came together to contribute money to repay a loan that the Ranch had taken in 1963; that himself and the late Pius Kivindu King'oo were amongst the committee members who were appointed to collect money to repay the said loan and that the late King'oo lived on the portion of the land belonging to the Ranch until his death in 2007.

13. PW1 denied that Musau leased to King'oo the land that he was meant to occupy; that it is only members of the Ranch that were allowed to graze on the land; that the late King'oo lived on the land and that he was a village elder.

14. In cross-examination, PW1 stated that King'oo went on the land in the year 1964 when Musau left; that Muli Nzuki was one of the principal members of the Ranch; that Musau was a member "under" Muli Nzuki; that King'oo was a member of the committee that was mandated to collect money for the purpose of repaying a loan and that his father had two people "under" him while Muli had four people "under" him.

15. The 1st Plaintiff, PW2, informed the court that she is the wife of the late Pius Kivindu King'oo (*King'oo*); that in 1966, the 1st Defendant's father, Musau Mwaniki (*Musau*), agreed to sell to his late husband a share at Ngelani Ranch; that at that time, Musau was still paying for his share in a partnership of four (4) person, namely Mulinge Ikwava, Kasuli Nthenge, Musembi Nzivu and Muli Nzuki and that Muli Nzuki was the principal member in the Ngelani Ranch.

16. It was the evidence of PW2 that the five members were allocated plot number 13 which was divided into five portions being 13A to 13E and that the negotiations for the purchase of Musau's share were oral. According to PW1, the people who were present during the negotiations included her sister-in-law, Luis Mbulwa Muinde and her mother-in-law, Syokau King'oo.

17. PW2 informed the court that her late husband gave to Musau one (1) cow as the initial payment for the share at the ranch and paid the balance of the purchase price by installments; that the last instalment of Kshs. 500 was paid to Mr. Musau through her husband's uncle, Makau Nzusyo and that the change in the shareholding was made in a book that was kept by Muli Nzuki.

18. It was the evidence of PW2 that after paying for Musau's share, Mr. King'oo took possession of the suit land in 1969; that he put up his house on the land and employed a herdsman to take care of his cattle. It was the evidence of PW2 that Mr. King'oo died in 2007 and that the process of sub-division of the Ngelani Ranch commenced in 2009. According to PW2, it is the Management Committee of the Ngelani Ranch that unlawfully transferred the share of King'oo to the 1st Defendant, who is the son of Makau.

19. PW2 informed the court that Mr. King'oo participated in school projects located in Ngelani Ranch and that he used to collect the money that was meant to repay the loan for the Ngelani Ranch. PW2, informed the court that the late King'oo was in possession of the suit land until he died and that Mr. Makau relocated after selling the land to Mr. King'oo.

20. PW2 denied that her late husband leased the land from Musau for grazing purposes; that it is not true that the land was leased to her mother-in-law, Syokau, or her late father-in-law Lau Muli and that the family vacated the suit land 3-4 years ago.

21. The 1st Plaintiff, PW3, adopted the evidence of his mother, PW2, word for word. In addition to what PW2 stated, PW3 stated that when a dispute arose between themselves and the 1st Defendant, the then District Commissioner (DC) convened a meeting and directed the family of Nzuki Muli to produce the original book which had a list of the members; that he made a copy of the said book and that the book shows how the five partners contributed towards the share.

22. According to PW3, the book that was kept by Mr. Nzuki Muli shows the crossed name of Mr. Musau, which was replaced by his father's name; that the book shows the contribution that was made by his father towards the share he purchased and that his late father occupied the land together with his mother and grandmother.

23. PW3 informed the court that his late father was a member of the Board of Governors of Kaseve Primary that changed its name to Ngelani Ranch Primary School which is within the Ranch; that his late father was also a village elder and that he (PW3) went to Ngelani Ranch Primary School, having been born there.

24. PW3 stated that his father was buried in Kangundo in the year 2007 because the land in Ngelani Ranch had not been sub-divided; that none of the original shareholders were buried on the suit land and that he never saw the 1st Defendant's father on the land.

25. PW3 informed the court that Muli Nzuki, as the principal member, was allocated plot 13 which was sub-divided into five portions being 13A – 13E; that after survey, plot 13A became L.R. No. 8914/43 and that the Title Deed came out in the name of the 1st Defendant.

26. According to PW3, he was not aware when the title document was issued in favour of the 1st Defendant and that he only learnt later that the title had been issued in favour of the 1st Defendant in the year 2014. It was the evidence of PW3 that while the suit was pending, the 1st Defendant sold the land to the 5th Defendant.

27. PW3 stated that the 3rd Defendant was the Chairman of the Society and was aware of his father's interest in the suit land. In cross-examination, PW3 stated that he was 35 years old; that his father told him about the transaction between him and the 1st Defendant's father and that he was born and grew up on the suit land.

28. PW4 informed the court that her husband moved to Ngelani Ranching Unity land in the year 1967 where his mother, Mulimi Kasuli had bought shares with five (5) other partners being Muli Nzuki, who was the principal shareholder, Musau Mwaniki, Musembi Nzivo and Mulinge Ikwava.

29. According to PW4, in 1969, Musau Mwaniki, the 1st Defendant's father, summoned her together with Muli Nzuki, his wife Kisove Muli and Mulako Nzuva and informed them that he had sold his share at Ngelani Ranching Unity to Pius Kivindu King'oo, the 1st Plaintiff's father.

30. It was the evidence of PW4 that Musau allowed the 1st Plaintiff's father to take possession of the suit land while he moved to Shimba Hills where he settled. According to PW4, it is the Plaintiffs' family which have been in possession of the suit land since 1969. It was the evidence of PW4 that the Plaintiff's father became a village elder, the Chairman of the local 'cattle dip' and the local primary school.

Defence case:

31. The 1st Defendant, DW1, informed the court that he inherited the suit land from his late father, Makau; that the bigger portion of the land was owned by five partners, including his father and that Muli Nzuki was the principal partner.

32. According to DW1, in 1966, his father allowed one Syokau King'oo to graze her cows on the suit land and migrated to Shimba Hills; that Syokau King'oo is the mother of Pius Kivindu King'oo, the 1st Plaintiff's father and that sometimes in the year 1992, his father came back from Shimba Hills and asked Pius Kivindu King'oo to vacate the suit land.

33. According to DW1, when Syokau King'oo died, his son, the 1st Plaintiff's father, continued with the animal husbandry within the Ranch; that in 1992, his father dared the 1st Plaintiff's father to take the traditional oath to establish if he ever paid him for the land and that the 1st Plaintiff's father refused to take the traditional oath. DW1 stated that the Plaintiffs did not have any document to show that King'oo purchased the suit land.

34. According to DW1, his father would not have sold his share to the 1st Plaintiff's father without notifying the other four partners. It was the evidence of DW1 that his late father convened a meeting at Nzuki Muli's home on 12th July, 1992 to resolve the issue of ownership of the suit land and that in attendance were PW4's husband, Muli and his sons, Kyalo Musembi, King'oo and his sons and that the King'oo refused to take the traditional oath.

35. It was the evidence of DW1 that upon receiving a demand letter from their advocate, King'oo vacated the suit land in 1992 and only went back to the land in the year 2001 after the death of his father in the year 2000. In cross-examination, DW1 stated that he had not obtained the Letters of Administration in respect of the Estate of his late father; that the Minutes of 12th July, 1992 is a true reflection of what happened and that it is Muli who kept the original book that had the names of the shareholders.

36. DW1 informed the court that his father's name had been cancelled in the register book and replaced with the name of the 1st Plaintiff's father, Mr. King'oo; that the five names in the book shows the owners of the land and that in the meeting of 12th July, 1992, three members stated that they had heard that the Musau had been sold his share to Mr. King'oo. It was the evidence of DW1 that the late King'oo only acquired grazing rights on the suit land.

37. According to DW1, when their advocate did the demand letter in 1992, King'oo was living on the disputed land with his family and that he vacated the land after receiving the demand letter. It was his evidence that parcel number 13A is the same as L.R. No. 8914/43; that his father left the land in the year 1966; that the sub-division of the entire land was done by the elders in the year 2009 and that upon the said

subdivision, the land that his father was entitled to was allocated to him. DW1 admitted that he sold the disputed land to the 5th Defendant in the year 2016 after obtaining the Title Deed.

38. The 2nd Defendant, DW2, informed the court that he is the son of the late Muli Nzuki; that his father was one of the original members of Ngelani Ranching Unity which had a total of 22 members with equal shares and that his father's share was owned by himself and four other partners, namely Mulinge Ikwava, Mulimi Kasuli Nthenge, Musembi Nzivo and Musau Mwaniki.

39. According to DW2, Musau Mwaniki, the 1st Defendant's father, allowed Syokau King'oo, who is the mother of Mr. King'oo and the 1st Plaintiff's grandmother to keep her cattle on the suit land and to pay the County Council for keeping cattle on the land.

40. According to DW2, in 1992, his late father called for a meeting to confirm if indeed Makau had sold his share to Mr. King'oo and that Makau was willing to take the traditional oath to confirm that he had only allowed Syokau King'oo to graze on his land. DW2 stated that he never saw any evidence of the alleged sale of Musau's share to the late Syokau King'oo or Kivindu King'oo and that if there was any sale, then all the five partners would have been involved. According to DW2, the Plaintiffs only filed this suit to take advantage of the demise of Mr. Musau and the other original partners of Ngelani Ranch Unity.

41. On the issue of how King'oo's name entered into the records of the five partners, DW2 stated that all the partners who were in the meeting of 12th July, 1992 stated that they had heard that King'oo had purchased Musau's share and that Makau Nzusyo informed the meeting that he is the one who had handed to Musau the installment of Kshs. 500.

42. DW2 stated that all the payments in respect of the suit land used to be recorded; that the records show that it is King'oo who paid the Council's fee of Kshs. 200 for the land and that King'oo was not paying for the land but for grazing rights.

43. DW3 informed the court that he has been the Secretary of Ngelani Ranching Unity since the year 1995; that he only became aware of the Plaintiffs' claim after issuing to the 1st Defendant a Title Deed in respect to the disputed land and that it is Muli Nzuki who forwarded to the Society the names of the Partners who were entitled to the suit land.

44. According to DW3, Mr. Muli only introduced four partners; that his share was sub-divided between the five of them in equal shares and that the Plaintiffs were unable to produce evidence of the sale of the land to Mr. King'oo. DW3 stated that the Chairman of the Ngelani Ranch is Boniface Makau and that the Society never received the letter dated 14th October, 2014.

45. The Deputy Manager, Risk Management Services, of the 5th Defendant, DW4, informed the court that on 21st October, 2015, the 1st Defendant legally sold land known as L.R No. 8914/43 to the 5th Defendant; that the 5th Defendant carried out due diligence prior to the purchase of the land and that the 5th Defendant was not aware of the relationship between property known as Plot 13A and L.R. No. 8914-Ngelani Ranching Unity and L.R. No. 8914/43.

46. DW4 testified that the 5th Defendant is an innocent purchaser for value and holds a valid and proper title to L.R. No. 8914/43; that the 5th Defendant is not privy to the dispute between the Plaintiffs and the Defendants and that the beacons to the suit land were showed to the 5th Defendant by the 1st Defendant.

Submissions:

47. The Plaintiffs' advocate submitted that the Plaintiffs had proved that there was an oral contract of sale of land between Pius Kivindu King'oo and Musau Mwaniki; that the late King'oo took possession of the suit land after the said purchase and that the land which the late King'oo was entitled to was surveyed as L.R. No. 8914/43.

58. The Plaintiffs' counsel submitted that based on the doctrine of *lis pendens*, Articles 40(6) and 10 of the Constitution; Sections 26(2) and 80 of the Land Registration Act, the 5th Defendant cannot be said to be an innocent purchaser for value over the suit property.

49. The Plaintiffs' counsel submitted that at the time of the sale of the suit property by the 1st Defendant to the 5th Defendant, there was active litigation over the suit property; that the doctrine of *lis pendens* prohibits the transfer of a suit property to a third party pending litigation and that the transfer of the suit property to the 5th Defendant was null and void.

50. On the issue of limitation of time, the Plaintiffs' advocate submitted that the Plaintiffs' family has been in possession of the suit land until the death of Mr. King'oo; that the 1st Defendant's interest in the suit land only arose on 31st December, 2014 when he was issued with a Title Deed and that the suit is not barred by limitation of time.

51. The 1st-3rd Defendants' advocates submitted that Section 3 (3) of the Law of Contract Act (*before the 2003 amendments*) provided that for a land transaction to be enforceable, there must be a note or memorandum thereof in writing; that there is no such note or memorandum in respect of the alleged sale between the 1st Defendant's father (*Musau*) and the 1st Plaintiff's father (*King'oo*) and that even after receiving an eviction notice in the year 1992, the late King'oo did not move the court appropriately.

52. The Defendants' counsel submitted that the book that was produced in evidence showed payments to the local authority for grazing of cattle on the suit land; that the late King'oo was not allowed to pay for survey fees because he was not recognized as one of the owners of the land and that the payments reflected in the book were not for the purchase of the land but grazing rights.

53. The 5th Defendant's advocate submitted that the Plaintiffs' pleadings and evidence are in direct contradiction with each other and that although the Amended Plaintiff claims that the Agreement between Mr. Musau and King'oo was entered into in 1969, the letter by Mr. Kivindu King'oo was silent on the issue of the purchase of share or land.

54. The 5th Defendant's counsel submitted that none of the witnesses alluded to being present when Mr. Nzusyo is said to have paid Musau the alleged balance of Kshs. 500 and that on the issue of a common intention as between parties to the alleged Agreement, there was no evidence that was tendered to support the claim.

Analysis and findings:

55. According to the evidence of the Plaintiffs and the Defendants, parcel of land title L.R. No. 8914 measuring approximately 1,989 acres was owned by a white settler known as Peter Joseph Heining. After Independence, the said settler agreed to sell the land, otherwise known as Ngelani Ranch Unity, to 22 shareholders. Each of the said 22 shareholders was allowed to have members under his name for the purpose of buying the said land.

56. One of the twenty two (22) initial (*principal*) shareholders who acquired Ngelani Ranch Unity from the white settler was the late Muli Nzuki, the 2nd Defendant's father. Muli Nzuki had four partners who were entitled to his share in equal portions. The said four partners were: Musau Mwaniki (*the 1st Defendant's father*); Mulinge Ikwava; Musembi Nzivu and Mulimi Kasuli (*mother-in-law to PW4*).

57. The evidence by the Plaintiffs, who are a son and mother respectively, was that in 1966, the 1st Plaintiff's father Pius Kivindu King'oo (*King'oo*), entered into an oral Agreement with the 1st Defendant's father (*Musau Mwaniki*) and bought the share that he was holding in the share of Muli Nzuki.

58. According to the evidence of the wife of the late Mr. King'oo (PW2) and his son (PW3), the consideration for the land that the late King'oo bought was Kshs. 1,500, which was paid by giving to Mr. Musau one cow and Kshs. 500 in cash. PW2 and PW3 informed the court that the cash of Kshs. 500 was paid to Mr. Musau through Mr. King'oo's uncle, Makau Nzusyo (*Mr. Nzusyo*).

59. PW4, who is the daughter-in-law of one of the principal shareholders in Ngelani Ranch, informed the court that she settled at Ngelani Ranch with her husband in 1967 and that in 1969, or thereabouts, Musau Mwaniki (*the 1st Defendant's late father*) went to Muli Nzuki's home accompanied by the mother of the late King'oo, Ms. Syokau King'oo (*also deceased*). It was the evidence of PW4 that Musau summoned her, together with Muli's wife, at Mr. Muli Nzuki's home and informed them that he had sold his share to Mr. King'oo – the 1st Plaintiff's father.

60. PW1 informed the court that his father was one of the twenty two (22) principal members that owned Ngelani Ranch Unity, and that he started living on the said Ranch in 1938, before it was sold to the said twenty two (22) members by the white settler. According to PW1, he knew Mr. King'oo and Mr. Musau; that Mr. Musau entered the Ranch briefly in 1964 and thereafter Mr. King'oo and his mother, Syokau King'oo took his farm and began farming and grazing on the Ranch as members.

61. It was the evidence of PW1 that he heard that Mr. King'oo had purchased the shares of Mr. Musau, and that Mr. King'oo became an active member of the Ranch.

62. The Defendants have denied the assertion by the Plaintiffs that Mr. King'oo bought the share belonging to Mr. Musau. According to the 1st Defendant (DW1) and the 2nd Defendant (DW2), the late King'oo and his mother Syokau King'oo were only given grazing rights on the land.

63. After the 1st Defendant was allocated the parcel of land in the year 2014, as an inheritance of his father, Mr. Musau, he sold the said land to the 5th Defendant. It is the Title Deed that was issued to the 1st Defendant, which he subsequently transferred to the 5th Defendant during the pendency of this suit, that the Plaintiffs are challenging. The only issue that arises in this case is who between the Plaintiffs and the 1st Defendant are entitled to the suit land.

64. The Plaintiffs' case is that the late King'oo entered into an oral Agreement to purchase his share whereafter he took possession of the land. From the evidence, it is not clear exactly when the said oral Agreement was entered into, if at all. According to PW4, who is the wife of one of the five partners in Mr. Muli Nzioki's share, Mr. Musau informed her in 1969 that he had sold the land to Mr. King'oo.

65. The evidence that was produced in this court shows that the only book/register that showed the names of the people who were in possession or occupation of the land that Mr. Muli Nzuki was entitled to as one of the principal shareholders was kept by Mr. Muli Nzuki. The original book, which is in Kikamba language, was produced in evidence by Mr. Muli's son (DW2). The copy of the book with the translated version was produced by the Plaintiffs.

66. The first entry in the book was made on 2nd July, 1966, with a heading "*Book of the Company*". It shows the five names with some money indicated against each name. The names are Muli s/o Nzuki; Musau s/o Mwaniki; Musembi s/o Nzivu; Mulinge s/o Ikwava and Mulinge s/o Kasuli. The name of Musau s/o Mwaniki, who is the 1st Defendant's father, is cancelled. Below the names, the following words have been written:

“we have agreed whoever will not bring his balance will take home his cows and when he clears he brings them back.”

67. The second entry in the book was done on 16th April, 1968. On the said date, the name of Musau s/o Mwaniki had been replaced all

together with the name of Kivindu King'oo. The names show the payments that each person had contributed. The other entry in the book showing the five names, excluding Musau, was made on 19th August, 1968. On 8th June, 1969, an entry was made showing that Kivindu King'oo has refunded Muli Nzuki Kshs. 50.

68. The Plaintiffs produced in evidence the Minutes of 12th July, 1992 titled "*How Kivindu King'oo bought land from Musau Mwaniki.*" The Minutes shows that Muli Nzuki, together with Mutua Kasuli and Kalekye Musembi "*heard that the land was bought.*" It would appear that the meeting never resolved the issue of whether Kivindu King'oo ever purchased the land from Musau. Instead, it was resolved that the two should escalate the dispute to the area Chief.

69. Indeed, the issue of the Plaintiffs' father having been in possession of the suit land since 1966 or thereabouts has been admitted by the 1st and 2nd Defendants. The Defendants admitted in their evidence that the late Musau relocated to Shimba Hills in Kwale and left his share of the land in the possession for Syokau King'oo, the mother of Mr. King'oo. According to the Defendants, it is Syokau King'oo who invited her son, Mr. King'oo, on the land, and that the two moved out of the land in 1992 after a demand letter was issued to them by Mr. Musau.

70. The demand letter by the advocate of Mr. Musau dated 31st July, 1992 and addressed to Kivindu King'oo was produced in evidence. The said demand letter gave Kivindu King'oo a grace period of two months to move out of the land. The letter was copied to Makau Nzusyo.

71. In response to the demand letter, Kivindu King'oo responded via a letter dated 24th August, 1992 as follows:

"I was very much disturbed by your letter of 31st July, 1992, that I vacate from your client's plot at Katani within sixty (60) days. Take note that I dwelt in Ngelani Ranching Unity from 1964 until today and your letter left me in full darkness."

72. It would appear that even after being informed to vacate the suit land in 1992, the late Kivindu King'oo did not take any step to stop the eminent eviction. According to the Defendants, Mr. Kivindu King'oo voluntarily left the land in 1992. Indeed, the Plaintiffs did not exhibit any evidence to show that Mr. King'oo did not vacate the suit land around 1992.

73. Although the 1st Plaintiff exhibited a school leaving certificate signed by the headmaster of Ngelani Ranch Primary School to prove that he went to school which is situated on Ngelani Ranch, and to prove that the family has always been on the suit land, the said leaving certificate shows that he joined standard one on 15th January, 1993 and left the school on 30th November, 1994.

74. The 1st Plaintiff (PW3) did not offer any explanation as to why he left Ngelani Ranch Primary School in 1994, having joined standard one the previous year. Is it because his father, Pius Kivindu King'oo, left and relocated from Ngelani Ranch Unity after receiving the demand letter in 1992? That, in my view, is the only plausible explanation why the 1st Plaintiff had to get another school away from Ngelani Ranch Primary School.

75. Turning back to the issue of whether the 1st Plaintiff's father, the late Mr. Kivindu King'oo, bought the share that was held by Mr. Musau, the evidence by the Plaintiffs was that the Agreement between the two was oral, and that the records held by the principal member, Mr. Muli were changed to indicate the changes.

76. As I stated earlier on, the name of Musau s/o Mwaniki was deleted from the book that was being held by Muli s/o Nzuki. It is not clear from the said book if the deletion was done in 1966 or 1968. What is clear from the said record is that the payments indicated against the name of the five people, including Mr. Muli, who was the principal member, was for grazing purposes by the people indicated therein.

77. I say so because on 2nd July, 1966, it was noted that "*whoever will not bring his balance will take home his cows and when he clears he brings them back.*" The book which was kept by Mr. Muli does not state that whoever does not pay up loses his share in the land. That being the position, the register of 1966-1969 only shows the payments that were being made in respect to the grazing rights on Ngelani Ranching Unity, and not the purchase of the land, or shares.

78. The Plaintiffs informed the court that Mr. King'oo purchased Mr. Musau's share by giving him one cow and Kshs. 500 in cash. However, no witness was present when the said cow was handed to Mr. Musau or when he was paid Kshs. 500 by the Plaintiffs' uncle. It is not clear why the said consideration was paid, if at all, to Mr. Musau without any witnesses.

79. Indeed, Kshs. 500 must have been a lot of money in the 60's. How can this court ascertain that the Plaintiffs' uncle, Mr. Makau Nzusyo ever paid Mr. Musau Ksh. 500? If indeed the late King'oo paid consideration for the said share, why didn't he say as much when he received the demand letter of 31st July, 1992 from the firm of M. Masika & Advocates? That would be the most natural thing for a purchaser of land to say in response to the letter asking for his eviction.

80. The failure by the late King'oo to categorically state in his response to the demand letter that he had bought the suit land from Mr. Musau clearly shows that he knew he had not bought the land. In his response dated 24th August, 1992, he was disturbed by the demand letter requiring him to vacate the suit land because he had resided on the suit land since 1964, and not because he had purchased the land. Indeed, from the Leaving Certificate of the 1st Plaintiff, he withdrew the 1st Plaintiff from Ngelani Primary School in 1994.

81. The evidence before me shows that the late King'oo, together with his late mother, Syokau King'oo, were allowed by the late Musau Mwaniki the rights to graze their cattle within the Ranch when Mr. Musau moved to Shimba Hills. Indeed, the payments that the late King'oo paid to the Athi River Council were for the cattle "*dip*" and for 'Tick Control Services' and not for the land. In fact, the payments for the grazing rights on the land were made by all the people, including the original purchasers like Muli.

82. If Mr. Musau had the intention of selling his land, then the first people whom he would have informed were the four partners. However, none of the four partners witnessed the sale of the share that Mr. Musau held in common with his four other partners. The fact that Mr. Muli “heard” that Mr. Musau had sold his share is not the same as Mr. Muli having been notified of the sale of the share by his partner.

83. In conclusion, it is my finding that had the 1st Plaintiff’s father bought the suit land as claimed, then he would have put up resistance in the year 1992 when he received a demand letter. Instead, he only lamented how he had lived on the land since 1964, but did nothing to enforce his rights, if any. Indeed, the 1st Plaintiff, who was in nursery in 1993, had to terminate his studies in a school that was on the Ranch in 1994, meaning that Mr. King’oo vacated the land with his family as stated by the Defence.

84. That being the case, and in the absence of evidence of the consideration that Mr. King’oo paid for the suit land, I find and hold that the Plaintiffs failed to prove their case on a balance of probabilities. Consequently, the Plaintiffs’ suit is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE