



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC SUIT NO. 83 OF 2018**

**DAVID MUTWIWA KIOKO**

**PETER MUNYAO MUSYOKA ..... PLAINTIFFS**

**-VERSUS-**

**KATUMO NDUUTI**

**LAND REGISTRAR, MAKUENI COUNTY ..... DEFENDANTS**

**JUDGEMENT**

1. The suit herein commenced by way of a plaint dated 08<sup>th</sup> August, 2018 and filed in court on 10<sup>th</sup> August, 2018 in which the Plaintiffs seeks for judgment against the Defendants jointly and severally for:-

**(a) A declaration that the registration of land parcel KISAU/NGONI/387 in the names of the Defendant is null, void and of no legal effect.**

**(b) An order to the Land's Registrar Makueni County to cancel the title deeds KISAU/NGONI/387 issued to the Defendant KATUMO NDUUTI.**

**(c) An order to the Land Registrar Makueni County to issue new title deeds in the names of the Plaintiffs and the Defendant to hold jointly and in equal shares.**

**(d) Costs and interest.**

**(e) Any other relief which this Court deems fit and just to grant.**

2. From the affidavits of service sworn at Machakos on 05<sup>th</sup> October, 2018, 26<sup>th</sup> November, 2018 and 21<sup>st</sup> January, 2019, it is apparent that it is only the 1<sup>st</sup> Defendant was served with summons to enter appearance and to file his defence. He neither entered appearance nor did he file his defence. This matter therefore proceeded as undefended suit.

3. During the hearing, the 1<sup>st</sup> Plaintiff adopted his statement dated 19<sup>th</sup> February, 2017 as his evidence. He said that land parcel known as Kisau/Ngoni/387 is registered in the name of the 1<sup>st</sup> Defendant herein. That he and his co-plaintiff are nephews of the said Defendant. That the aforementioned land was ancestral having been owned by one Nduuti Mulei who had two wives. That the 1<sup>st</sup> wife had two sons namely Kioko Nduuti and Musyoka Nduuti who are fathers to the Plaintiffs herein. The 2<sup>nd</sup> wife of Nduuti Mulei had two sons who include the 1<sup>st</sup> Defendant herein.

4. That during adjudication and demarcation, the 1<sup>st</sup> Defendant fraudulently had the land registered in his name. That the family had a meeting on 07<sup>th</sup> March, 2015 to try to resolve the matter but no agreement was reached. His prayer was that the title deed issued in the name of the 1<sup>st</sup> Defendant be cancelled and the land be subdivided into three houses of Nduuti Mulei who was their grandfather.

5. The Plaintiff produced a copy of certificate of official search as P.Exhibit No.1.

6. The Plaintiffs called Japheth Muumbi (PW1), the Vice General Chairman of Eombe clan as their witness. He said that at the request by a civil organization known as MAPACA, the Eombe clan was mandated to arbitrate a family dispute involving the beneficiaries of Nduuti Mulei who include the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant herein. That they called for several meetings involving the Plaintiffs and the 1<sup>st</sup> Defendant which bore no fruit. That as a result of their failure to resolve the dispute, the Eombe clan advised the Plaintiffs to seek legal

redress.

7. In his submissions, the Plaintiffs' Counsel submitted that the Plaintiffs are beneficiaries of the suit property. He went on to submit that a title that is illegally and fraudulently acquired can be challenged under the Land Registration Act. The Counsel relies on the case of **Isaac M'Inanga Kieba vs. Isaaya Theuri M'Lintari and Another [2018] eKLR**.

8. The aforementioned case is a Supreme Court decision where the court expressed itself as follows:-

*“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group of family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor”*

9. If I understood the Plaintiffs' Counsel well, he seems to say that land parcel number Kisau/Ngoni/387 is family land and that notwithstanding the fact that it is registered in the name of the 1<sup>st</sup> Defendant, the latter holds it in trust for the Plaintiffs. This is what the 1<sup>st</sup> Plaintiff alluded to in his evidence before this court. That the suit was the property of his late grandfather, Nduuti Mulei who upon his demise, the 1<sup>st</sup> Defendant had it fraudulently registered in his name. There being no evidence to the contrary, my finding is that the Plaintiffs have a cause of action against the 1<sup>st</sup> Defendant. In the circumstances, I hereby proceed to enter judgment to the Plaintiffs and against the 1<sup>st</sup> Defendant in terms of prayers (a), (b) (c) and (d). It is so ordered.

**Signed, Dated and Delivered at Makueni this 26<sup>th</sup> day of September, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Thuku holding brief for Mr. Mutune for the Plaintiff present

Mr. Kwemboi – Court Assistant

**MBOGO C. G., JUDGE,**

**26/09/2019.**