

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC NO. E001 OF 2021

JONES MUENDO NDUMBUTHI (*Suing as the legal representative of the estate of the late Ndumbuthi Mwanja Muoka*)....PLAINTIFF
-VERSUS-

MULWA KYUTI
RICHARD KIOKO KYUTI (*Suing as the legal representatives of the estate of the late Kyuti Mbole alias Kyunde Mboli*)
THE LAND REGISTRAR, MAKUENI.....
DEFENDANTS

JUDGMENT

Introduction

1. The Plaintiff brought this suit against the Defendants claiming the following reliefs:
 - a. A declaration that the estate of the late Ndumbuthi Mwanja Muoka is entitled to the transfer and ownership of land parcel No. Nzai/Mumbuni/207.
 - b. An order of permanent injunction to be issued against the 1st and 2nd Defendants either by themselves, their servants, agents and/or any other person claiming under them or through them from encroaching or entering and or in any other way interfering with the Plaintiff's quiet enjoyment in land parcel No. Nzai/Mumbuni/207.
 - c. An order of permanent injunction to be issued against the 1st and 2nd Defendants either by themselves, their servants, agents and/or any other person claiming under them or through them from subdividing, selling, alienating and/or disposing off and or any other way interfering with land parcel No. Nzai/Mumbuni/207.
 - d. An order do issue restraining the 3rd Defendant from registering any subdivision to the title LR No. Nzai/Mumbuni/207.
 - e. Costs of this suit.

f. Any other or further relief that this honourable court may deem fit to grant.

2. The Plaintiff is the administrator of the estate of his late father Ndumbuthi Mwanja Muoka. The Defendants are the administrators of the estate of their late father Kyuti Mbole alias Kyunde Mboli.
3. The late Ndumbuthi Mwanja Muoka (Ndumbuthi) and Kyuti Mbole alias Kyunde Mboli (Kyuti) were brothers. The late Ndumbuthi owned parcel NO. 205 which upon registration became Nzai/Mumbuni/205 (suit property).
4. In the late 1960's, Kyuti moved from parcel 207 with his family and went and settled at Kitonyoni. He left behind Daniel Muthama Mutuku to look after his land. Kyuti died in 1971.

Plaintiff's Case

5. The Plaintiff testified that Ndumbuthi purchased Kyule's land LR No. Nzai/Mumbuni/2017 between 1969 and 1971. Ndumbuthi had two wives. The first wife was Nduuti Ndumbuthi who was settled on LR No. Nzai/Mumbuni/205. The second wife Munaa Ndumbuthi was settled on the suit property.
6. It is the Plaintiff's evidence that the family of Kyuti was severally approached to transfer the suit property to Ndumbuthi but they declined. When Ndumbuthi died on 15th September, 2013, the family of Kyuti denounced the sale between Kyuti and Ndumbuthi. The family of Kyuti secretly went and carried out succession in respect of the estate of Kyuti without disclosing that Ndumbuthi had purchased the suit property.
7. When a grant in respect of the estate of Kyuti was confirmed, the administrator's subdivided the suit property into twelve (12) portions. The Plaintiff's brother Harrison Mutua Ndumbuthi testified that his step mother was buried on the suit property and that his step brother is residing on the suit property. He stated that when Ndumbuthi was sick, he sold portions of the suit property to raise money for treatment. He stated that his step brother

has colluded with the family of Kyuti to deny their mother's house their share of the suit property.

Defendants' Case

8. The evidence from the Defendants is that Ndumbuthi is brother to Kyuti who died in 1971. When Kyuti moved from the suit property, he left his brother Ndumbuthi to take care of the suit property. They denied that Kyuti sold the suit property to Ndumbuthi. The Defendants stated that the sale agreements produced were never signed by any of the parties to the agreements.
9. DW1 Peter Muasya Kyuti testified that he was born in 1964. In 1971, he was about seven (7) years. He stated that at that tender age, there is no way he would have been a witness to a land sale agreement. He denied the Plaintiff's allegation that they secretly carried out succession in respect of the estate of their father.
10. The Defendants testified that there are three persons on the suit property who purchased land from Ndumbuthi.
11. The Defendants called Daniel Muthama Mutuku who is a village elder where the suit property is situated. He stated that he was not aware of any land sale by Kyuti to Ndumbuthi. During cross examination, it turned out that he was Kyuti's caretaker between 1969 until 1971 when Kyuti died that is when he ceased to be a caretaker.

Parties Submissions

12. The parties were directed to file written submissions. The Plaintiff filed his submissions dated 20th September, 2025.

Plaintiff's Submissions

13. The Plaintiff submitted that his father purchased the suit property in 1969 after which the family of Kyuti moved out. The Plaintiff took possession and has been in possession since then. The Plaintiff's step mother Munaa

Ndumbuthi died and was buried on the suit property. The Defendants did not attempt to stop her burial.

14. The Plaintiff submitted that the Ndumbuthi family has built houses on the land and have even sold portions of the suit property to the third parties. The Plaintiff relied on the case of **Harris TR & Sav Bank –vs- Solomon Smith Barney Inc 530 US 238, 250-51 (2000) citing Moore –vs- Crawford, 130 US 122 128 (1989)** where the United States Supreme Court stated as follows:

“Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favour of the one who is truly and equitably entitled to the same.”

15. The Plaintiff submitted that the succession proceedings in respect of the estate of Kyuti were conducted fraudulently. They relied on the case of **Re Estate of Mwanja Mutungi alias Mwaura Gichichio Mbura (Deceased) (2018) eKLR** where it was held that concealment of material facts when petitioning for grant is sufficient ground for revocation under Section 76 of the Law of Succession Act.

16. The Plaintiff finally submitted that he had proved a case for grant of an injunction. He relied on the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358** and **Mrao Ltd –vs- First American Bank of Kenya Ltd (2003) eKLR**.

17. The Defendants submitted that there was no valid sale agreement between Kyuti and Ndumbuthi. They relied on Section 3(3) of the Law of Contract Act which states as follows;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

a. the contract upon which the suit is founded—

i. is in writing;

- ii. is signed by all the parties thereto; and
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

18. The Defendants submitted that the agreements presented by the Plaintiff were not dated and signed by either the seller or the purchaser. DW1 Peter Muasya Kyuti who was listed as one of the witnesses was a minor and did not sign the agreement and was not capable of witnessing an agreement at that tender age.
19. The Defendants submitted that Ndumbuthi was allowed to take care of the suit property as he was related to Kyuti who had died and left young children. He could not therefore have any proprietary interest even if he was in occupation.
20. The Defendants submitted that the suit property was demarcated between 1969 and 1972 and if Ndumbuthi had any claim, he should have raised it during that time. On the issue of succession, the Defendants submitted that the Plaintiff filed objection proceedings in Makindu which were dismissed. He appealed to Makueni High Court but the appeal was withdrawn.
21. The Defendants submitted that the allegations of fraud were never proved. The succession proceedings were carried out lawfully.

Analysis and Determination

22. I have considered the evidence of the Plaintiff and that of the Defendants. I have also considered the submissions by the parties. The issues which emerge for determination are firstly, whether there was a valid sale agreement between Kyuti and Ndumbuthi over the suit property. The second

issue is whether the Defendants were under obligation to inform the Plaintiff of the succession proceedings in respect of the estate of Kyuti. Thirdly is the Plaintiff entitled to any reliefs in the plaint. Fourthly who is to pay the costs of the suit.

23. On the first issue, the Plaintiff alleges that Ndumbuthi purchased the suit property from Kyuti between 1969 and 1971. The Plaintiff produced two agreements. The first agreement is dated 12th December, 1969. The second agreement was made in 1971. There is no date written in this agreement. In both agreements the witnesses did not sign the two agreements.

24. I am aware that the requirements of signing a contract and witnessing the same came later on but in this case, the two agreements are doubtful. First, one of the witnesses to both agreements was Peter Kyuti who is Kyuti's son. This witness testified as DW1. He stated that he was born in 1964. In 1969, he was five years old. In 1971, he was seven years old. It is very doubtful that a child of 5 or 7 years would have witnessed a sale of land at that tender age.

25. In the first agreement of 12th December, 1969, Ndumbuthi claims to have given Kyuti 3 cows. In the agreement of 1971, he claims to have paid Kyuti Kshs.3,500/=. Payment was made in five instalments whose dates are not given. The total of the five instalments is Kshs.2,900/=. There was no evidence given on the balance of Kshs.1,600/=.

26. The evidence which was adduced is that Kyuti died in 1971. It is therefore not clear whether this agreement was made shortly before Kyuti died or it was made after Kyuti had died. The evidence which came out is that Kyuti was a brother to Ndumbuthi. He had been left to take care of the land left by Kyuti after Kyuti moved out of it. DW3 confirmed that if there would have been any sale, he would be aware because he was the secretary of the area assistant chief. This witness was the one who was taking care of Kyuti's land until after the demise of Kyuti.

27. It is clear from the evidence that there was no sale between Kyuti and Ndumbuthi. PW2 Harrison Mutua Ndumbuthi is the eldest son of Ndumbuthi. In his witness statement, he stated that his step brother John Kioo Ndumbuthi was colluding with the Kyuti family to deny them a share of the suit property. I saw the certificate of confirmation of the estate of Kyuti. The name of John Kioo Ndumbuthi is not among the beneficiaries of the suit property. I do not therefore understand the basis of the Plaintiff's claim. I therefore find that there was no sale between Kyuti and Ndumbuthi over the suit property.

28. On the second issue, the Defendants were not under any obligation to inform the family of the Plaintiff about the succession of their father's estate. There was no sale of the suit property to Ndumbuthi. When the Plaintiff learnt of the succession cause at Makindu Succession Case No. 57 of 2016, he applied for annulment of the grant dated 7th August, 2019. This application was dismissed on 28th January, 2020. The Plaintiff had filed a similar application dated 26th July, 2018 which was dismissed on 18th December 2018. The Plaintiff appealed to the High Court but this appeal was withdrawn.

29. There was therefore nothing fraudulent in the succession proceedings. The Defendants were therefore under no obligation to inform the Plaintiff or involve him in the succession proceedings as Ndumbuthi had not purchased the suit property.

Disposition

30. On the third issue, it is my finding that the Plaintiff is not entitled to any of the reliefs in the plaint in view of my finding that there was no sale agreement between Kyuti and Ndumbuthi. I therefore find that the Plaintiff has failed to prove his case on a balance of probabilities. The Plaintiff's case is dismissed with costs to the Defendants.

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HON. E. O. OBAGA

JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 11TH DAY OF DECEMBER, 2025.**

IN THE PRESENCE OF:

Mr. Kasyoka for Defendant.

Ms. Wawira for Mr. Wakwaya for Defendants

Court assistant Steve Musyoki_____

ORIGINAL