



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 122 OF 2017 (O.S)

MUSYIMI NDUTO MULAA)

MUKONYO KYOVE).....PLAINTIFFS

VERSUS

NZISA KOMBO)

MATATA KOMBO) (Sued as administrators of the estate of

KOMBO NDUTO (DECEASED).....DEFENDANTS

JUDGMENT

1. By their Originating Summons dated 28th November, 2011 and filed in court on 02nd December, 2011 Musyimi Nduto Mulaa and Mukonyo Kyove (hereinafter referred to as the 1st and the 2nd Plaintiffs) seek the following orders against Nzisa Kombo and Matata Kombo (hereinafter referred to as the 1st and the 2nd Defendants) who are sued in their capacity as the administrators of the estate of Kombo Nduto:-

1) A declaration that the property known as MAKUENI/KYALUMA/3 is an ancestral land for the family of the late Nduto Mulaa hence the late Kombo Nduto held the Title under customary Trust.

2) A declaration that the said property should be shared among the children of the late Nduto Mulaa or their heirs namely:- Muendo Nduto (Deceased), Mulwa Nduto (deceased), Kyove Nduto (deceased) Musyimi Nduto and Kombo Nduto (deceased) unless the heirs expressly denounce their right.

3) Cancellation of the Title No.Makueni/Kyaluma/3 issued to Nzisa Kombo, and all the other entries on the Register.

4) That the Honourable Court be pleased to order the division of the said property and apportionment of shares to all the beneficiaries.

5) That the Honourable Court be pleased to issue an injunction against NZISA KOMBO, her agents and/or servants from disposing, alienating or charging the land known as MAKUENI KYALUMA/3 and from evicting MUKONYO KYOVE, MONICA MUTUKU and all other beneficiaries until the hearing and determination of this originating summons.

6) That the Honourable Court be pleased to grant such further or other relief as may be just in the circumstances.

7) That in any event the Defendants be condemned to pay the costs of this application.

The originating summons is based on the grounds that:-

a) That the property was acquired by the Late Nduto Mulaa.

b) That Nduto Mulaa had several children namely Muendo Nduto (deceased), Mulwa Nduto (deceased) Kyove Nduto (deceased) Musyimi Nduto and Kombo Nduto (deceased), Naomi Nduto, Mbithe Nduto and Kalau Nduto.

c) That the widow of the late Kombo Nduto, namely NZISA KOMBO through succession cause No.219/2007 caused the property to be registered in her name as an absolute owner.

- d) That during demarcation the land was registered in the name of Kombo Nduto to hold in trust for the other beneficiaries.**
- e) That NZISA KOMBO has threatened to evict all the other beneficiaries from the land.**
- f) That it is in the interest of justice and fairness that the property be declared as being held under customary Trust and shared to the rightful/beneficiaries.**

It is supported by the affidavit of Musyimi Nduto Mulaa the 1st Plaintiff sworn at Nairobi on the 28th November, 2011. The second Plaintiff swore a further affidavit on the 20th March, 2018.

2. The two Defendants have opposed the originating summons via the replying affidavit of the first Defendant sworn at Machakos on the 23rd May, 2012.
3. On the 04th October, 2017 parties consented to dispose off the application by way of *viva voce* evidence.
4. Four witnesses who include the two Plaintiffs as well as Wanza Mbevo Ndolo (PW1) and Harun Musyoki Mbindyo (PW2) testified on behalf of the two Plaintiffs. The Plaintiff's evidence in chief was more or less a repetition of depositions in their respective affidavits. As for the first Plaintiff, his evidence was that he is the brother of the late Kombo Nduto to whom proceedings in succession cause number 219 of 2007 relate. That he had other brothers who are all now deceased. Their names are Muendo Nduto, Mulwa Nduto, Kyove Nduto and Ngii Nduto. That he and his brothers' parents by the names of Nduto Mulaa and Malinda Nduto settled in 1930's in the land now known as Makueni/Kyaluma/3. That he and one of his brothers moved out of the said Makueni/Kyaluma after they acquired their own land. That Kombo Nduto held the aforementioned land in trust for others and that when Kombo Nduto died, Nzisa Kombo obtained a title for the suit land vide succession cause number 219 of 2007. That Nzisa has now threatened to evict the family of the late Kyove Nduto from the said land parcel number Makueni/Kyaluma/3.
5. The evidence in chief of the second Plaintiff was that she and others were born and raised in the land parcel number Makueni/Kyaluma/3. That she and her children as well as the children of the late sister reside on the suit land. That after the 1st Defendant obtained letters of administration in succession cause number 219 of 2007, the 1st Defendant issued eviction notices to her and others, an issue that forced her to file objection proceedings in the aforementioned succession cause on the 09th November, 2011.
6. The 1st Plaintiff's evidence in cross-examination is that although he does not lay any claim against the suit land, he would like the second Plaintiff and others to get their share of it.
7. The 2nd Plaintiff in her evidence in cross-examination told the court that she has never been married and denied the assertion that their ancestral land is in Kitui. She maintained that Kombo's land belongs to the family and pointed out that she was not aware that he had been registered as the absolute proprietor. She said that she was aware that the suit land was registered in the name of the first Plaintiff by virtue of a succession cause.
8. Wanza Mbevo Ndolo's (PW1) evidence in chief was that the 1st Defendant is her mother in law. She went on to say that the 1st Defendant served her with notice to vacate the suit land. Her evidence in cross-examination was that the suit land is ancestral.
9. Harun Musyoki Mbindyo's (PW2) evidence in chief was that the suit land belongs to the family of Kombo, Mukonyo, Kyove and another whose name he could not recall. His evidence in cross-examination was that during demarcation, family members were asked to elect one of them to be registered as the owner and pointed out that Kombo held the suit land in trust of the children of his late brother, the late Kyove.
10. The evidence of the 1st Defendant was that her husband, one Kombo Nduto had a parcel of land by the time when she married him. She pointed out that no one else was in the said land and that Nduti Kyove who used to reside in Kitui together with her husband joined her and Kombo in their land. She asserted that Makueni/Kyaluma/3 was acquired by her husband who had it registered in his name in the 1970's. According to her, the brothers of her husband never sued him while he was still alive and termed the actions of the Plaintiffs as an attempt to snatch his land. She said that she filed Machakos succession cause number 219 of 2007 whereupon she was issued with a grant which enabled her to obtain a title deed.
11. Her evidence in cross-examination was that the suit land is not ancestral. She said that the 2nd Plaintiff and one Syokau were born in the suit land. She went on to say that Kombo had asked Nduti to buy her own land and pointed out that he led her to Kitise to buy her own land. The 1st Defendant went on to say that Nduti did not relocate to Kitise and was eventually buried in the suit land. She said that when she filed the Machakos succession cause number 219 of 2007, she did not disclose that there were other people living on the suit land. She said that she issued eviction notices to the 2nd Plaintiff and Wanza (PW 1) to move out of the suit land. She also said that at the time of filing for the succession cause, she did not disclose to the Court that Kombo had sold land to other people and admitted that she too had sold land to some people.
12. Kimanthy Mulwa (DW2) in his evidence in chief told the Court that Kombo Nduuta Mulaa's farm does not belong to his family. He went on to say that Kombo whom he knew as a neighbour told him that he had come from Kitui.
13. Kimanthy's (DW2) evidence in cross-examination was that the 2nd Plaintiff resides on the suit land. He also said that her mother is buried on the said land. He agreed that Mukonyo and her sisters children are orphans.
14. In her written submissions, the Plaintiffs' Counsel urged the Court to declare a trust in respect of the subject land despite the registration

that was done in favour of the 1st Defendant. The Counsel was of the view that since all the parties in the case were from the Kamba community, land was commonly held or registered in the name of the surviving male to hold the same in trust for the other surviving members of the family. The Counsel went on to submit that the evidence adduced is manifestly clear that Kombo Nduto was the surviving male residing on the land during adjudication. The Counsel cited the cases of **Phillicery Nduku Mumo vs. Nzuki Makau [2002] eKLR** and **Mbui Mukangu vs. Gerald Mutwiri Mbui [2004] eKLR**.

15. On the other hand, the Counsel for the Defendants submitted that the Plaintiffs did not prove that there exists a customary trust over land parcel number Makueni/Kyaluma/3. The Counsel distinguished the first authority cited by the Plaintiffs' Counsel on the grounds that it involved the 1st wife of the deceased being registered as the owner during demarcation while the second authority involved a father who as the registered owner of land failed in his attempt to evict his son from his land.

16. I have read the evidence on record. I have also read the submissions that were filed. From the evidence on record, it is clear that both the 1st Plaintiff as well as the late Kombo who is the husband of the 1st Defendant moved from Kitui and settled in Kyaluma. The 1st Plaintiff in his own evidence told the Court that he moved out of the suit land and bought his own land elsewhere. There is no denial that the 2nd Plaintiff was born on the suit land and continues to reside on it. In my view the ancestral land for the parties herein is in Kitui where the family hailed from before settling in Kyaluma. The Plaintiffs did not adduce evidence to show that at the time of adjudication and demarcation, the late Kombo was registered to hold the land in trust for himself as well as his siblings who include the father of the second Plaintiff. Even though the 2nd Plaintiff told the court that she filed objection in Machakos succession cause number 219 of 2007, to the challenge the transmission of the suit land to the 1st Plaintiff, she did not tell the Court what was the outcome of the objection. It therefore seems to me that the Plaintiffs are out to appeal against the determination in Machakos succession number 219 of 2007 before this Court, an issue that this court will not entertain. The upshot of the above is that I agree with the Defendants' Counsel that the Plaintiffs have not established on balance of probabilities that they have a cause of action against the Defendants. In the circumstances, I hereby dismiss the Originating Summons with costs to the Defendants.

Signed, dated and delivered at **Makueni** this **03rd** day of **May, 2019**.

MBOGO C. G.,

JUDGE.

In the presence of:-

Ms. Muendo for the Plaintiffs

No appearance for the Respondents

Ms. C. Nzioka – Court Assistant

MBOGO C.G, JUDGE

03/05/2019.