



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 304 OF 2013**

**(FORMERLY MACHAKOS ELC SUIT NO. 152 OF 2009)**

**CECILIA SITUMAI NDETI**

**MICHAEL KYENDE NDETI**

**(Suing as the legal representatives of the estate of**

**PROFESSOR KIVUTO NDETI.....PLAINTIFF**

**=VERSUS=**

**ESTHER NGONDU NDETI**

**ALEX KIILU NDETI**

**(Sued as the Legal Representatives of the estate of**

**IDAH NDINDA NDETI).....1<sup>ST</sup> DEFENDANT**

**LENGESI MUTHEKE.....2<sup>ND</sup> DEFENDANT**

**NZOMO MUTHEKE.....3<sup>RD</sup> DEFENDANT**

**NZIOKA MUTHEKE.....4<sup>TH</sup> DEFENDANT**

**PRISCILLAH MWANIA.....5<sup>TH</sup> DEFENDANT**

**LAWRENCE MAINGI KIILU.....6<sup>TH</sup> DEFENDANT**

**RULING**

The parties to this suit are members of the Ndeti family. The Ndeti family has had along running dispute going back to 1980s over the ownership of all that parcel of land known as L.R No. 7149/9 (I.R No. 18728) together with the developments thereon (hereinafter referred to as “the suit property). Whereas the plaintiffs have claimed that the suit property belonged solely and exclusively to Professor Kivuto Ndeti (deceased), the defendants who have all along been led by one, Patrick Mutheke Ndeti who was a nephew of Professor Kivuto Ndeti maintained that the suit property was a family property owned by an entity known as P. N. Ndeti & Brothers Limited and that the same was registered in the name of Professor Kivuto Ndeti (then Dr. Kivuto Ndeti) to hold in trust for the Ndeti family.

The dispute first came to the High Court in 1981 when Patrick Mutheke Ndeti (deceased) filed a suit against Professor Kivuto Ndeti (deceased) namely, Nairobi HCCC No. 430 of 1981, Patrick Mutheke Ndeti v. Dr. Kivuto Ndeti (hereinafter referred to as “the first suit”). Patrick Mutheke Ndeti(deceased) was substituted in that suit with Idah Ndinda Mutheke (deceased). After the death of Idah Ndinda Mutheke, she was substituted in the suit with the 1<sup>st</sup> defendants herein. On the other hand, Professor Kivuto Ndeti (deceased) was substituted in that suit with the plaintiffs herein.

The first suit was transferred to this court and registered as ELCC Suit No. 55 of 2015. In the first suit, Patrick Mutheke Ndeti (hereinafter referred to only as “Patrick”) claimed that the suit property was owned by members of the Ndeti family and that the same was supposed to be shared by them in accordance with Akamba Customary Law. Patrick claimed that he was entitled to a portion of the suit property measuring

3 acres which he had cultivated and developed with residential houses over a period of time. Patrick claimed that the suit property was registered in the name of Professor Kivuto Ndeti (deceased) (hereinafter referred to only as “the Professor”) to hold in trust for himself and the other members of the Ndeti family including Patrick. Patrick averred that in breach of that trust, the Professor was attempting to sell the suit property to a third party which sale was likely to deprive Patrick of his right to a portion of the property. Among the reliefs that Patrick sought against the Professor were;

- (i) A declaration that the suit property belonged to the Ndeti family under Akamba Customary Law and,
- (ii) A declaration that a portion of the suit property measuring 3 acres on which Patrick had erected a dwelling house belonged to him exclusively and should be conveyed to him.

The dispute in the first suit was referred to arbitration by a panel of elders on 14<sup>th</sup> January, 1986. The elders made an award that was filed in court in September, 1986. The award was in favour of Patrick. An application by the Professor to set aside the award was dismissed on 12<sup>th</sup> March, 2008 by the High Court. An appeal against that dismissal to the Court of Appeal was similarly dismissed on 11<sup>th</sup> July, 2014.

On application by Patrick, the award by the elders was adopted by this court as a judgment of the court on 26<sup>th</sup> July, 2017. According to the decree extracted on 20<sup>th</sup> September, 2017 following the adoption of the said elder’s award, the court ordered among others that;

- (i) Patrick was occupying the suit property under a family arrangement following the establishment of P. N. Ndeti & Brothers Ltd. that had contributed Kshs.20,000/= towards the acquisition of the property and as such, it was unfair to evict him from the suit property being a shareholder in P. N. Ndeti & Brothers Ltd.
- (ii) An injunction was issued restraining the Professor from selling the suit property or any portion thereof until such a time that P. N. Ndeti & Brothers Ltd. was dissolved and the shareholders who were family members allocated their respective shares of the assets owned by the company.
- (iii) The house that was occupied by Patrick on the suit property belonged to him.

The said decree in the first suit has neither been varied nor set aside. After the application to set aside the award by the elders was dismissed, the Professor brought the present suit on 3<sup>rd</sup> April, 2008 against Idah Ndinda Mutheke (deceased) who was the widow of Patrick who had passed away by then and 5 others (hereinafter referred to only as “the defendants in the present suit”). The plaint in the present suit was amended on 4<sup>th</sup> April, 2008. In the amended plaint dated 3<sup>rd</sup> April, 2008, the Professor averred that he had been and was still the registered proprietor of the suit property which he purchased personally in 1969. The Professor averred that he had allowed a partnership entity known as P. N. Ndeti & Bros. to erect a house on the suit property to be occupied by Patrick who was its manager. The Professor averred that Patrick occupied the said house with his family with his consent and permission. The Professor averred that Patrick subsequently converted P. N. Ndeti & Bros. which was a family business into a limited liability company. The Professor averred that at no time did he transfer the suit property or a portion thereof to Patrick. The Professor averred that following the death of Patrick, the defendants in the present suit who had remained in occupation of the suit property became trespassers thereon. The Professor sought judgment against the defendants in the present suit for among others;

- (i) A mandatory injunction to compel the defendants to pull down, remove demolish or otherwise obliterate the illegal structures they had erected on the suit property.
- (ii) An order for the defendants to vacate the suit property and in default to be evicted from the property.
- (iii) A declaration that the Professor’s title over the suit property was indefeasible under Section 23 of the Registration of Titles Act.

The defendants in the present suit filed a joint statement of defence on 14<sup>th</sup> April, 2008 in which they averred that together with Patrick, they were members of the Ndeti family and that the suit property among others belonged to the Ndeti family the same having been bought using resources from the family business. The defendants in the present suit averred that the suit property was registered in the name of the Professor to hold in trust for himself and the other members of the Ndeti family until such a time that the Ndeti family properties would be put together and distributed. The defendants in the present suit averred that the Ndeti family properties including the suit property that were acquired through family businesses namely, P. N. Ndeti & Bros. and P. N. Ndeti & Brothers Ltd. had not been distributed amongst the family members and that the Professor was taking advantage of the death of his brothers who were partners and shareholders in the said businesses to deprive their children and other dependants of their rightful shares in the said properties. The defendants in the present suit averred that the Professor and the defendants in the present suit settled on the suit property by reason of the fact that it was family property and that the Professor did not have a better right to the suit property than his deceased brothers whose children he had sued for residing on their fathers’ respective portions of the suit property. The defendants in the present suit averred that this suit was *res judicata* and an abuse of the court process in that a similar suit namely, HCCC No. 430 of 1981 (the first suit) between the parties over the same subject matter had been heard and determined.

In her affidavit sworn on 14<sup>th</sup> April, 2008 in response to an application for interlocutory injunction that was filed by the Professor in the present suit, the then 1<sup>st</sup> defendant in the present suit, Idah Ndinda Ndeti (deceased) stated that she was a widow of Patrick who was the plaintiff in the first suit and that the said Patrick and the other defendants in the present suit were the children of Mutheke Ndeti and Julius Kiilu Ndeti who were the brothers of the Professor. In his further affidavit sworn on 16<sup>th</sup> April, 2008 in support of the said application for interlocutory injunction, the Professor did not deny that all the defendants in the present suit were members of the Ndeti family.

On 22<sup>nd</sup> May, 2008, the defendants in the present suit filed an application seeking an order that this suit be struck out or dismissed and in the

alternative, that the same be stayed on the ground that the issues raised in this suit were directly and substantially in issue between the parties in the first suit which had been heard and determined on merit and as such the suit was *res judicata*. The defendants averred further that the suit was an abuse of the process of the court in that there were other previous suits between the parties that had been determined and/or were pending over the same subject matter.

The Professor opposed the application through a replying affidavit sworn on 28<sup>th</sup> May, 2008 in which he stated among others that the first suit did not raise the same issues raised in the present suit and that the parties to the suit were different from the parties to this suit. He stated that whereas in the first suit, Patrick's claim was for a house that had been constructed on the suit property, in the present suit, he (the Professor) was claiming the entire parcel of land measuring 100 acres on which the defendants in the present suit had trespassed on. In a ruling delivered on 28<sup>th</sup> September, 2012, the court stayed the present suit pending the final determination of the first suit. On the argument by the Professor that the issues raised in the first suit and in the present suit were different, the court stated as follows:

**“It is clear from the pleadings that the issues in HCCC No. 430 of 1981 is a claim by the plaintiff there (Patrick Ndeti, now deceased) for a house situated on the suit property, while in this suit, the issue is trespass on the entire parcel of land. The plaintiff in the suit herein was the defendant in the former suit and therefore ought to have raised the issue of trespass therein by way of a counter-claim rather than bringing issues to court in bits and pieces....”**

As I have stated earlier in this ruling, the appeal to the court of appeal by the Professor against the dismissal of his application to set aside the award that was filed in the first suit was dismissed by the Court of Appeal on 11<sup>th</sup> July, 2014 and subsequently, the said award was adopted by this court as a judgment of the Court on 27<sup>th</sup> July, 2017 and a decree issued in terms thereof.

What is now before the court is a Notice of Motion application dated 9<sup>th</sup> October, 2017 brought by the defendants in the present suit under sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya seeking an order for the striking out of this suit with costs to the defendants. The application which is supported by the affidavit of Esther Ngondu Ndeti sworn on 9<sup>th</sup> October, 2017 was brought on the grounds that this suit was stayed pending the hearing and determination of the first suit which had been determined through a ruling delivered on 27<sup>th</sup> July, 2017. The defendants averred that it was fair and just that a final order be made in this matter to bring the proceedings to an end. The defendants averred that since the plaintiff's in the present suit brought the suit well aware of the existence of the first suit, they should bear the costs of the suit.

The defendant's application was opposed by the plaintiffs in the present suit (the plaintiffs) through an affidavit sworn by Kyende Ndeti on 17<sup>th</sup> July, 2018. In the affidavit, he reiterated that the issues raised in the present suit were separate and distinct from the issues that were raised in the first suit. Kyende Ndeti averred further that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in the present suit some of whom have moved out of the suit property while others are deceased were not parties to the first suit and that the court needs to make appropriate orders as concerns them including an order for costs. He averred that the deceased defendants in the present suit have not been substituted. Kyende Ndeti averred further that there were still several issues pending resolution in the first suit and as such that suit cannot be said to have been conclusively determined. He averred that it was premature to ask for the dismissal of this suit while there are still trespassers on the suit property who need to be evicted.

The defendants' application was heard by way of written submissions. The defendants filed their submissions on 16<sup>th</sup> October, 2019 while the plaintiffs filed their submissions on 13<sup>th</sup> February, 2020. I have considered the application together with the supporting affidavit. I have also considered the affidavit in reply filed in opposition to the application and the respective submissions by counsels. The following is my view on the matter. It is not in dispute that what was in dispute in the first suit was the ownership of the suit property and more particularly whether the suit property was owned by the Professor absolutely or whether the Professor held the same in trust for himself and other members of the Ndeti family. It is not disputed that in the decree issued by the court on 20<sup>th</sup> September, 2017 in the first suit, there was a finding that P. N. Ndeti & Brothers Ltd. which was a company whose shareholders and directors were members of the Ndeti family had contributed Kshs.20,000/= towards the purchase of the suit property which according to the material on record was purchased at a total sum of Kshs.60,000/=. It is also not disputed that it was held in that suit that it was not proper for Patrick who was the plaintiff in that suit to be evicted from the suit property until; an inventory was taken of the assets that were owned by P. N. Ndeti & Brothers Ltd. some of which were registered in the names of individual members of the Ndeti family, the company is dissolved and the assets of the company distributed to the shareholders in accordance with the shares that each held in the company. It is not disputed that the defendants in this suit are members of the Ndeti family and that they claim the suit property through P. N. Ndeti & Brothers Ltd. The 1<sup>st</sup> defendants are the legal representatives of Idah Ndinda Ndeti (deceased) who was the widow and legal representative of the estate of Patrick Mutheke Ndeti (deceased)(Patrick). Patrick who was the plaintiff in the first suit in whose favour a decree in the first suit was issued was the son of Mutheke Mutua Ndeti (deceased) who was a brother of the Professor who was the defendant in the first suit. Patrick was a shareholder and a director of P. N. Ndeti & Brothers & Ltd. while his father, Mutheke Ndeti was a partner in P. N. Ndeti & Bros. The defendants in the present suit are survivors or successors of Mutheke Mutua Ndeti and Patrick Mutheke Ndeti(Patrick), and Julius Kiilu Ndeti. Julius Kiilu Ndeti was also a partner in P. N. Ndeti & Bros. and a shareholder and a director of P. N. Ndeti & Brothers Limited. The Professor had claimed in this suit that the defendants were trespassers on the suit property and should be ordered to vacate the same. In the first suit, the court had already made a finding that Patrick through whom the 1<sup>st</sup> defendants herein derive their claim had an interest in the suit property through P. N. Ndeti & Brothers Ltd. and as such he could not be ordered to vacate the property until the said company was dissolved, the shares of the various shareholders determined and distributed to them.

As stated earlier, the other defendants in this suit have also claimed the suit property through P. N. Ndeti & Brothers Ltd. There is already a finding in the first suit that P. N. Ndeti & Brothers Ltd. made contribution towards the purchase of the suit property and as such its shareholders had interests in property. I am in agreement with the defendants that following the determination of the first suit, there is nothing left to be tried in this suit. This court cannot be called upon to determine once again whether or not the suit property was owned by the Professor absolutely or was held by him in trust for the Ndeti family through P. N. Ndeti & Brothers Ltd. The court cannot also be called upon to determine whether the defendants who are members of the Ndeti family and who claim the suit property through P. N. Ndeti & Brothers Ltd. are trespassers on the suit property. These are issues which have been laid to rest in the first suit. I am in agreement with the defendants that this suit is an abuse of the process of the court. As the court had observed in the ruling delivered on 28<sup>th</sup> September, 2012 an

excerpt of which I have reproduced above, all the issues raised in this suit should have been raised by the Professor in the first suit where he was a defendant by way of a counter-claim. It was not open to the Professor to file a fresh suit over the same subject matter. I am satisfied that the court has already determined the issues raised in this suit in the first suit. The plaintiffs will have to live with the said determination. I am of the view that the parties should now concentrate on the implementation of the decree that was issued in the first suit. I believe that that the implementation of that decree will bring to a close this family dispute that has been raging for close to 40 years.

In conclusion, I find merit in the defendants' Notice of Motion application dated 9<sup>th</sup> October, 2017. This suit is accordingly struck out. Since the parties are members of the same family, each party shall bear its own costs of the suit.

**Dated and Delivered at Nairobi this 26<sup>th</sup> Day of November, 2020**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Nkatha h/b for Mr. Murugara for the Plaintiffs

Mr. Musyimi h/b for Mr. Mutua for the Defendants

Ms. C. Nyokabi - Court Assistant