



**REPUBLIC OF KENYA**

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

**MAKUENI ELC NO. 101 OF 2018**

**PAUL MUNYWOKI MUSWII.....PLAINTIFF**

**VERSUS**

**VICTORIA NZILANI MUNYWOKI.....1<sup>ST</sup> DEFENDANT**

**EDWARD MATHEKA JOHN.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR-MAKUENI COUNTY.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By his Plaint dated 11<sup>th</sup> October, 2018 and filed in court on 15<sup>th</sup> October, 2018, the Plaintiff prays for judgment against the Defendants jointly and severally for: -

- a) **A Declaration that land parcel UKIA/MUKUYUNI/970 and land parcels created thereof form part of the Estate of one MUNYWOKI MUSWII.**
- b) **An order directing the 3<sup>rd</sup> Defendant to cancel and/or revoke titles to land parcels UKIA/MUKUYUNI/2415 and UKIA/MUKUYUNI/2416.**
- c) **An order directing the 3<sup>rd</sup> Defendant to re-open the closed register of land parcel UKIA/MUKUYUNI/970.**
- d) **An eviction order as against the 2<sup>nd</sup> Defendant from the Estate of the Deceased.**
- e) **Costs and interest of this suit.**
- f) **Any other relief that this Honourable Court deems fit to grant.**

2. The Plaintiff has averred in paragraphs 5, 6, 7, 8, 13 and 14 of his plaint that land parcel No.UKIA/MUKUYUNI/970 was originally registered in the name of Munywoki Muswii who is now deceased, that the 1<sup>st</sup> Defendant commenced and/or took out succession proceedings in Makueni Principal Magistrates' Court Succession Cause No. 81 of 2012 without involving all the beneficiaries to the deceased's estate, that the grant of letters of administration of the deceased's estate was confirmed on 25<sup>th</sup> April, 2017 even in the existence of an application to revoke the grant and in the absence of the Applicant, that the 1<sup>st</sup> Defendant sold 0.821 hectares to the 2<sup>nd</sup> Defendant before the grant was confirmed, that the register of land parcel No.UKIA/MUKUYUNI/970 has been closed and land parcels UKIA/MUKUYUNI/2416 and UKIA/MUKUYUNI/2415 created thereof and that the Plaintiff with the other beneficiaries of the estate of the deceased have been denied the use and enjoyment of the said parcel of land and have been subjected to inconvenience and damage.

3. The matter proceeded as undefended suit after the 1<sup>st</sup> and the 3<sup>rd</sup> Defendants were served on the 26<sup>th</sup> October, 2018 and 5<sup>th</sup> November, 2018 respectively. The 2<sup>nd</sup> Defendant was served on 5<sup>th</sup> February, 2019. All the defendants failed to enter appearance and to file their defence.

4. The Plaintiff in his evidence told the court that Victoria Nzilani Munywoki, the 1<sup>st</sup> Defendant herein is the 3<sup>rd</sup> wife of his late father Munywoki Maswii. That Edward Matheka John, the 2<sup>nd</sup> Defendant purchased a parcel of land from the 1<sup>st</sup> Defendant. The Plaintiff said that his father's two elder wives were Nthenya Munywoki and Mumbua Munywoki and both are now deceased. He went on to say that his father's land was UKIA/MUKUYUNI/970. That the 1<sup>st</sup> Defendant applied for letters of administration without his knowledge and that she was issued with the same on 2013 and later confirmed in 2017. That he has since then filed an application for revocation of the grant issued to the 1<sup>st</sup> Defendant. It was also his evidence that the 1<sup>st</sup> Defendant applied for 45 days to reply to his application but she instead rushed to

the Land Control Board where she commenced the process of acquiring title deeds. He pointed out that he later learnt that the register of land parcel No. UKIA/MUKUYUNI/970 had been closed and two parcels whose title deeds are UKIA/MUKUYUNI/2415 in the 1<sup>st</sup> Defendant's name and UKIA/MUKUYUNI/2416 in the name of Edward Matheka the 2<sup>nd</sup> Defendant issued.

5. The Plaintiff went on to produce six (6) documents in his list of documents dated 11<sup>th</sup> October, 2018 as P.Exhibit Nos. 1 to 6 respectively.

6. It was also the Plaintiff's evidence that the Assistant County Commissioner for Kaiti Sub County summoned the family of the late Munywoki where it was resolved that the suitland be subdivided but the 1<sup>st</sup> Defendant did not comply with the resolution. The Plaintiff prayed that the two title deeds be cancelled so that the land can revert to its original title.

7. The Plaintiff called Waema Munywoki (PW1) who gave evidence similar to his. Waema (PW1) stated that his prayer was for his late father's land to be subdivided amongst his father's three wives and the 2<sup>nd</sup> Defendant be evicted from the suitland.

8. In his written submissions, the Plaintiff's counsel dwelt on the issue of failure by the Defendants to enter appearance and/or file defence. The Counsel cited the case of **Ochola Kamili Holdings Ltd vs. Guardian Bank [2018] eKLR** where J. A. Makau, J observed that;

***“The Plaintiff through an affidavit of service annexure marked KC-1 has proved that summons were served upon the Defendants on 5<sup>th</sup> August 2015 and acknowledged receipt by stamping on the copy of summons to enter appearance. I have perused the affidavit of service dated 10<sup>th</sup> May 2018 by Benson Mutinda, a licensed court process server, and attached copy of the summons and I am satisfied that summons to enter appearance were duly served. Further to the above, assuming that summons were not served together with a copy of the plaint and other documents were served, the Defendant by having appeared before the trial Judge for an application for injunction two (2) times and having taken part in the proceedings and having been armed with a copy of the plaint, I find Defendant cannot claim that it was not aware of the nature of the claim facing it and can't further be heard to stay the suit has abated as it did not have copy of the summons served. I nevertheless find and hold summons to enter appearance were duly served as the affidavit of service drawn and filed by Benson Mutinda dated 10<sup>th</sup> May 2018 has not been challenged or controverted after the Plaintiff filed their replying affidavit.”***

9. The aforementioned affidavits of service show that the Defendants herein were served with summons to enter appearance and to file their defence. The three Defendants neither entered appearance nor did they file their defence. Unlike the Defendants in the authority relied upon by the Plaintiff, the Defendants herein have not sought to have the suit herein struck out for failure to serve summons to enter appearance for want of prosecution.

10. The Plaintiff in his evidence told the court that he applied for revocation of the grant issued in Makueni Principal Magistrate's Court Succession Cause No. 81 of 2012. (See P.Exhibit No. 6). He did not tell the court what became of his application after the 1<sup>st</sup> Defendant applied for 45 days to respond to his summons for revocation of grant. I say so because from the averments in his plaint, the prayers sought therein would have been addressed in the said Succession Cause No. 81 of 2012. It is common knowledge that once the grant issued to the 1<sup>st</sup> Defendant is revoked, the titles in UKIA/MUKUYUNI/2415 and UKIA/MUKUYUNI/2416 will automatically stand cancelled. The suit property would thereafter revert to the estate of the deceased but as observed elsewhere in my judgment, it was upto the Plaintiff to inform this court on what became of his application for revocation of grant issued to the 1<sup>st</sup> Defendant. It seems to me that the Plaintiff herein is trying to address this court on that which he ought to have raised in the said Succession Cause No. 81 of 2012. This court will not countenance the same. In the circumstances, my finding is that the Plaintiff has not satisfied this court that he has a cause of action against the Defendants herein and his claim against the Defendants must fail. I, therefore, proceed to dismiss his suit against the Defendants. The Plaintiff will bear the costs of his own suit. It is so ordered.

**Signed, Dated and Delivered at Makueni this 16<sup>th</sup> day of December, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Muthiani for the Plaintiff

Ms. C. Nzioka –Court Assistant

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

**16/12/2019.**