



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC SUIT NO.356 OF 2017

NZOMO KALELI.....PLAINTIFF

VERSUS

MUTHINI KILEI.....1ST DEFENDANT

JUSTUS KIIO MUTHINI.....2ND DEFENDANT

PIUS MAKONGE KALELI.....3RD DEFENDANT

MAINA MUTHINI.....4TH DEFENDANT

SILA MUTHINI.....5TH DEFENDANT

MWALUKO MUTHINI.....6TH DEFENDANT

J U D G E M E N T

1. By his amended plaint dated 20th March, 2019 and filed in court on 25th March, 2019, Nzomo Kaleli, the Plaintiff herein, prays for judgement against the Defendants for: -

1) A declaration that the Plaintiff is the *bona fide* registered sole proprietor of all those parcels of land known as Nzai/Mumbuni/334 and Nzai/Kilili/29.

1) a) A permanent injunction restraining the Defendants whether by themselves, their agents and/or servants from, cutting down trees, planting, grazing, cultivating, subdividing, selling or otherwise interfering or in any manner dealing with the suit properties being Nzai/Mumbuni/334 and Nzai/Kilili/29.

2) An order of eviction to issue against the Defendants, their family members or any one purporting to derive right of entry or re-entry from them from all those parcels of land known as Nzai/Mumbuni/334 and Nzai/Kilili/29 with the supervision of, and/or enforcement by the Officer Commanding Station, Wote Makueni County.

4) The cost of the suit be provided for.

2. He has averred in paragraphs 3, 5, 6, 8A, 9 and 10 of his amended plaint that he is the sole and legal/absolute registered and Bona Fide owner of the suitlands herein Nzai/Mumbuni/334 and Nzai/Kilili/29 both situate within Makueni County, that he has been in possession of the suitlands Nzai/Mumbuni/334 and Nzai/Kilili/29 and had allowed and/or authorized the Defendants to live on the suit lands considering their relationship as an act of kindness and not as owners of the same, that the Defendants herein have misused their privilege to live on the suitlands and have been causing wanton damage and waste to the suit properties herein by demolishing his house, excavating stones, cutting down trees, shrubs and vegetation on parcel numbers Nzai/Mumbuni/334 and Nzai/Kilili/29 causing waste and selling the said tree trunks without the consent and permission from him and thus he (Plaintiff) has suffered loss and damage, that he assisted the Defendants to acquire Plot No.372 within Kiteng'ei "B" Settlement Scheme, Kibwezi Division so that they could move out of his lands but they have refused, declined and/or neglected to vacate claiming that they are entitled to a share of Nzai/Mumbuni/334 and Nzai/Kilili/29, that although he had allowed and/or authorized the Defendants to reside on land title numbers Nzai/Mumbuni/334 and Nzai/Kilili/29, the Defendants' illegal acts of wasting his lands, threatening him and laying claim to the said parcels of lands rendered them trespassers and their continued occupation of the suitlands is detrimental to him and therefore no longer tenable, that his claim against the Defendants is for a declaration that he is the registered bona fide proprietor of the suit properties herein Nzai/Mumbuni/334 and Nzai/Kilili/29 and that an order of

eviction do issue against them, their family members or any one purporting to derive right of entry or re-entry from them from all those parcels of land known as Nzau/Mumbuni/334 and Nzau/Kilili/29.

3. The Plaintiff's claim is denied by the Defendants vide the joint statement of defence dated 15th November, 2017 and filed in court on even date by the 1st Defendant with the authority of her co-Defendants.

4. The Plaintiff in his evidence in chief adopted his statement dated 20th March, 2019 and filed in court on 25th March, 2019 as his evidence. His evidence was that the 1st Defendant is his younger sister while her co-Defendants her children. He went on to say that the Defendants reside in his land parcel number Nzau/Mumbuni/334 (*hereinafter referred to as suitland*). It was also his evidence that when the 1st Defendant was chased away by one Beatrice Kilei with whom she was married to under woman to woman marriage, his mother asked him to top up to the money that the latter had set aside to buy land for her (the 1st Defendant and her children). It was also his evidence that one of the sons of the 1st Defendant, Benjamin Mutaiti Nzomo (PW2), looked for land in Kitengei. He added that his mother requested him to escort Benjamin (PW2) to Kitengei to go and pay the seller of the land in question. It was also his statement that whereas the 1st Defendant and her son moved into the land that was purchased, her other children fenced off his land.

5. The Plaintiff produced five documents in his supplementary list of documents dated 20th March, 2019 as P.Exhibit No.1 to 5 respectively. The documents in question were title deeds for land parcels Nzau/Kilili/29 and Nzau/Mumbuni/334 as (P.Exhibit Nos. 1 "a" and 1"b") respectively, certificate of official search (P.Exhibit No.1 "b"), copy of judgement delivered on 23rd February, 2010 in Makueni Principal Magistrate's Court in criminal case No.354 of 2009 as P.Exhibit No.2 and a copy of ownership card in the name of Benjamin Mutaiti Nzomo dated 14th March, 2003 as P.Exhibit No.3.

6. The Plaintiff's evidence in cross-examination by the 1st Defendant was that Nzau/Nziu/334 does not belong to his father and that he was the one who acquired it. He said that he could not remember for how long the 1st Defendant had occupied the suitland but pointed out that it was since the survey commenced. He said that the 1st Defendant has refused to vacate the suitland despite his requests for her to do so. He pointed out that his father's land in Mbitini was sold so that land could be bought for her. And on being cross-examined by the 2nd Defendant, the Plaintiff told the court that he acquired the suitland in 1953. On being cross-examined by the 3rd Defendant, the Plaintiff told the court that he did not grab his father's land. The Plaintiff went on to tell the court in his evidence in cross-examination by the 5th Defendant that he was the one who settled his father on his (Plaintiff's) land. He agreed that he had no documents to show that he was the one who bought the land for the Defendants. He said that he has never shared his father's property with the 1st Defendant. On being cross-examined by the 6th Defendant, the Plaintiff told the court that his father had land in Mbitini. And in his evidence in re-examination, the Plaintiff revealed that the Mbitini land was sold and the proceeds of the sale sub-divided amongst his father's three (3) wives. He said that his mother used her share to buy land for the 1st Defendant.

7. The Plaintiff called Maria Kyengo Maketi *aka* Mbelete Kaleli (PW1), Benjamin Mutaiti Nzomo (PW2) and Dominic Musangi Nzioka (PW3) as his witnesses.

8. Maria's (PW1) evidence in chief was that the Plaintiff and the 1st Defendant are her younger brother and sister respectively. She went on to say that she is familiar with the dispute herein and that the 1st Defendant does not own any share in the suitland. She pointed out that the suitland did not belong to their parents so as to entitle the Defendants a share of it. According to her, her parents owned land in Mbitini and Nzavi. That their mother bought land for the 1st Defendant in Mito Andei. She went on to say that when the Surveyor moved into the suitland, the 1st Defendant did not claim for any share and that she raised her claim after the survey exercise had been completed. It was also her evidence that their mother used the proceeds that she got from the sale of their father's land to buy land for the 1st Defendant.

9. Maria (PW1) denied in her evidence in cross-examination by the 1st Defendant that she had conspired with the Plaintiff in order to deny the 1st Defendant her rightful share. And on being cross-examined by the 2nd Defendant, Maria told the court that the Plaintiff was 14 years when he acquired the suitland in 1953. When she was cross-examined by the 3rd Defendant, Maria (PW1) reiterated that their mother bought land for the 1st Defendant and that the Plaintiff's land was not ancestral. She however admitted that she had no documents to show how the Plaintiff acquired the suitland. And on being cross-examined by the 4th Defendant, Maria (PW1) admitted that her parents are buried in the suitland. Her evidence in cross-examination by the 5th Defendant was that she wasn't there when the suitland was acquired.

10. Benjamin (PW2) in his evidence in chief told the court that the 1st Defendant is his mother while her co-Defendants are his younger brothers. He too told the court that the Defendants are not entitled to the Plaintiff's land. He revealed that he and the Defendants own a 28 acre parcel of land in Kitengei 'B' Settlement Scheme in Mito Andei. He went on to indicate that the land in question is plot No.372 and that it is registered in his name, that of the 2nd, 3rd and 5th Defendants. According to him, the land was meant for the 1st Defendant. That their grandmother bought the land from the proceeds that she got after selling her land in an area known as Maatha.

11. Benjamin's (PW2) evidence remained unchallenged in cross-examination.

12. Dominic's (PW3) evidence in chief was that he was aware of the land dispute between the Plaintiff and the Defendants. According to him, the Defendant do not have shares in the parcels of land that the Plaintiff owns in Nzau. His evidence in cross-examination by the Defendants was that the suitland belongs to the Plaintiff and that the Plaintiff's mother is buried in the land in question.

13. Litia Muthini Kaleli (1st Defendant) adopted her statement filed in court on 4th April, 2018 as her evidence. She went on to produce the letter dated 14th May, 2014 from P. M. Mutuku & Co. Advocates, clan minutes dated 06th November, 2017 and the letter from the Chief dated 07th September, 2017 as D.Exhibit No.1, 2 and 3 respectively. The documents in question are in the list of documents dated 11th April,

2018. According to her, the suitland is ancestral land and that is where she lives. It is also her evidence that her father is buried in the same land and that her sisters have teamed up with the Plaintiff to deny her rightful share of her father's land. The 1st Defendant went on to tell the court in her evidence in cross-examination by Mr. Kaluu that she was once married by one Manoti before her mother went to pick her up and showed her where to cultivate. That she later married one Kaleli and also admitted that she was married by one Beatrice Kilei. She said that Mwanzia is her first born son and that he lives in Mtito Andei. She said that she does not know one Benjamin Mutaiti nor does she have a child by that name. She however said that the person who testified as Benjamin Mutaiti (PW2) is her son. She said that she does not know how he (PW2) acquired the land that he lives in. She said that the land where she resides in is registered in the name of the Plaintiff. She said that she was present when the land was surveyed and asserted that she had evidence to show that the land belonged to her father. She admitted that she did not lodge any objection during the adjudication process. She said that she has neither refused to move out of the suitland nor does she know of any other land at Kitengei 'B' Settlement Scheme.

14. The 3rd to the 6th Defendants did not record any statements in compliance with Order 11 Civil Procedure Rules and as such, the four (4) could not testify. They however together with the 1st Defendant called Matonoi Nzite (DW1), Wilfred Mailu (DW2) and Erastus Kioko (DW3) as their witnesses. The three witnesses adopted their statements recorded on 11th April, 2018, 18th July, 2018 and 18th July, 2018 respectively as their evidence.

15. Briefly, Matonoi's (DW1) evidence was that one Kaleli Nganda went to settle in Mwilu in Mumbuni after he left Mbitini in Maatha area. That he had three wives one of whom was Wamwele, the mother of the Plaintiff and the 1st Defendant herein. That Kaleli died in the year 1961 and his land was surveyed in 1969 and subsequently subdivided equally amongst his three houses. That the land was supposed to be registered in the names of Kaleli's wives but the Plaintiff had his mother's parcel of land registered in his name as she was old. According to him, the land in question therefore belongs to the house of Wamwele and it should be subdivided between the Plaintiff and the 1st Defendant.

16. His evidence in cross-examination was that the mother of the 1st Defendant did not buy any land for the latter in Mtito Andei. He said that Benjamin (PW2) who is the son of the 1st Defendant resides in his own land that he bought in Mtito Andei.

17. Wilfred's (DW2) evidence was that he is the Chairman of Ekuwa Divisional Clan, Matiliku. That as a committee, they had three meetings concerning the land dispute between the Plaintiff and the 1st Defendant. He pointed out that the latter was not married and she worked for the Plaintiff as a herds person. That the Plaintiff inherited the suitland from his father and had it registered in his name. That he has stayed with the 1st Defendant since she was young to date. He added that the land is ancestral and therefore the Plaintiff's attempt to evict the 1st Defendant from it is driven by malice.

18. On being cross-examined by Mr. Kaluu for the Plaintiff, Wilfred (DW2) told the court that the 1st Defendant would still be entitled to a share of her father's land whether or not she was married. He went on to say that he was not aware that the suitland was acquired by the Plaintiff. He said that they held a meeting during the lifetime of the mother of the 1st Defendant who talked of a small portion of land being allocated to the 1st Defendant and her children to settle but admitted that his statement does not capture the wishes of the mother of the 1st Defendant. He said that he was not aware that before she passed on, the mother of the 1st Defendant acquired a piece of land in Kibwezi nor was he aware that it was her wish that the 1st Defendant should move out of the Plaintiff's land.

19. Erastus Kioko (DW3) in his evidence in chief adopted his recorded statement filed in court on 18th July, 2018 as his evidence. His evidence in cross-examination was that he attended the meetings that were held to solve the dispute between the Plaintiff and the Defendants. He said that the mother of the 1st Defendant attended the meeting. He admitted that he did not have the clan minute book where the deliberations were recorded. He went on to say that the mother of the 1st Defendant was alive in 1969 when adjudication process commenced and could not tell why the land was not registered in her name.

20. In his written submissions, the Counsel for the Plaintiff framed three issues for determination namely: -

- a) Whether the Plaintiff is the bona fide registered proprietor of land parcels numbers Nzai/Mumbuni/334 and Nzai/Kilili/29?**
- b) Whether land parcels numbers Nzai/Mumbuni/334 and Nzai/Kilili/29 are ancestral lands?**
- c) Whether the Defendants are trespassers on land parcels numbers Nzai/Mumbuni/334 and Nzai/Kilili/29?**
- d) Whether the Plaintiff is entitled to the reliefs sought?**

21. On the other hand, the Defendants in their submissions framed two issues as follows: -

- a) Whether the suitlands are ancestral land with customary and trusts rights attached to.**
- b) Whether the registration of the Plaintiff as the proprietor of the suitlands extinguishes the customary rights of the Defendants.**

22. The Plaintiff's Counsel argued the first two issues together. His submission was that the Plaintiff herein is the bona fide registered proprietor of land parcels number Nzai/Mumbuni/334 and Nzai/Kilili/29 (P.Exhibit Nos 1(a) and (b)). He went on to submit that the Plaintiff's title to the suit properties has not been impeached even though the Defendant's claim hangs on what they referred to as ancestral land. The Counsel was of the view that the Defendants had not adduced evidence to buttress their claim and nor have they sought to have the Plaintiff's title to the suit properties cancelled and that nothing would have barred the Defendants from impeaching the title if the Plaintiff obtained the same fraudulently.

23. The Counsel cited **section 24 of the Land Registration Act No.3** of 2012 which provides that: -

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

24. The Counsel further cited **section 25(1) of the same Act** which provides that: -

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-”

25. In light of the protection provided by the aforementioned **sections 24 and 25(1) of the Land Registration Act**, the Counsel submitted that the Plaintiff is free to use the suit properties as he pleases which include the right to occupy the land free from all other interests and claims whatsoever. The Counsel relied on the case of **John Kipchirchir Koech vs. Philip Cheruiyot Sang [2018] eKLR** where the Court held: -

*“The burden of proving that the suit property was family property therefore fell on the Defendant once he questioned the legitimacy of the Plaintiff’s title. The Defendant failed to produce any substantive evidence to prove his allegation whereas the official search indicated the Plaintiff as the registered owner. All the evidence adduced in court indicates that the Plaintiff is in fact the proprietor of the land parcel known as **KERICHO/KAITET/460**. I therefore find and hold that the issue of trust does not arise.”*

The Counsel urged the Court to fully associate itself with the aforesaid holding.

26. The Counsel further cited the aforementioned authority where the Court held thus: -

“It is therefore my finding the Plaintiff is the absolute proprietor of the suit property. Consequently, he is entitled to protection of the said title as provided for under the Land Registration Act No. 3 of 2012.”

27. Regarding the issue of whether or not the Defendants are trespassers on land parcels number Nzau/Mumbuni/334 and Nzau/Kilili/29, the Plaintiff’s Counsel went on to cite **Joseph Kipchirchir Koech’s** case (supra) where the Court dealt with the issue of trespass as follows: -

*“According to **BLACK’S LAW DICTIONARY 8TH EDITION**, Trespass is defined, in the strictest sense, as:*

“An entry on another’s ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property”

52. A continuing trespass is defined as: -

“A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property”

53. *Both the Plaintiff and the Defendant have admitted that they lived on the suit property in peace and harmony for a period of 30 years or thereabouts before their dispute arose. This evidence was corroborated by their witnesses who testified that the two parties have been living together on the suit property for a long time. The Plaintiff in paragraph 5 of the Plaintiff pleads that he authorized the Defendant, albeit for a temporary period, entry into the suit property. By demand letters dated 24th May 2012 and 4th June 2012, the Plaintiff asked the Defendant to vacate the suit property. I can therefore infer from this that the consent which the Plaintiff had granted the Defendant was officially revoked on 24th May 2012. The Defendant therefore had no authority to be on the suit property once the Plaintiff demanded his eviction from the land and his mere denial of the Plaintiff’s right of proprietorship does not negate the trespass. In view of this, I find that the Defendant’s continued occupation of the land after he was asked to vacate the same constitutes trespass upon private land.”*

28. Arising from the above, the Counsel submitted that the Defendant’s occupation of the suit premises was revoked the moment they commenced their illegal activities of cutting down trees and threatening the Plaintiff. The Counsel pointed out that the acts complained of meant that the Plaintiff’s quiet occupation of the suit property was no longer tenable.

29. As for the relief’s sought, the Counsel urged the Court to grant them since the Plaintiff had proved his case.

30. While addressing their first issue which is whether the suit properties are ancestral land with customary and trusts right attached thereof, the 1st Defendant, on behalf of her co-Defendants, submitted the two parcels are of ancestral lineage as confirmed by Matonoi Nzile (DW1). The Defendant went on to submit that both parties have been occupying and using the land since time immemorial thus the court should hold that the Plaintiff holds the two parcels of land in trust for himself as well as the Defendants.

31. Regarding the issue of whether the registration of the Plaintiff as the proprietor of the suitlands extinguishes the customary rights of the Defendants, the 1st Defendant submitted that **while section 24 of the Land Registration Act No.3 of 2012** provides for absolute ownership

of the suitlands to the Plaintiff together with all rights and privileges belonging or appurtenant thereto, **section 28** provides for overriding interests which at **section 28(b)** include customary trusts. The 1st Defendant urged the Court to take equitable and trusts approach and hold that the Defendants are entitled to the suitlands.

32. The Defendant relied on the case of **Philicery Nduku Mumo vs. Nzioki Makau [2002] eKLR**. She concluded her submissions by asserting that the Plaintiff has not proved his case on a balance of probabilities as required by the law.

33. Having evaluated the evidence on record and rival submissions filed herein, my finding is that the only issue for determination is whether the Plaintiff holds land parcels numbers Nzai/Mumbuni/334 and Nzai/Kilili/29 in trust for himself and the Defendants herein. I say so because it is not in dispute that the Plaintiff is indeed the registered owner of the aforementioned two parcels of land herein. The 1st Defendant in her statement filed in Court on 11th April, 2018 and which statement she adopted as her evidence asserts that the suitland belonged to her late father who died in the 1960s. In her further statement filed in court on 19th March, 2019, the 1st Defendant further stated that there were deliberations of the dispute concerning the suit properties that were held by the clan committee. The only documentary evidence that she provided from the deliberations by the clan were the minutes produced as D.Exhibit No.2. Wilfred (DW2) who was one of the two key witnesses of the Defendants in his evidence in cross-examination admitted that even though the Plaintiff was the registered owner of the suitlands, he could not attribute the registration to fraud. Equally another key defence witness Erastus (DW3) admitted that he did not have the clan minute book where the clan deliberations were recorded that the 1st Defendant was entitled to a share of the suit property. The latter witness also could not tell why the suitlands were registered in the name of the Plaintiff in 1969 and yet his mother was still alive at the material time. Matonoi (DW1) cannot be heard to say that Benjamin (PW2) resides in his own land at Mtito Andei when the uncontroverted evidence was that the land in question was bought for the 1st Defendant and that it is registered in the names of Benjamin (PW2), that of 2nd, 3rd and 5th Defendants. Therefore, the defendants cannot be heard to say that they know of no other land where they can settle.

34. The Defendants have not rebutted the Plaintiff's evidence that the family land was at Mbitini and the same was sold and part of the proceeds which were due to the Plaintiff's and the 1st Defendant's mother were used to purchase land for the 1st Defendant and her co-Defendants at Kitengei 'B' Settlement Scheme in Mtito Andei. Having stated that the suitlands herein were family land, the Defendants had the evidential burden to prove that the Plaintiff holds the two parcels of land in trust for himself and them as well which burden they failed to discharge. As earlier on observed, Wilfred (DW2) and Erastus (DW3) who are officials of Ekuwa Divisional clan admitted that they did not have the clan minute book to show the deliberations that were made that the two parcels of suitland are ancestral and thus the Defendants herein and particularly the 1st Defendant were entitled to a share. The clan minutes dated 06th November, 2017 (D.Exhibit No.2) were prepared with an eye to this suit taking into consideration that they are dated 06th November, 2017 which is 3 days after this suit was filed in court. Whereas Article 159(2) (c) of the Constitution provides for dispute resolution mechanisms, those minutes (D.Exhibit No.2) are of no probative value since the Plaintiff appears not to have willingly participated in the deliberations and he drew the clan's attention to the existence of this suit which was ignored.

35. As for trespass, the letter from P. M. Mutuku & Company Advocates (D.Exhibit No.1) that the Defendants produced clearly shows that the Plaintiff had complained of their action of cutting down his trees thus his licence for the Defendants to remain in the two parcels of land had lapsed. In addition, when the defendants declined to move to their own parcel of land in Kitengei B that the Plaintiff and his mother bought for the 1st Defendant, the inference to be drawn is that they had turned to be trespassers into the Plaintiff's land.

36. I do note that the Plaintiff has not sought for any damages for trespass and I will not award any. The evidence by the Defendants that the two parcels of suitland belonged to the father of the Plaintiff and the 1st Defendant is tenuous and I will disregard the same.

37. The upshot of the foregoing is that there is no evidence before this Court to show the existence of trust. The Defendants have no reasonable and probable cause to remain in the suitland. I found the Plaintiff and his witnesses candid as opposed to the Defendants who in my view were out on a fishing expedition in an attempt to claim that which they are not entitled to. The end result is that the Plaintiff has on a balance of probabilities satisfied this Court that he has a cause of action against the Defendants. In the circumstances, I hereby proceed to enter judgement in his favour and against the Defendants as hereunder.

1) A declaration is hereby issued that the Plaintiff is the *bona fide* registered sole proprietor of all those parcels of land known as Nzai/Mumbuni/334 and Nzai/Kilili/29.

1) a) A permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their agents and/or servants from, cutting down trees, planting, grazing, cultivating, subdividing, selling or otherwise interfering or in any manner dealing with the suit properties being Nzai/Mumbuni/334 and Nzai/Kilili/29.

2) An order of eviction is hereby issued against the Defendants, their family members or any one purporting to derive right of entry or re-entry from them from all those parcels of land known as Nzai/Mumbuni/334 and Nzai/Kilili/29 with the supervision of, and/or enforcement by the Officer Commanding Station, Wote Makueni County.

4) The cost of the suit be provided for.

Signed, Dated and Delivered at Makueni in open court this 23rd day of December, 2020.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Hassan holding brief for Mr. Kaluu for the Plaintiff present

Plaintiff present

1st Defendant present in person

3rd Defendant present in person

5th Defendant present in person

Mr. Sospeter Mwololo– Court Assistant

MBOGO C. G., (JUDGE),

23/12/2020.