

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. E053 OF 2022

BETWEEN

BONIFACE NZIOKA KIAMBA:.....PLAINTIFF

VERSUS

JACKSON MUTUKU MBITHI:.....1ST DEFENDANT

JACOB KIMONGO MBITHI:.....2ND DEFENDANT

LOISE MBATHA MBITHI:.....3RD DEFENDANT

JUDGEMENT

The Plaintiff's claim against the Defendants is for subdivision of all that parcels of land registered in their names in trust of other family members. That the cause of action arose because the land parcel Nos. 2787, 2580, 2714, 2717, 2784, 2948, 2792, 2572, 2705, 2645 and 2580 at Ngelani Adjudication Section 24 Mitaboni Farmers and Traders Limited were owned by their late father Kiamba Kimii and therefore are their ancestral lands. That during the survey, the families agreed that all those parcels be registered in the name of their eldest brother Elijah Mbithi (Deceased). That the 1st and 2nd Defendants are sons to the late brother Elijah Mbithi. That the 3rd Defendant is a wife of their late brother Elijah Mbithi. That unfortunately, their late brother died before they subdivided and shared the land

equally. That they had been occupying the land equally and peacefully before their late brother died. That the Defendants without their knowledge and full disclosure filed and obtained a Grant in respect of their late brother. That they did register all the disputed parcels in their names. That the Defendants are threatening to evict them and have denied them the use of some of the parcels they have been using since their birth. That it is fair that the parcels be divided equally among the two (2) houses for peace to prevail.

The Plaintiff prays for judgment against the Defendants for the following orders;

1. A permanent injunction restraining the Plaintiff from evicting the Defendants from the suit parcels.
2. A declaration that the Defendants hold the suit parcels in trust of all other family members and that the same be shared equally between the family bearing in mind that there were two (2) houses.
3. Costs of the suit.

The Defendants stated that the land parcel Nos. 2580, 2714, 2717, 2784, 2948, 2792, 2572, 2705 and 2645 at Ngelani Adjudication Section and Plot No. 24 Mitaboni Farmers and Traders Limited were owned by the late Elijah Mbithi and after his demise the same were ordered by the court to be transferred by way of transmission to the Defendants. The land parcel Nos. 2580, 2714, 2717, 2784, 2948, 2792, 2572, 2705 and 2645 at Ngelani Adjudication Section are private

properties and are not ancestral properties and have never been such. That the deceased, Elijah Mbithi, had bought the land parcel Nos. 2580, 2714, 2717, 2784, 2948, 2792, 2572, 2705 and 2645 at Ngelani Adjudication Section from various people together with the 3rd Defendant. The deceased had also similarly bought the parcel of land, Plot No. 24 at Mitaboni Farmers and Traders Limited. The land at Ngelani Adjudication Section and Plot No. 24 at Mitaboni Farmers and Traders Limited are in different areas and are not one property as pleaded in the Plaint. The parcels of land contained in the Plaint are private properties and the titles thereof have not been challenged, cancelled or impeached. The Plaintiffs has no lawful claim or interest over the properties. The parcels of land were never held in trust by Elijah Mbithi (the deceased) in favour of the Plaintiff or other family members. The Defendants aver that the only parcel of land which is ancestral property is Plot No. 2787 at Ngelani Adjuration Section which was owned by one Lawrence Kiamba Kimii (deceased) who was the father of Elijah Mbithi (the deceased) and the Plaintiff herein.

The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the parties. The issues for determination are:

- a. *Who is the lawful proprietor of the suit land parcels.?*
- b. *What orders should this court issue?*

The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows;

“Subject to this Act, 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.”

Section 26 (1) of the Land Registration Act states as follows;

“The Certificate of Title issued by the Registrar upon registration ... 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... and the title of that proprietor shall not be subject to challenge except –

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.”

The Plaintiff led evidence that the cause of action arose because the land parcel Nos. 2787, 2580, 2714, 2717, 2784, 2948, 2792, 2572, 2705, 2645 and 2580 at Ngelani Adjudication Section 24 Mitaboni Farmers and Traders Limited were owned by their late father Kiamba Kimii and therefore are their ancestral lands. That during the survey, the families agreed that all those parcels be registered in the name of their eldest brother Elijah Mbithi (Deceased). That the 1st and 2nd

Defendants are sons to the late brother Elijah Mbithi. That the 3rd Defendant is a wife of their late brother Elijah Mbithi. That they had been occupying the land equally and peacefully before their late brother died. That the Defendants without their knowledge and full disclosure filed and obtained a Grant in respect of their late brother after his demise That they did register all the disputed parcels in their names.

The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR held that;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

DW1 testified that the late Elijah Mbithi Kiamba bought all the suit parcels save for No. 2787 which was owned by his father. Subsequently they moved to No. 2572 with her family which is three kilometers away. That the parcels were bought

from different people at different times during her marriage and are in different locations. That they was no contribution from any family member even though her husband allowed his family members to use some of the properties. DW2 Paul Malemba Kiamba testified that he was a step brother to both the Plaintiff and the Late Elijah Mbithi Kiamba. He confirmed that the only ancestral land is land parcel No. 2787. That Plot No. 24 at Mitamboni Farmers and Traders Limited was bought by a group of shareholders including both him and the late Elijah Mbithi Kiamba individually and not jointly with anyone else. DW3 Jackson Mutuku Mbithi states that he is the son of DW1 and the late Elijah Mbithi Kiamba. That all the suit parcels accept No. 2787 are registered in the name of late Elijah Mbithi Kiamba and were transferred by way of transmission after succession cause No. 557 of 2007 was concluded. The court has no reason to disbelieve the evidence adduced by the Defendants as to how they acquired the above mentioned suit properties. I concur with their submissions.

Section 26 of the Land Registration Act which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012) (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the Land Registration Act (repealed) in light of the provisions of Article 40 of the Constitution which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of the Constitution which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another [2018] eKLR.”

I find that the defendants have established that they are the legitimate proprietors of the suit property and hence they are entitled to the same.

Section 109 of the Evidence Act Cap 80 is clear that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The well-known mantra *“he who asserts must prove.”* Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

In *James Muigai Thungu vs County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the Evidence Act Chapter 80 Laws of Kenya succinctly states:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The Plaintiff testified that his late brother Elijah Mbithi Kiamba held the suit parcels in trust for the entire family. That the suit parcels were bought by the Late Lawrence Kiamba from the dowry he received when he married off his two daughters. The land was bought between 1956 and 1974. Again, he states he personally bought land parcel No. 2705. That the late Elisha bought at least three personally and he is not contesting those. That Plot 24 it is about 20 km away and it was divided into three between Joash, Paul and Elijah but he is only claiming Elijah's portion. PW2 James Wambua Muia stated that he is the son of the late John Muia a brother to the Late Elijah. That at the time he was born the suit

properties were already existing. PW3 Gerald Mutiani Nziwa testified that he is the son of the late Simon Nziwa a brother to the late Elijah. That he lives in parcel No. 2787 and his father was buried there. That he does not live in plot No. 701. I find that the Plaintiff's evidence contradictory and cannot stand. No evidence has been adduced by the Plaintiff to establish any trust or even that PW1 bought plot No. 2705. Why is he claiming only late Elijah's portion in plot 24 Mitamboni? Furthermore, no evidence was adduced to establish the current ownership of the suit properties accept for a certificate of confirmation of grant dated 10th November 2008 detailing the distribution. I find that the only parcel of land which is ancestral property is Plot No. 2787 at Ngelani Adjudication Section which was owned by one Lawrence Kiamba (deceased) who was the father of Elijah Mbithi (the deceased) and the Plaintiff which was not included in the distribution. I find that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF
NOVEMBER 2025.**

N.A. MATHEKA

ORIGINAL