



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 91 OF 2013**

**KINGI NZIOKI NGUYO.....PLAINTIFF**

**VERSUS**

**JOHN MULWA NZIOKI.....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 14<sup>th</sup> October, 2013, the Plaintiff averred that prior to the year 1991, Plot No. 256 situated at the Mua Hills Settlement Scheme was registered and held in trust by William Mutisya Ndasi (*deceased*) on his behalf and on behalf of Isaac Ngila Ndasi, Kingi Nzioki Nguyo (*the Plaintiff*) John Mulwa Nzioki (*the Defendant*) and Rael M. Nzina.

2. It is the Plaintiff's case that a Certificate of Confirmation of Grant to the Estate of the late William Mutisya Ndasi was made with a schedule on the distribution of parcel of land known as Machakos/Mua Hills/256 measuring 89.5 Hectares; that the suit land was to be distributed equally amongst the beneficiaries who included himself and that the beneficiaries of the suit land agreed that the whole portion should be registered in the name of Loice Ndunge Mutisya (*deceased*) who would in turn sub-divide it and transfer the sub-divisions amongst the beneficiaries of the Estate.

3. The Plaintiff has averred that parcel number 256 was subsequently sub-divided into ten (10) portions; that each of the beneficiaries was entitled to two portions of land and that he was entitled to parcels of land known as Mua Hills/450 and 451 measuring 8.45 Ha and 8.10 Ha respectively.

4. The Plaintiff finally averred that it was not until 18<sup>th</sup> April, 2013 that he discovered that parcels of land known as Mua Hills/450, 451, 452 and 453 were all registered in the name of the Defendant in the year 1998; that the registration of parcels of land known as Mua Hills/450 and 451 in the name of the Defendant was done fraudulently and that the said titles should be cancelled by this court.

5. In his Defence, the Defendant averred that it is not true that the parcel number Mua Hills/256 was registered in the name of the late William Mutisya Ndasi; that the Confirmation of Grant was issued by the court in anticipation that the Plaintiff would get his share of the land after refunding the Defendant the amount of consideration paid by the Defendant towards acquisition of the land and that the Plaintiff should be dismissed.

6. The Plaintiff, PW1, informed the court that the Defendant is his elder brother and that in the 1960's, him, together with the Defendant, William Mutisya Ndasi, Ngila Ndasi and Nzina Ndasi, jointly agreed to buy land registered as No. 256 at Mua Hills Settlement Scheme measuring 221 acres.

7. According to PW1, after purchasing the said land, they agreed to have the land registered in the name of William Mutisya Ndasi as the trustee; that they also agreed that the Defendant should do livestock farming on the land and that they were advanced with a loan by the Government which they paid by practicing livestock farming on the suit land.

8. It was the evidence of PW1 that they each contributed a sum of Kshs. 600 to secure the purchase of the land and that he paid the said amount without the assistance of the Defendant. According to PW1, when the late William died, the Letters of Administration were issued to Loice Ndunge Mutisya; that they distributed parcel number 256 amongst the five of them and that 2 acres of the suit land was sold to one of the five members to finance the survey work.

9. PW1 testified that each of the five members got two (2) portions of land as drawn on the sketch map by the Surveyor and that he only came to realize much later that the Defendant had parcels of land known as Mua Hills/450 and 451 fraudulently registered in his name. The Plaintiff produced in evidence several documents which I shall refer to later.

10. The Defendant, DW1, stated that in the late 1960's, himself, together with William Mutisya Ndasi, Isaka Ngila Ndasi, Rael Mathembo and the Plaintiff formed a syndicate to jointly acquire land from the then Settlement Schemes and Co-operative Societies; that the acquisition of the land was achieved through individual efforts and that the Plaintiff requested him to make all the required payments on his behalf with

a promise to refund the same.

11. The Defendant informed the court that the Plaintiff is not entitled to the land that they purchased in Mua Hills because he never paid for it.

12. In cross-examination, DW1 stated that he paid Kshs. 100,000 for his share and the Defendant's share for the land they purchased; that they registered the land in the name of William Mutisya (*deceased*) and that each of the five partners was entitled to two parcels of land after parcel number 256 was sub-divided into two portions; that everything was done in trust and that he could not tell the exact amount of money that the Plaintiff was to refund him.

13. In his submissions, the Plaintiff's advocate submitted that the Defendant never produced any Agreement to show that he made payments for the suit land on behalf of the Plaintiff; that there is Agreement on distribution of the suit land and that the Defendant's remedy, if any, lay in suing for a refund of the purchase price.

14. The Defendant's advocate submitted that the Defendant filed receipts which were issued to him after the payments he made to the Public Fund Trustees; that the Plaintiff is asking to be given free land and that the distribution Agreement of 1996 was in anticipation that the persons involved would pay up their respective considerations which the Defendant did not.

15. The evidence by both the Plaintiff (PW1) and the Defendant (DW1) was that they came together as a group comprising the Plaintiff, the Defendant, William Mutisya Ndasi, Isaka Ngila Ndasi and Rael Mathembo Nzina and purchased a parcel of land measuring approximately 221 acres in Mua Hills Settlement Scheme. After acquiring land known as Machakos/Mua Hills/256 as tenants in common shares, the five partners had the land registered in the name of William Mutisya Ndasi.

16. Before the said parcel of land could be sub-divided and shared, it was the evidence of the Plaintiff and the Defendant that William Mutisya Ndasi died. The partners agreed to have William's wife, Loice Ndunge Mutisya, take out the Letters of Administration, which she did in Machakos High Court Succession Cause No. 78 of 1990.

17. The Certificate of Confirmation shows that the court distributed the parcel of land known as Machakos/Mua Hills/256 measuring 89.5 Ha amongst all the five partners, with Loice Ndunge Mutisya taking up the share of her late husband, William.

18. The sub-division and distribution of parcel number Machakos/Mua Hills/256 by the court was very specific. Each of the five partners was to get a portion of land measuring 17.9 Ha. The Certificate of Confirmation in Machakos High Court Succession Cause No. 78 of 1990 dated 21<sup>st</sup> February, 1994 has never been set aside.

19. According to the Plaintiff, he was entitled to two portions of land known as Machakos/Mua Hills/450 and 451 while the Defendant's land was parcel number 452 and 453. However, the Defendant had all the four parcels of land registered in his favour in 1998.

20. The Defendant agreed in his testimony that indeed, the Plaintiff was entitled to the two portions of land that arose from the sub-division of parcel number 256. However, according to the Defendant, the Plaintiff never paid for the two portions of land as agreed between the two of them. It was the evidence of the Defendant that each of the five partners agreed to contribute equally towards the purchase of the parcel number 256.

21. The evidence before me shows that the transaction between the five individuals, including the Plaintiff and the Defendant, was purely on trust. Indeed, no Agreement was produced by the Plaintiff or the Defendant to show how each one of them contributed towards the purchase or acquisition of the suit land. Indeed, there is no evidence to show that any consideration was paid for the entire land known as Mua Hills/256.

22. Although the Defendant claims that he paid the amount that the Plaintiff was supposed to pay for his share, he never produced any Agreement to that effect. In fact, the Defendant was unable to state the amount of money that he paid on behalf of the Plaintiff.

23. The two receipts that the Defendant produced dated 3<sup>rd</sup> April, 1998 of Kshs. 5,000 each were not for the purchase of parcel number 256. The receipts were for the payment of stamp duty.

24. Considering that the Defendant did not object when the Succession Court directed, by the consent of the five parties, that parcel number 256 be distributed amongst the five persons, the Defendant cannot turn around, nineteen (19) years after the distribution of the said land, and contend that the Plaintiff never contributed towards the purchase of parcel of land number 256, which was registered in the name of William on 15<sup>th</sup> January, 1991 and sub-divided into ten (10) portions, being parcels number 450-459 on 26<sup>th</sup> September, 1997.

25. The distribution of the ten (10) parcels of land amongst Loice, Isaka, Rael, the Plaintiff and the Defendant having been sanctioned by the court in High Court Succession Cause No. 78 of 1990, and the said order having not been set aside, I find that the Plaintiff has proved his case on a balance of probabilities. The Defendant is only entitled to two portions of land and nothing more.

26. Although the Defendant was registered as the proprietor of parcels of land known as Machakos/Mua Hills/450 and 451 in 1998, there is no evidence to show that he has been in continuous occupation of the said parcels of land. Indeed, the Defendant never adduced any evidence to show that he is entitled to the land by way of adverse possession.

27. It is for the reasons I have given above, that I allow the Plaintiff's Plaint dated 14<sup>th</sup> October, 2013 as follows:

*a. A declaration be and is hereby issued that the Plaintiff is the lawful and beneficial owner of land parcel numbers Machakos/Mua Hills/450 and Machakos/Mua Hills/451.*

*b. An order for rectification of the register be and is hereby issued directing the registration of the Defendant as the registered proprietor of land parcel numbers Machakos/Mua Hills/450 and Machakos/Mua Hills/451 be cancelled and the Plaintiff be registered as the sole proprietor thereof.*

*c. The Defendant to pay the costs of the suit.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4<sup>TH</sup> DAY OF OCTOBER, 2019.**

**O.A. ANGOTE**

**JUDGE**