



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 19 OF 2014**

**DANIEL MULE MUSAU .....1<sup>ST</sup> PLAINTIFF**

**PHILIP MUILU MUSAU**

*(Suing as legal administrator's Ad litem of the Estate*

*of MUSAU MUILU MWOVA – Deceased).....2<sup>ND</sup> PLAINTIFF*

**VERSUS**

**TITUS NDAMBUKI.....DEFENDANT**

**JUDGMENT**

1. According to the Plaintiffs' averment in their Plaint dated 11<sup>th</sup> March, 2014, the late Musau Muilu Mwova was the registered proprietor of land known as Masii/Utithini/181 (*the suit land*); that the Defendant trespassed on the suit land claiming that he owns a portion thereof measuring 10 acres and that the Defendant should be restrained from his acts of trespass and waste of the suit land.
2. The Defendant filed a Defence in which he averred that the Plaintiffs are the sons and beneficiaries of the Estate of the late Musau Muilu Mwova together with other siblings, including Samuel Katela Musau, Sospeter Mutinda Musau and Peter Mutie Musau and that on 22<sup>nd</sup> February, 2011, the three beneficiaries of the Estate of Musau Muilu sold their beneficial interest in the suit land to him.
3. The Defendant finally averred that the Plaintiffs are aware of the Agreement that he entered into with their siblings and that the suit is driven by greed and ulterior motive of disinheriting Samuel Katela, Sospeter Mutinda Musau and Peter Mutie Musau.
4. This matter proceeded for hearing on 10<sup>th</sup> December, 2018. The 2<sup>nd</sup> Plaintiff, PW1, informed the court that the 2<sup>nd</sup> Plaintiff is his brother; that his late father, Musau Muilu Mwova, is the registered proprietor of parcel of land number Masii/Utithini/181 and that a full Grant has never been applied for or issued by the court in respect of the Estate of their late father.
5. According to PW1, in August, 2012, the Defendant entered the suit land and harassed the Plaintiffs' family members and that the Defendant should be enjoined from trespassing on the suit land.
6. It was the evidence of PW1 that their late father's Estate has never been distributed and that they objected to the sale of the suit land before the Succession proceeding are complete.
7. In cross-examination, PW1 informed the court that his father had two wives; that all his brothers and step-brothers are entitled to the suit land and that the purported Agreement between the Defendant and some of his brothers is a nullity.
8. The Defendant neither testified nor called witnesses to testify.
9. The Plaintiffs' advocate submitted that the purported people who sold a portion of the suit land to the Defendant had no capacity to deal with the free property of the late Musau Mailu Mwova since they had not taken out Letters of Administration of the said Estate.
10. Counsel submitted that pursuant to the provisions of Section 45 of the Law of Succession Act, any sale of land belonging to a deceased person before the said Estate is distributed is a nullity.
11. The Plaintiffs' counsel submitted that in any event, the suit land being agricultural required the consent of the Land Control Board before it could be sold; that no application for consent to transfer was ever made to the Land Control Board and that the Plaint should be allowed as prayed.

12. The evidence before me shows that parcel of land known as Masii/Utithini/181 was registered in favour of Musau Muilu (*deceased*) on 23<sup>rd</sup> April, 1971. However, the late Musau Muilu was not issued with a Title Deed until 25<sup>th</sup> November, 1980.

13. The 2<sup>nd</sup> Plaintiff produced a Death Certificate which shows that late Musau Muilu Mwova died on 24<sup>th</sup> April, 1995. According to the uncontroverted evidence of PW1, the Estate of the late Muilu has never been distributed amongst his beneficiaries.

14. Although the Defendant averred in his Defence that he bought a portion of the suit land from some of the beneficiaries of the Estate of the late Muilu, he did not testify in court. As was held by the Court of Appeal in *Stephen Gachau Githaiga & Another vs. Attorney General (2015) eKLR*, where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of facts.

15. In any event, even if it is true that the Defendant purchased a portion of the suit land from the Plaintiffs' relatives, such a purchase runs afoul the provision of Section 45 (1) of the Law of Succession Act which provides as follows:

***“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”***

16. The purported sale of a portion of the suit land by some of the beneficiaries of the late Musau Muilu to the Defendant without the authority of the court amounts to intermeddling with the free property of the deceased. This is the legal position that has withstood the test of time. In the case of *Elly Odhiambo Onyuka vs. Ayub Odhiambo Migwalla, (2005) eKLR*, the Court of Appeal held as follows:

***“...The question here is whether the late John Aloo Onyuka had the capacity to enter into a sale agreement with the Ayub Odhiambo Migwalla (the respondent herein) while the said John Aloo Onyuka had not yet obtained the grant of letters of administration. According to the evidence the grant of letters of administration was issued to John Aloo Onyuka on 29th September 1993, while the consent by the family, although not dated, has at the back the date of 5th January, 1991. That means the late John Aloo Onyuka had no capacity to enter into a sale agreement in respect of the suit land which was still registered in the name of his late father Ezekiel Onyuka. Indeed the property of the deceased Ezekiel Onyuka was protected by section 45(1) of the Law of Succession Act (Cap 160 Laws of Kenya) which provides:-***

***“Except so far as expressly authorized by this Act or by any other written law or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with any free property of the deceased.”***

17. That being the law, I find that the purported purchase of the suit land by the Defendant, is null and void. For those reasons, I allow the Plaint dated 11<sup>th</sup> March, 2014 as follows:

***a. A permanent injunction be and is hereby issued restraining the Defendant by himself, his servants or agents or others whomsoever from trespassing, encroaching, wasting the suit land and/or denying the Plaintiffs free access to that piece of land known as Masii/Utithini/181 or in any other manner howsoever from laying claims over the suit land.***

***b. 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