



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 114 OF 2017**

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

**MUSILA MUINDI.....1<sup>ST</sup> PLAINTIFF**

**MUMO MUINDI..... 2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**MUNYAO MASUA..... 1<sup>ST</sup> DEFENDANT**

**MUTINDA MASUA..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Through a plaint dated 22<sup>nd</sup> September, 2015, the Plaintiffs prays for orders against the Defendants for;

**a) An order of permanent injunction to restrain the Defendants either by themselves, servants and agents or otherwise from interfering with the Plaintiffs' use and possession of Mbooni/Iiani/417.**

**b) Costs and interest.**

2. The land parcel at the centre of the dispute is Mbooni/Iiani/417 (*suit land*) and is registered in the name of Masua Makusya who is deceased. It is clear from the plaint that all the parties herein are related but the averments in the plaint do not bring out the relationship clearly.

3. It is pleaded that the deceased had two wives and in addition to the suit land, he was also the owner of Mbooni/Iiani/533 (*collectively, the suit properties*). The suit land was given to the 2<sup>nd</sup> wife, Mumbua Masua while the 1<sup>st</sup> wife, Kalunde Masua, got Mbooni/Iiani/533. The Plaintiffs are from the lineage of the first wife and they have averred that prior to the deceased's death, they had purchased part of the suit land and its remainder was given to their mother, Mutete Masua. They have averred that their mother was given the remainder because she nursed the deceased when he was ailing.

4. Their grievance is that the Defendants do not recognize the sale between them and the deceased and have laid claim to the entire suit land to the extent of causing chaos that culminated in a criminal case in Tawa Law Courts. They have averred that the Defendants' actions amount to trespass and hence this suit.

5. The suit is opposed through the statement of defence dated 19<sup>th</sup> October, 2018. The Defendants have averred that the suit properties are registered in the deceased's name hence the suit is bad in law as it is brought against the children of the deceased who have no capacity to be sued. They have averred that the Plaintiffs are not grandsons of the deceased hence strangers to the estate. They have also averred that the Plaintiffs cannot inherit the estate through their grandmother who died before the properties were acquired while their mother was married to one Muundi. They deny each and every allegation in the plaint.

6. The 1<sup>st</sup> Plaintiff, Stephen Musila Muindi, adopted his statement filed on 09<sup>th</sup> October, 2019 in which he stated that the deceased was their grandfather and the biological father to their mother. That they were born on the suit land which their mother inherited from their grandmother, Kalunde. He does not understand what the Defendants want by selling the suit land and leaving their plot No. 533. He produced the following documents;

· Application & plaint dated 22/09/15 -P.Exhibit-1

· Caution dated 16/07/2015 -P.Exhibit 2

- Official search of Mbooni/Iiani/417 - P.Exhibit 3
- Official search of Mbooni/Iiani/533 - P.Exhibit 4
- Citation Cause No. 159/2016 -P.Exhibit 5
- Death certificate of Masua Makusya -P.Exhibit 6
- Summons from Assistant County Commissioner (ACC)-P.Exhibit 7
- Letter from ACC to OCS -P.Exhibit 8
- Letter from ACC dated 03/09/2015 -P.Exhibit 9
- Letter from Chief, Wazauni Location -P.Exhibit 10
- Letter from chief & OB No. 4/2/2017 -P.Exhibit 11
- Letter from chief dated 18/10/2017 -P.Exhibit 12
- Letter from chief dated 19/10/2015 -P.Exhibit 13
- Proceedings of Tawa Law Courts -P.Exhibit 14
- Judgment of Tawa Law Courts -P.Exhibit 15
- Letter from Assistant County Surveyor -P.Exhibit 16
- Second letter from Assistant County Surveyor -P.Exhibit 17
- P22 form from Mbooni police station - P.Exhibit 18
- Letter from Agricultural office, Tulimani Ward - P.Exhibit 19
- Hearing Notice dated 09/10/2019 - P.Exhibit 21
- Letter from Ministry of Interior - P.Exhibit 22
- Letter from Chief, Wanzauni Loc. dated 02/08/2019-P.Exhibit 23
- Warrant of arrest dated 22/10/2018 -P.Exhibit 24

7. On cross examination, he said that his father's name is Muindi Masua but did not have his identity card. His father had a parcel of land-417 Mbooni/Iiani. He did not have a title deed for the land in question. His grandmother is Kalunde Masua but she too does not have the title deed. No title deed has been issued in respect of Mbooni/Iiani 533. His brother is Mumo Muindi. He agreed that Plot No 417 is in the name of his grandfather. He agreed that Munyao Masua and Mutinda Masua are sons of his grandfather. He agreed that the two cultivate plot 417 but denied that they were born on it. His prayer is to get inheritance of his grandmother.

8. Joshua Katuva Nzivo (PW1) testified that the Plaintiffs and their grandfather Masua Mukusya (the deceased), are known to him. The Defendants are also known to him and their father's first wife was from Atuii clan. He adopted his statement filed on 09<sup>th</sup> October, 2019 in which he gave his age as 89 years. He stated that the deceased married Kalunde in 1939 and they bore; Beatrice Mutete Masua, Monicah Mulenge Masua and Muindi Masua who is also deceased. Kalunde died in 1954 and she was buried on the suit land.

9. Beatrice Mutete cared for her father after the death of their mother and as a result, she was given the suit land which was being utilized by her mother. While living on the suit land, Beatrice Mutete gave birth to Peter Wambua Mutete, Kioko Mutete, Musila Mutete and Mumo Mutete. After the death of Beatrice Mutete, the deceased married Teresia Mumbua Masua in 1994 and they bore three boys and four girls. The deceased gave plot 533 Mbooni/ Iiani to his 2<sup>nd</sup> wife and her children live on the said land. The plot is bigger than the suit land and he does not know what Teresia's children want from Beatrice's children by grabbing and selling their land.

10. On cross examination, he reiterated that the deceased was known to him. The Plaintiffs are also known to him and their father's name is Muindi Masua. Muindi did not own any land. The Defendants reside on plot 533 and they are no longer restrained by Court from cultivating the suit land. Plot 417 was bequeathed to Kalunde Masua and 533 was bequeathed to Teresia. He agreed being related to the deceased because the deceased's brother has married a sister of Joshua Katuva Nzivo's (PW1's) father.

11. Elizabeth Mbeneka Musau (PW2) testified that the Plaintiffs are known to her and are her children because their grandfather is a brother to her father. The Defendants are also known to her as they are her cousins. She adopted her statement filed on 09<sup>th</sup> October, 2019 in which

she stated that the deceased is a brother to her biological father. Kalunde Masua was the deceased's 1<sup>st</sup> wife and was given plot 417 where her grandchildren, the Plaintiffs, live. Plot 533 was given to the 2<sup>nd</sup> wife, Mumbua Masua. According to her, Mumbua's family should leave plot 417 and relocate to their plot.

12. On cross examination, she said that plot 417 is registered in Kalunde's name but did not have its title deed. Plot 533 is registered in Teresia's name but did not have its title deed either. The Defendants are sons of the deceased and they reside on plots 417 and 533.

13. The 2<sup>nd</sup> Defendant, Joseph Mutinda Masua testified that the deceased was their father. He adopted their joint statement dated 19<sup>th</sup> October, 2018 as their evidence in chief and the same is a replica of their defence which I have already highlighted.

14. On cross examination by the 1<sup>st</sup> Plaintiff, he agreed that the deceased had two wives but could not name the 1<sup>st</sup> wife. Beatrice Masua is his sister as she is a daughter of the 1<sup>st</sup> wife. He could not remember when the deceased married his mother. He agreed that they met the Plaintiff on plot 417 when his mother married the deceased. He agreed that the Plaintiffs grew up in the plot until they got married.

15. The Plaintiff's submissions were that they have been in use and occupation of the suit land whereas the Defendants have been enjoying the peaceful occupation of parcel 533. They contend that the Defendants are trespassers and intermeddlers of the suit land and their defence should be struck out.

16. The Defendants submitted that the Plaintiffs have no capacity to file the claim and that the proper Court to deal with the claim is the Probate and Administration Court.

17. Having looked at the pleadings, evidence and rival submissions, it is my considered view that the only issue for determination is whether the orders sought should be granted.

18. The search certificate (P.Exhibit 3) shows that the suit property is registered in the name of the deceased, Masua Makusya, and the parties have not disputed this position. The Plaintiffs pleaded that they bought part of the suit land from their grandfather but did not adduce any evidence to prove the same. Further, the Plaintiffs did not adduce any will or grant of letters of administration to show that the Defendants have capacity to be sued on behalf of the estate of the deceased. The question of sale of the suit land is the only one that can be entertained by this Court but has not been proved. Even if evidence had been adduced to prove that there was sale, the suit would have been a non starter for want of Defendants' capacity to be sued.

19. The rest of the issues revolve around the question of who the rightful beneficiaries are and how the deceased's estate should be distributed. I agree with the Defendants that the right forum is the Probate and Administration Court. It is noteworthy that the jurisdiction of the Probate Court and this Court are distinct. **In re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** Musyoka J stated that:

*“The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”*

20. The upshot is that the Plaintiffs have not satisfied this Court on a balance of probabilities that they have a cause of action against the Defendants and hence I hereby proceed to dismiss the suit. This being a suit that involves family members, each party will bear their own costs.

**Signed, dated and delivered in open court at Makeni this 30<sup>th</sup> day of October, 2020.**

**MBOGO C.G.,**

**JUDGE.**

In the presence of; Ms. Nzioka (court Assistant), 1<sup>st</sup> Plaintiff, 2<sup>nd</sup> Defendant, Mr. Kisongoa for the Defendants.

**MBOGO C.G., (JUDGE),**

**30/10/2020.**