



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 112 OF 2015**

**JOHN KIHARA MAINA** (suing for and on behalf of the estate of  
MAINA THUO (DECEASED).....**PLAINTIFF**

**VERSUS**

**SAMUEL KIOI THUO** .....**DEFENDANT**

**JUDGMENT**

**(Suit by plaintiff seeking orders that defendant is holding half the land registered in his name in trust for him; evidence showing that the land was initially owned by the plaintiff's grandfather who subdivided the land equally to the plaintiff's father and the defendant as his sons; plaintiff's father assigning his interest to the plaintiff; Land Control Board consent to subdivide the land into two equal portions granted; defendant however proceeding to procure title to the whole land in his name; defendant held to be holding half the land in trust for the plaintiff; defendant could not have properly obtained title to the whole portion given the consent of the Land Control Board; land to be subdivided into two equal portions and each person to get a separate title)**

1. This suit was commenced through a plaint which was filed on 15 April 2015. In his plaint, the plaintiff pleaded that the suit land which is land parcel Bahati/Kabatini Block 1/1273 was previously owned by his grandfather, one Paul Thuo Kinyoro (deceased) and that he distributed this land to his two sons, the defendant and the father of the plaintiff (now deceased). The property was thus to be registered in their joint names but the defendant procured title in his sole name. It is the plaintiff's contention that this was done fraudulently. In this suit, the plaintiff wants to have orders inter alia that the defendant holds half a portion of the suit land in trust for the plaintiff on behalf of the estate of his deceased father. He also wants the defendant's title cancelled and a half portion of it transferred to himself.

2. The defendant filed defence vide which he refuted the claim of the plaintiff. He averred inter alia that he purchased this land together with his father's second wife, one Esther Nyambura (deceased) as a single joint share from Ndefo Limited, a land buying company. He pleaded that it was company policy that only one person be entered in their register and they thus registered the share in the name of his father. It is his view that the plaintiff's claim is malicious and driven by greed.

3. A hearing date was taken by consent but only the plaintiff and his counsel attended. In his evidence, the plaintiff testified inter alia that he lives in Gatanga in Murang'a. He reiterated what he had pleaded in the plaint, that the suit land was owned by his grandfather who distributed it to the defendant and his (plaintiff's) father in equal shares. The two then went to the Land Control Board and got consent to subdivide the land into two equal portions. He produced the consent as an exhibit. He stated that after consent was obtained, a surveyor was engaged to formally subdivide the land into two, so as to have separate titles in the name of the defendant and the plaintiff's father. His father however died in the year 2006. He was residing in Murang'a and before his death, he called his family and distributed his property. His portion of the suit land was distributed to the plaintiff and the plaintiff then moved from Murang'a to the suit land and built a structure. The defendant however started disturbing his possession and the plaintiff later discovered that the defendant had procured title on 29 November 2012 to the whole land in his sole name. He thus opted to come to court.

4. PW-2 was Harrison Mwangi Thuo, a brother to the defendant and the plaintiff's late father. He testified that his father had two wives, he coming from the second house, and the defendant and the plaintiff's late father, from the first house. He testified that his father assigned the suit land to his first house and the defendant and the plaintiff's late father were to divide it equally. He refuted the pleading in the defence that his mother, Esther Nyambura, bought this land together with the defendant. He explained that the land was owned by Ndeffo which comprised of ex-freedom fighters and it is his father who was a member and the person to whom the share certificate was issued. He testified that in the year 2001, the plaintiff's late father called him, and asked him to go to the surveyor who subdivided the land, but he died before titles could issue. He affirmed that the land was given to the plaintiff by his late father and the plaintiff can no longer be accommodated in Murang'a.

5. With the above evidence, the plaintiff closed his case. Mr. Kahiga, learned counsel for the plaintiff did not make submissions and left it to the court. I have assessed all relevant material and I am of the following view :-

6. There is no question that the suit land is registered in the name of the defendant, having become registered on 29 November 2012. The contention of the plaintiff however is that the defendant holds half of this land in trust for the estate of his late father. I have no reason not to believe the plaintiff's evidence which is uncontroverted by the defendant. I have seen for myself that consent to subdivide the land was duly obtained from the Land Control Board and the land was to be split into two portions, to the defendant and Maina Thuo, the father of the plaintiff. If indeed the defendant solely owned this land, I do not see how he could have gone to the Land Control Board and had consent issued which partitions the land into two portions one to himself and one to Maina Thuo. His contention in the statement of defence that he purchased a share together with his step-mother is unsupported by any evidence. In fact the share certificate shows the name of their father, which appears to have been mysteriously altered to read the defendant's name. The defendant has not come to court to explain that alteration. His claim that he purchased the land with his step-mother has also been denied by a son to his step-mother. It was explained by PW-2 that Ndeffo was owned by ex-freedom fighters and his mother was never a member. I am thus persuaded that indeed, the defendant owned only half of this land, the other half belonging to his brother, Maina Thuo.

7. I am persuaded that the defendant holds half of the suit land in trust for the estate of Maina Thuo. In as much as he is the registered proprietor, the defendant's title is subject to a trust as provided for under Section 25 of the Land Registration Act, which provides as follows :-

#### Rights of a proprietor

(25) 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—

(1) (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by [section 28](#) not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

8. It will be seen from subsection 2 above, that a proprietor is not relieved of his obligations as trustee. It has also not been explained how the defendant got title in his sole name whereas the consent of the Land Control Board shows that the land was to be subdivided into two portions. Given this consent, I do not see how the defendant could have acquired title solely in his name without some element of fraud and/or misrepresentation on his part. That being the case, the title of the defendant is therefore impeachable following the provisions of Section 26 of the Land Registration Act. The same provides as follows :-

#### Certificate of title to be held as conclusive evidence of proprietorship

(26) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(1) (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

9. It will be seen from the above that title can be impeached if it was procured through fraud and/or misrepresentation to which the title holder is a party, or where the title has been acquired illegally, unprocedurally or through a corrupt scheme. As I stated earlier, I do not see how the defendant could have obtained title in his sole name yet he himself appeared before the Land Control Board to have the land subdivided into two equal portions, meaning that at the time he acquired title to the whole land, he knew that he was only entitled to half of it. It is clear to me that the defendant must have obtained title by fraud or misrepresentation on his part thus his title is liable to be cancelled.

10. Following my above findings, I now order as follows :-

**i. That it is hereby declared that the defendant holds in trust for the estate of Maina Thuo one half of the land comprised in the title to the land parcel Bahati/Kabatini Block 1/1273 (Ndeffo).**

**ii. That the defendant's title to the said land be cancelled and the said land be subdivided into two equal portions, one portion to the estate of Maina Thuo and the other portion to the defendant, and separate titles to each portion be issued in the names of the estate of Maina Thuo and the defendant.**

**iii. That the defendant is hereby ordered to execute all requisite forms and instruments to transfer the half portion of the land to the estate of Maina Thuo and if he does not do so within 14 days from today, the Deputy Registrar or Executive Officer of this court do proceed to execute the said instruments.**

**iv. That the defendant is hereby permanently restrained from interfering with the plaintiff's possession of the half portion of the land parcel Bahati/Kabatini Block 1/1273 (Ndeffo) belonging to the Estate of Maina Thuo.**

**v. That the plaintiff shall have the costs of this suit.**

11. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 7<sup>th</sup> day of March 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In Presence of : -**

Ms. Amulabu holding brief for Mr. Kahiga for the plaintiff.

No appearance on part of M/s Gitonga Mureithi & Co. for the defendant.

Court Assistant :Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**