



**REPUBLIC OF KENYA**

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

**ELC CASE NO.193 OF 2017**

*(Formerly Machakos ELC No.134 of 2014)*

**JULIUS MUTUNGA WAMBUA.....PLAINTIFF**

**VERSUS**

**JOSEPH MUTISYA KILUNDO.....1<sup>ST</sup> DEFENDANT**

**THADDEUS MUSYOKI KILUNDO.....2<sup>ND</sup> DEFENDANT**

**MASIKA KILUNDO.....3<sup>RD</sup> DEFENDANT**

**MWELU KILUNDO.....4<sup>TH</sup> DEFENDANT**

**SYOMBUA NDUVI.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. By his plaint dated 16<sup>th</sup> October, 2014 and filed in court on 17<sup>th</sup> October, 2014, the Plaintiff prays for judgment against the Defendants jointly and severally for: -

- a) An eviction order against the defendants from the suit premises.**
- b) General Damages for trespass.**
- c) Cost of this suit.**
- d) Any other relief this Honourable court may deem fit and just to grant.**

2. The Plaintiff has averred in paragraph 4 of his plaint that the Defendants illegally and without any right or colour of right or way trespassed into his land parcel No. Makueni/Kikumini/117.

3. The Plaintiff's claim is denied by the Defendants in their joint statement of defence dated 04<sup>th</sup> December, 2014 and filed in court on 08<sup>th</sup> December, 2014. The Defendants have averred in paragraph 3 of their defence that even though they admit that the suitland is registered in the name of the Plaintiff, the same was so registered in trust and for their benefit as they are all family members. The Defendants have further averred in the said paragraph 4 that they have lived in the suitland since 1960's and that the orders sought are travesty of justice.

4. In his reply to defence dated 16<sup>th</sup> January, 2015 and filed in court on 21<sup>st</sup> January, 2015, the Plaintiff has averred in paragraph 3 that the suit land belonged to his deceased father and that it was transferred to him after he followed the laid down procedures.

5. The Plaintiff's case was that he is the registered owner of Makueni/Kikumini/117 (P.Exhibit No.1). It is also his case that the Defendants have trespassed onto the said land parcel No. Makueni/Kikumini/117 and have adamantly refused to vacate it despite his request for them to do so forcing him to ask his advocate to write a demand letter dated 11<sup>th</sup> September, 2014 (P.exhibit No.3).

6. The Plaintiff went on to say that his late father, Wambua Ndunda, acquired the land in 1940s from the colonial government. That his father developed the land and when he fell ill, he invited his brother, Kilindo Ndunda, to take care of it. The Plaintiff added that he acquired a title deed after filing succession cause in respect of the estate of his deceased father.

7. His evidence in cross-examination was that he does not know if his father's brother is buried on the suitland. That if they were to visit the suitland, he will only be able to identify the site where his father's house had been erected. He said that as he acquired the title deed, he informed the lands office that his father's brother used to reside on the suitland. He went on to say that the land is subdivided into ten parcels and not two and that the records at the lands office do not show that the land had been subdivided into two portions. He disagreed with the suggestion that the brother of his father was the first one to move to Kikumini where the suitland is situated. He further disagreed with the suggestion that his father's land is separate from that of his brother. He said that the certificate of official search dated 11<sup>th</sup> March, 2016 which is in page 18 of the Defendant's list of documents shows one Julius Mutunga Wambua as the proprietor of the suitland. He acknowledged the Defendants' beneficial interest but disagrees with their claim.

8. The Plaintiff's evidence in re-examination was that the name of the brother to his father does not appear in the record. He reiterated that his father was allocated the land by the colonial government as he was the one who was on the ground and asserted that the land in question is not ancestral.

9. Florence Mwelu Kilundo (4<sup>th</sup> Defendant) in her evidence in chief told the court that she and her siblings have resided in the suitland for 27 years and her children also reside on the same land. According to her, the land belongs to her father and that the Plaintiff does not own a house on it. She added that she has never seen the Plaintiff's livestock on the suitland. She said that there are clear boundary markings and that their land is 35 acres while that of the Plaintiff's father is 22 acres.

10. On being cross-examined by Mr. Narangwi for the Plaintiff, Florence (4<sup>th</sup> Defendant) told the court that their ancestral land is in Mbooni and admitted that the suitland is not ancestral. According to her, the Plaintiff's father was the one who placed the request to be allocated land. She said that when the Plaintiff's father fell sick, he invited the Defendants' father to join him in the land in 1952. She revealed the purpose of the invitation was to make sure that the land in question was not allocated to someone else while the Plaintiff's father was away. She said that the Plaintiff's father gave their father the land in question. On being asked whether she had challenged the Plaintiff's title in court, the 4<sup>th</sup> Defendant answered in the negative. She went on to say that her father inherited the ancestral land in Mbooni while they awaited the outcome of this suit. She further said that the Plaintiff obtained a title deed because the land was subdivided between his father and her father. She was not re-examined.

11. Thaddeus Musyoki Kilundo (2<sup>nd</sup> Defendant) adopted the statement that he recorded on 11<sup>th</sup> January, 2018 as his evidence. His evidence was that in 1958 he was taken to the suitland and resided in it until 2000 when he moved to Ngwata. He pointed out that he built a permanent house on the suitland in 1978 which was valued by the Ministry of Lands and Settlement. Thaddeus (2<sup>nd</sup> Defendant) produced a copy of valuation report as D.exhibit No.2. The purpose of the valuation report was to enable him get paid owner/occupier allowance by his employer. He said that the house is on their father's side of the land. He went on to say that although the Plaintiff claims the entire land as belonging to his father, the land was subdivided into two parcels in 1979 wherein his father got 35 acres while Wambua got 22 acres. He further said that the Plaintiff has never developed the suitland. That when he carried out a search on 04<sup>th</sup> September, 1988, he found that the land had been subdivided between his father and the Plaintiff's father and produced a receipt for certificate of search and opening of a new register as D.Exhibit No.2. He added that there is a boundary between the two parcels of land. The witness went on to produce a bundle of documents as D.Exhibit Nos.3, 3(a) to 15 respectively. He urged the court to dismiss the Plaintiff's claim.

12. On being cross-examined by Mr. Narangwi for the Plaintiffs, Thaddeus (2<sup>nd</sup> Defendant) told the court that D.Exhibit No.1 does not show the land parcel number. He said that he applied for certificate of search and opening of a new register and paid Kshs.50/= for the two processes. He also said that no mutation was ever done by the surveyor even though his father was still on the land in 1988. According to him the land dispute between themselves began in 1989 forcing their father to move to court vide case number 411/89 in an attempt to obtain an injunction. He revealed that his father passed on before the case could be heard. He said that Kilunda Ndunda moved into the suitland in 1954 while Wambua Ndunda did so in the 1940s. He conceded that the land was registered in Wambua Ndunda's name. It was his evidence that even though his father and the Plaintiff's father agreed to share the land in 1954, he had no memorandum between the two. He reiterated that the land was subdivided in 1979 by the surveyors even though he had no record of the subdivision. He also said that although he was advised to challenge the succession cause, he did not do so. He added that he was yet to file a succession cause in respect of his father's estate.

13. The Defendants called Ogige Atuti (DW1) the Chief Lands Registration Officer Makueni as their witness. The witness told the court that land parcel No. Makueni/Kikumini/617 is registered in the name of Julius Mutunga Wambua. He went to say that the land in question initially belonged to Wambua Ndunda who upon his demise, a succession cause was filed and James Mutunga inherited it in 1989. He went on to say that there is no parcel of land known as 618 nor does parcel number 616 exist. He revealed that the two were supposed to have originated from 617 but the latter number was never subdivided and pointed out that there was a process of subdividing 617 but the exercise was not completed since numbers had been given and that there are no blank numbers in the register.

14. On being cross-examined by Mr. Narangwi for the Plaintiff, Ogige (DW1) told the court that John Mutunga Wambua has title number to Makueni/Kikumini/117. He said that land parcel No.617 does not exist and that the only green card that he had was Makueni/Kikumini/117. He said that they started keeping record of the latter parcel of land on 01<sup>st</sup> September, 1967 when it was registered under Wambua Ndunda's name. He said that Julius inherited the land upon the death of Wambua Ndunda. He said that he had no record of the application to subdivide Makueni/Kikumini/117. It was also his evidence that it was Julius Mutunga Wambua who told him that they had begun the process of subdividing the land in question into 617, 616 and 618. He said that he could not be able to know what transpired before the first registration but from the records, there was no objection during the adjudication process.

15. In his written submissions dated 20<sup>th</sup> February, 2019 and filed in court on 25<sup>th</sup> February, 2019, the Plaintiff's Counsel submitted that the Defendants have not controverted the Plaintiff's averment in the plaint nor impeached his oral evidence. The Counsel went on to submit that the Plaintiff has proved that the Defendants have trespassed into his land. Regarding the definition of what constitutes trespass, the Counsel cited ***Black's Law Dictionary (9<sup>th</sup> Edition)*** which defines trespass as;

*“An unlawful act committed against the person or property of another, especially wrong entry on another's real property.”*

The Counsel further cited Clerk & Lindsel in Torts (17<sup>th</sup> Edition) para 17-01 where trespass is defined as;

*“An unjustifiable entry by one person upon the land in possession of another.”*

16. The Counsel also cited Section 3(1) of the Trespass Act Chapter 294 of the Laws of Kenya which defines trespass as;

*“Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier.....”*

It was further submitted on behalf of the Plaintiff that the latter had proved his case against the Defendants and therefore he should be awarded Kshs.500,000/= as general damages for trespass. The Counsel cited the case of Ochako Obinchi vs. Zacharia Oyoti Nyamongo (2018) eKLR where J. M. Mutungi, J held that;

*“if the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.”*

17. On the other hand, the Defendant’s Counsel submitted that parties are bound by their pleadings and cannot be allowed to raise new facts and fresh issues without amendment. The Counsel went on to submit that although the Plaintiff claims that Makueni/Kikumini/117 was registered in the name of his father and that he (Plaintiff) acquired ownership through succession cause, there is no mention of any succession cause in the pleadings. The Counsel went on to submit that no evidence was adduced in court by the Plaintiff to show that the land was registered in the name of the Plaintiff’s father and that if anything, the evidence produced by Ogise (DW1) shows clearly that the Plaintiff’s registration was the first one with regard to the suitland as no other title had ever been issued for the land. The Counsel urged the court to disregard the new issues that the Plaintiff now seeks to introduce. It was also submitted that the Plaintiff seeks to evict the Defendants from the suitland where they have lived all their lives on the basis that he is the sole registered owner of the land. The Counsel submitted that the Defendants have indicated that though the Plaintiff is registered as the sole proprietor of the suitland, he holds the title in trust for them. The Counsel added that there is no fairness and justice in the Plaintiff’s attempt to evict the Defendants from their homes. The Counsel cited the case of Isaack M’inangu Kireba vs. Isaiah Theuri M’Lintari and Another [2018] eKLR where the Supreme Court held that: -

*“It is therefore our view that, the decisions in Obiero v. Opiyo, and Esiroyo v. Esiroyo; were based on faulty conceptual and contextual premises. Faulty conceptually because, they did not take into account the complex nature of customary rights to land, and faulty contextually because, in interpreting Sections 27, 28 and 30 of the Registered Land Act, the courts paid little or no attention to the relevant provisions of the retired Constitution regarding trust land. It is the registration of land in the trust land areas that had triggered the enduring tension between registered proprietors and claimants under customary law. It is no wonder that customary rights to land would exhibit resilience in subsequent decisions....”*

The Counsel went on to submit that in the aforementioned case the learned Justices of Supreme Court further stated: -

*“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie vs. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:*

- 1. The land in question was before registration, family, clan or group land*
- 2. The claimant belongs to such family, clan, or group*
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.*

18. Arising from the evidence on record and the submissions filed, my finding is that the issues for determination are: -

**(a) Whether or not the Defendants have trespassed into land parcel No. Makueni/Kikumini/117.**

**(b) Whether or not the Plaintiff hold land parcel No. Makueni/Kikumini/117 in trust for the Defendants.**

**(c) Whether the orders sought by the Plaintiff should be granted.**

19. From the evidence on record, the suitland was acquired by the Plaintiff’s father from the colonial government in the 1940s. He later invited the Defendant’s father in 1954 to join him in the land. The two brothers appear to have lived peacefully until their death. It is not in dispute that the Defendants are in occupation of the suitland and appear to have lived on it for most of their lives. The dispute between the Plaintiff and the Defendants arose in the late 1980s after the Plaintiff had the suitland registered in his name. The Plaintiff says that he so

registered the suitland in his name after filing a succession cause in respect of the estate of his late father. The issue of the succession cause has not been pleaded in the plaint and I am in agreement with the Defendant's Counsel that the Plaintiff is out to introduce new issues in his evidence when he ought to stick to the averments in his pleadings. Throughout the lives of the Plaintiff's father and the Defendants' father, there is no evidence to show that the former ever tried to evict the latter from the suitland. The 2<sup>nd</sup> Defendant, Thaddeus, built a permanent house on the suitland in 1978 without the Plaintiff's father objecting to the said construction. From the circumstances of this case, it is safe to hold that the Plaintiff's father and the Defendant's father intended to share the suitland between themselves and that is why the former invited the latter to take care of it when he fell ill. The registration of the Plaintiff as the proprietor of the suitland would not preclude him from being held as holding it in trust for the Defendants. But it should be noted that parties are bound by their pleadings. There is no counterclaim by the Defendants where they have sought such orders. From the evidence on record, the Defendants cannot be said to be trespassers. In the circumstances, I hold that the orders by the Plaintiff in his plaint cannot be granted and his suit against the Defendants must therefore fail.

20. Arising from the above, my finding is that the Plaintiff has not satisfied this court that on a balance of probabilities, he has a cause of action against the Defendants. I, therefore, proceed to dismiss his suit with costs to the Defendants.

**Signed, Dated and Delivered at Makueni this 15<sup>th</sup> day of November, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Mutua Mboya for the Defendant

No appearance for the Plaintiff

Ms. C. Nzioka – Court Assistant

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

**15/11/2019.**