



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 130 OF 2014

RITA NALIAKA KISIELO.....1ST PLAINTIFF

AMOS SIMIYU MUHINDI.....2ND PLAINTIFF

VERSUS

PETER W. MUHINDI.....1ST DEFENDANT

DICKSON MUHINDI.....2ND DEFENDANT

JULIUS B. MUHINDI.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. In the plaint dated 5/8/2014 and filed in court on 6/8/2014, the plaintiffs pray for judgement against the defendants for:

(a) A declaration that the plaintiffs are the rightful and/or legal owners of the two (2) acres of land Title Number TRANS-NZOIA/KIPSOEN/194 and therefore they be put into possession of the same.

(b) An order of permanent injunction be issued restraining the defendants, their agents, servants, employees and/or any other persons claiming through them from in any other manner interfering with the plaintiffs' peaceful and quiet occupation of two (2) acres of land Title Number TRANS- NZOIA/KIPSOEN/194.

(c) Costs of the suit.

(d) Any other relief this court may deem just and fit to grant.

PLEADINGS

The Plaint

2. It is the plaintiffs' case that they are the administrators of the estate of the late **Joseph Kisielo Muhindi** (deceased), a grant of Letters of Administration Intestate having been granted to them on 30/5/2014 vide **Kitale High Court Succession Cause No. 65 of 2014** and the defendants are the beneficiaries and dependants of the estate of the late **Yohana Muhindi Musebe** (deceased) who owned land known as No. **Trans-Nzoia/Kipsoen/194** (hereinafter also referred to as "**Plot No. 194**") measuring approximately 35 ½ acres.

3. The plaintiffs aver that prior to the demise of the deceased, **Joseph Kisielo Muhindi** who was the husband and father to the 1st and 2nd plaintiffs respectively, the estate of his deceased father, **Yohana Muhindi Musebe** had been distributed and each of his sons given **two (2) acres** of the suit land.

4. The plaintiffs state that by virtue of their status as direct dependants of the estate of **Joseph Kisielo Muhindi**, they are entitled to inherit the two (2) acres that had been bequeathed to the said **Joseph Kisielo Muhindi** from the estate of the late **Yohana Muhindi Musebe**.

5. The plaintiffs further state that their efforts to take possession of that their share of the suit land have been in vain owing to lack of co-

operation on the part of the defendants who have denied the plaintiffs entry into the suit land.

6. The plaintiffs further aver that despite the fact that the administrators of the estate of the late **Yohana Muhindi Musebe** have been co-operative and willing to perform their role in ensuring that the plaintiffs have secured their share of the deceased's estate, the defendants have ensured that the process is not fulfilled.

7. The plaintiffs state that they have no other land to reside on and intend to construct a matrimonial home on their share on the suit land. Demand and notice of intention to sue was issued to the defendants but all has been in vain.

The Defence

8. The defendants filed joint a statement of defence on **22/8/2014** denying the claim. In the defence the defendants deny the plaintiffs' claim that they are the administrators of the estate of **Joseph Kisielo Muhindi** and deny that the said **Joseph Kisielo Muhindi** was entitled to **2 acres** of the suit land; they deny that **Joseph Kisielo Muhindi** was a dependant of the late **Yohana Muhindi Musebe** at his demise or that the defendants have denied the plaintiffs entry to the suit land. They state that the late **Joseph Kisielo Muhindi** was not entitled to any portion on **plot No. 194** since the decree and judgment in **Kitale High Court Succession Cause No. 79 of 2000** excluded him from the estate; that the dispute herein was heard and determined in **Kitale High Court Succession Cause No. 79 of 2000** and this suit is *res judicata*; that the plaintiffs remedy, if any, lies against the administrators of the deceased herein **Yohana Muhindi Musebe** and not the defendants; that the plaintiffs have for the last 30 years lived, used and occupied plot No. **Kaisagat/Chepkoilel Block 3/Bwayi/111** the home where the deceased **Joseph Kisielo Muhindi** was buried; that the filing of this suit is an afterthought, brought with ulterior motive as in **High Court Succession Case No. 65 of 2014** the plaintiffs never indicated that the deceased had a share or interest in **Plot No. 194**; that their elder brother **Joseph Kisielo Muhindi** during his lifetime never claimed interest in **Plot No. 194**; that the orders sought cannot issue against the defendants but against the administrators who are not parties to this suit; that no demand has been issued and that this suit is a non-starter and the plaintiffs ought to have moved the court in a succession cause.

The Plaintiff's Evidence

9. **PW1**, the 1st plaintiff, testified on **5/10/2016**. Her evidence is that her father-in-law who is father to the defendants met his demise before her husband died and upon distribution of his estate the 1st house of which her husband was a member got 13 acres. Her father-in-law's land parcel was known as **Trans-Nzoia/Kipsoen/194** and her husband was entitled to 2 acres thereof; a surveyor visited the land and prepared mutation forms; however the defendants occupied the **2 acres** her husband was entitled to. On cross-examination she admitted that her husband was buried at Bwayi where he had bought land and that she had already transferred that land into her name. She also admitted that the defendants are not the administrators to the estate of their father and that Plot No. **Trans-Nzoia/Kipsoen/194** was subdivided amongst the **4 wives** of her father-in-law; that the 1st defendant does not reside on the suit property and has his own land at Bilunda; that there were 5 sons in the 1st house and that her mother-in-law was named Esther. Upon re-examination she stated that her mother-in-law was given one acre and each of the sons was to get **2 acres**; however the 2nd and 3rd defendants now occupy the land meant for her mother-in-law's house and have not allowed her access to her husband's share.

10. **PW2 Merton Kisiangenai Muhindi**, testified on the same date as PW1. His evidence is that PW1, the 1st plaintiff is his sister-in-law, being wife to her late brother and that his father was **Yohana Muhindi Musebe** who met his demise in **1990**; that he is one of the administrators of his estate which comprised of **Trans-Nzoia/Kipsoen/194** measuring **35.5 acres**; that the 1st plaintiff's husband was one of the beneficiaries to the land allocated to his mother's house, that is, the 1st house from which PW2 also hailed. According to him the 1st house was given **13 acres** out of which he got **2 acres** while the remaining **11 acres** were to be shared amongst all the **5 sons** in the house after his mother took **1 acre**; therefore each son was to get **2 acres**. He further testified that the 1st plaintiff was entitled to her late husband's share of land but the 2nd defendant is cultivating the 1st plaintiff's entitlement. He maintained that the estate should be distributed as per **Kitale High Court Succession Cause No. 79 of 2000**.

11. Upon cross-examination PW2 stated that the 1st plaintiff has not demanded land from him in his capacity as administrator of his father's estate and neither did her husband do so before his demise. He conceded that Peter Muhindi the 1st defendant does not reside on the suit land and that only the 2nd and 3rd defendants reside thereon. On re-examination he maintained that the 2nd defendant had been resisting the distribution of the 11 acres from which the 1st plaintiff is entitled to a share measuring 2 acres. He conceded that her husband is named in the decree produced as **P. Exhibit 2**. With that evidence on the record the plaintiffs closed their case.

Evidence for the Defence Case

12. **DW1**, the 2nd defendant **Dickson Simiyu Muhindi**, testified on **23/8/2018**. His evidence is that **Plot No. 194** belonged to his father who died in **1990**; that **Kitale High Court Succession Cause No. 79 of 2000** was taken out in respect of their deceased father's estate; that four wives who included the 1st plaintiff's mother-in-law were to inherit their deceased father and the land was to be subdivided amongst them; that the plaintiff's husband was given some land in Kimilili as his share alongside other siblings and that he did not lodge any complaint in the succession proceedings; that he also never claimed any land from the administrators; that he had lived on the land for 40 years; that the High Court never divided the land among the children but only among the various houses. He maintained the 1st plaintiff has a place to live and that the High Court stated that her husband had bought 3 acres from a co-operative society. He posited that the 1st plaintiff's husband should have filed a claim in the succession cause if he had any and that the 1st plaintiff should have also have dealt with the administrators if she had any claim. He denied that the plaintiff's husband had any interest in his father's land. He denied that the decree (**P. Exhibit 2**) authorized the giving of any land to the children in the various houses. In his view the plaintiff should go back and move the court in the succession cause to determine if she has any claim.

13. Upon cross-examination by Mr. Ingosi he stated that there was a will upon his father's death; that statement however contrasts sharply

with his subsequent statement that his father died intestate and that the property was distributed by the court. He averred that **PW1** and **Moses Khisa Muhindi** were administrators of the estate and that **Fanuel, Joseph, Peter, Julius** and **himself** were to get **11 acres**. His arithmetic regarding the distribution was that his mother would get **2 acres** to include his father's grave, and that each person would have gotten at least **2 acres** while **Joseph** should have been excluded. He admitted that none of Joseph's family members are in occupation of any portion of the land. Upon re-examination he stated that his father's wives had filed **Kitale Succession Cause No. 86 of 2000** which was different from **Kitale High Court Petition No. 79 of 2000** filed by their sons and that the court consolidated the two succession causes and the wives were made administrators.

14. **DW2, Julius Barasa Muhindi**, the 3rd defendant testified on **23/8/2018**. His evidence is that his father had two land parcels which included land in Kimilili. He added that the land in Kimilili was sold and the proceeds thereof shared amongst his sons **Merton, Fanuel, Joseph** and **Peter**. All those who each received a portion of those proceeds bought land elsewhere. He denied being an administrator to his father's estate. Upon cross examination by Mr. Ingosi he admitted that that notwithstanding the revelation to the succession court that there had been land in Kimilili the court still included Joseph the 1st plaintiff's husband in the distribution of the Trans-Nzoia land. He admitted that **Merton** was given **2 acres** out of the **13 acres** that were allocated to his mother's house. He and **Dickson** are utilizing the land and they have not allowed the 1st plaintiff on the land and cannot do so since her husband had already gotten his share of their father's property elsewhere. He stated that his mother is now deceased and that each of the **5 brothers** could get at least **two acres** if the land was shared among them. He testified that he would not allow the administrators to give 1st plaintiff land in **Plot No. 194**.

15. The defence case was ordered closed on **29/4/2019** when the defendants failed to call another witness as had been intimated to court and the court directed parties to file submissions.

SUBMISSIONS

16. Submissions were filed on behalf of the plaintiffs on **15/7/2019**. No submissions were filed on behalf of the defendants. I have considered the filed submissions.

DETERMINATION

Issues for Determination

17. The main issues for determination in this matter are identified as follows:

(a) Whether the plaintiffs are entitled to 2 acres out of Trans-Nzoia/Kipsoen/194 and whether they should be put into possession thereof.

(b) Whether a permanent injunction should issue restraining the defendants or any person claiming through them from interfering with the plaintiffs' peaceful and quiet possession of 2 acres within Trans-Nzoia/Kipsoen/194.

(c) Who should bear the costs of the suit?

a. Whether the plaintiffs are entitled to 2 acres out of Trans-Nzoia/Kipsoen/194 and should be put into possession thereof

18. Central to this suit is the issue of how land left by **Yohana Muhindi Musebe** should be distributed. He was the father to the defendants and father in law to the 1st plaintiff. A decree that emanated from the **Kitale High Court Succession Cause No. 79 of 2000** was produced as **P. Exhibit 2**. Of interest in that decree is the particular entitlement handed to the 1st house headed by its matriarch, **Esther Nasambu**. That decree reads as follows:-

“It is hereby ordered that;

The first house of Esther Nasambu:

a. Merton Kisiangani to get 2 acres.

b. Esther Nasambu, Fanuel M. Muindi, Joseph Muhindi, Peter Muhindi, Dickson Muhindi and Julius B. Muhindi to get 11 acres. Total to the first house is 13 acres. Because it is the house with the largest number of units.”

19. DW2 conceded that that “Joseph Muhindi” who is named in the decree whose contents have been set out above is the 1st plaintiff's husband who is now deceased. His further evidence was that despite the revelation concerning the existence of the Kimilili property in the succession cause, the court still included Joseph in the distribution scheme.

20. Two things may be gathered from this inclusion. One is that the court was not convinced that Joseph had been given a share of property by his father before his father died so as to warrant his exclusion from subsequent distribution of the estate. Secondly the inclusion corroborates the evidence of DW2 that when the Kimilili land was sold, other persons besides Joseph were given a portion of the proceeds and they bought land elsewhere. Those persons he mentions included **Merton, Fanuel** and **Peter**. If it were the case that none of those who shared in the proceeds of the Kimilili land sale were entitled to distribution of the Trans-Nzoia land then **Merton, Fanuel** and **Peter** who fell under that category should not have been included in the distribution of the Trans-Nzoia land. If the 3 were included in the distribution then there was no good ground to exclude Joseph from such distribution.

21. The conclusion I arrive at from a consideration of the pleadings and evidence is that **Joseph** was entitled to **2 acres** out of the Trans-Nzoia land just as his other brothers were. In any event he is named as a beneficiary in the final decree in the succession cause which decree has not been quashed or set aside by any court of competent jurisdiction. The 1st plaintiff has produced evidence of a grant of letters of administration in respect of Joseph's estate in which both plaintiffs are named as co-administrators and therefore they are entitled to land meant for **Joseph** out of **LR. No. Trans-Nzoi/Kipsoen/194**. The assertions by the 2nd and 3rd defendants to the effect that neither Joseph nor the plaintiffs were entitled to a share of **LR. No. Trans-Nzoi/Kipsoen/194** appears to borne out of considerations other than the contents of the decree in **Kitale High Court Succession Cause No. 79 of 2000**.

22. DW2 in particular asserted in cross examination by Mr. Ingosi that the defendants have not allowed the 1st plaintiff access to the land and cannot allow her such access on the ground that her husband had been given land elsewhere. As I have stated that the claim by DW2 is baseless and in any event no evidence was produced by the defendants either at the succession cause or in this suit to prove that before his death **Yohana Muhindi Musebe** indeed gave any land to **Joseph** in **Kimilili**. I consider that objection by the defendants to be unfounded and unwarranted aggression against a defenceless widow which should not be upheld.

23. In the final analysis I find that the plaintiffs have established their claim on a balance of probabilities against the 2nd and 3rd defendants only, and that there is no need for the plaintiffs to go back to the succession court to establish their claim or particular share in the land comprised in **LR. No. Trans-Nzoi/Kipsoen/194** as this court has jurisdiction to pronounce itself as to ownership and size of entitlement claimed by the plaintiffs.

b. What Orders should issue?

24. I therefore enter judgment against the 2nd and 3rd **defendant** joint and severally and issue the following orders.

(a) A declaration is hereby issued that the plaintiffs as administrators of the Estate of the late Joseph Kisielo Muhindi are the rightful and/or legal owners of two (2) acres of land Title Number TRANS-NZOIA/KIPSOEN/194.

(b) An order is hereby issued that the administrators of the estate of Yohana Muhindi Musebe shall carve 2 acres out of Title Number TRANS-NZOIA/KIPSOEN/194 and put the plaintiffs into possession of those 2 acres.

(c) An order of permanent injunction is hereby issued restraining the defendants from cultivating, occupying, utilizing or in any manner interfering with land in excess of the 2 acres each of them is entitled to out of Title Number TRANS-NZOIA/KIPSOEN/194.

(d) An order of permanent injunction is hereby issued restraining the defendants, their agents, servants, employees and/or any other persons claiming through them from in any other manner interfering with the plaintiffs' entry into possession, peaceful and quiet occupation of their entitlement measuring two (2) acres of land out of Title Number TRANS-NZOIA/KIPSOEN/194.

(e) The 2nd and 3rd defendants shall jointly and severally bear the costs of the suit.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGI

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for plaintiffs

N/A for defendants

COURT

Judgment read in open court.

MWANGI NJOROGI

JUDGE

