



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 62 "B" OF 2014 (O.S)**

**JOHN KYALO MUIA.....1<sup>ST</sup> PLAINTIFF**

**ISAAC MULWA WAVINYA .....2<sup>ND</sup> PLAINTIFF**

**FRANCIS MUTUA KALOKI .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**FRANCIS MUTISYA MULE.....1<sup>ST</sup> DEFENDANT**

**STINOFLEX COMPANY LIMITED .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced by way of an Originating Summons dated 28<sup>th</sup> July, 2014 in which the Plaintiffs seeks for the following orders:

*a. A declaration that the 1<sup>st</sup> Defendant holds parcel/property known as Mavoko Town Block 2/11471 measuring 1 acre in trust for John Kyalo Muia, the 1<sup>st</sup> Plaintiff herein and Mavoko Town Block 2/11470 measuring 1 acre in trust for Francis Mutua Kaloki, the 3<sup>rd</sup> Plaintiff herein.*

*b. A declaration that the 1<sup>st</sup> Defendant holds in trust the proceeds of Kshs. 2,000,000 realized from the sale of parcel of land parcel/property known as Mavoko Town Block 2/11469 to the 2<sup>nd</sup> Defendant herein for Isaac Mulwa Wavinya.*

*c. A determination of the declared trust by transfer of property Mavoko Town Block 2/11471 consisting of 1 acre to the 1<sup>st</sup> Plaintiff and property Mavoko Town Block 2/11470 measuring 1 acre to the 3<sup>rd</sup> Plaintiff.*

*d. A determination of the declared trust by delivery of the said proceeds amounting to Kshs. 2,000,000 to the 2<sup>nd</sup> Plaintiff.*

*e. Costs of the suit and interest thereon.*

2. The basis of the suit is that the Plaintiffs are cousins; that the 1<sup>st</sup> Defendant is their uncle; that parcel of land known as Mavoko Town Block 2/11469 (*the suit land*) was meant for the 2<sup>nd</sup> Plaintiff and that the 1<sup>st</sup> Defendant sold the said land to 2<sup>nd</sup> Defendant for Kshs. 2,000,000.

3. The 3<sup>rd</sup> Plaintiff deponed that the 1<sup>st</sup> Defendant was the administrator of the Estate of the late Stephen Mule Muoka who was his father and the Plaintiffs' grandfather; that the deceased's wife (*their grandmother*) was provided for in the Estate and was allocated five (5) acres of the land known as Mavoko Town Block 2/140 and that the rest of the beneficiaries were allocated five (5) acres each in the said land.

4. It is the contention of the Plaintiffs that the land which was allocated to their grandmother, upon sub-division, became to be known as Mavoko Town block 2/7552; that their grandmother called for a meeting where she gave her land to the Plaintiffs; that the 1<sup>st</sup> Defendant was to hold the land for their benefit and that the three Plaintiffs, together with Stephen Mule Makau and Nzula Mutisya were to get one (1) acre each.

5. The Plaintiffs' case is that the 1<sup>st</sup> Defendant sub-divided parcel number 7552 into seven(7) portions, that is, 11465, 11466, 11467, 11468, 11469, 11470 and 11471; that he sold portion number 11469 meant for the 2<sup>nd</sup> Plaintiff to the 2<sup>nd</sup> Defendant and that he has refused to surrender the purchase price to the 2<sup>nd</sup> Plaintiff.

6. The Plaintiffs have deponed that the 1<sup>st</sup> Defendant has also refused to surrender parcel numbers 11470 and 11471 to the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs respectively.

7. In his reply, the 1<sup>st</sup> Defendant deponed that the Plaintiffs are his nephews; that the suit land belonged to his late father in which Succession Cause Number 353 "B" of 2003 was filed after his demise and that a Confirmation of Grant was issued on 16<sup>th</sup> December, 2005.

8. The 2<sup>nd</sup> Defendant deponed that after the grant was issued, they sub-divided parcel number 140 whose actual acreage was 48 acres; that out of the 10 acres belonging to his mother, 2 acres were taken up by a road of access and that in a family meeting of 23<sup>rd</sup> February, 2012, his late mother combined her share of 5 acres with the share of his brother, Daniel Kaloki Mule, to make up ten (10) acres and that 2 acres of that land were taken up by a road of access.

9. According to the 1<sup>st</sup> Defendant, his late mother sold 3 acres of her share to the 2<sup>nd</sup> Defendant in her life time; that 3 acres of her mother's share remain available and that it is those three (3) acres that are available for sharing. The 1<sup>st</sup> Defendant further deponed that his brother, Daniel Kaloki Mule, has petitioned for the said three (3) acres in the Succession Cause and that he is awaiting of the court to decide as to the person entitled to the 3 acres.

10. Daniel Kaloki Mule filed an Affidavit in which he deponed that the Plaintiffs are his nephews while the 1<sup>st</sup> Defendant (*deceased*) is his brother; that the 1<sup>st</sup> Defendant was the administrator of the Estate of his late father; that as per the Certificate of Confirmation, he was allocated 5 acres out of parcel number 140; that he has filed an Application in Succession Cause No. 353 "B" of 2003 claiming for his 5 acres; that her mother, Esther Ngali Mule, pronounced her share to be given to her five(5) grandchildren and that he is not claiming the same land that the Plaintiffs are claiming.

11. According to Daniel Kaloki, the Plaintiffs are entitled to the suit land; that each of the grandchildren was to be given one (1) acre each and that the Originating Summons should be allowed. The Originating Summons proceeded by way of *viva voce* evidence.

#### **The Plaintiffs' case:**

12. The 3<sup>rd</sup> Plaintiff, PW1, adopted the deposition of the 1<sup>st</sup> Plaintiff's Affidavit in support of the Originating Summons. PW1 informed the court that their late grandmother gave them her land measuring 5 acres; that the said share is in the Certificate of Confirmation of the Estate of their late grandfather and that the 1<sup>st</sup> Defendant promised to give them their respective shares.

13. After the sub-division of the entire parcel of land, PW1 stated that he was to get plot number 11471; that the 2<sup>nd</sup> Plaintiff was to get plot number 11469 and that the plot number 11470 was to be given to the 1<sup>st</sup> Plaintiff.

14. PW1 informed the court that the 1<sup>st</sup> Defendant had plot number 11471 registered in his name and sold plot number 11469 to the 2<sup>nd</sup> Defendant. According to PW1, his uncle Daniel has his own portion of land which they are not claiming.

15. According to the evidence of PW1, their grandmother gave them her share of land in the meeting of 23<sup>rd</sup> February, 2012 and that he was not aware whose share of land was taken up by the road measuring 2.28 acres.

16. It was the evidence of PW1 that there is no Succession Cause for their grandmother's Estate; that her grandmother never sold her share to the 2<sup>nd</sup> Defendant as alleged and that the minutes of 23<sup>rd</sup> February, 2012 shows that their grandmother was entitled to 10 acres, which includes the five (5) acres of land belonging to Daniel.

17. PW2 stated that the 1<sup>st</sup> Plaintiff is his son; that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are his nephews; that her late mother gifted her five (5) grandsons her portion of land measuring five (5) acres and that the 1<sup>st</sup> Plaintiff was allocated plot number 11471 by the clan who had been shown the plot by her mother while the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs were allocated portions number 11469 and 11470 respectively.

18. It was the evidence of PW2 that the 1<sup>st</sup> Defendant only transferred the land gifted by her mother to her grandsons to his son Stephen Makau and to Nzula; that his brother Daniel was allocated five (5) acres of the land and that the Plaintiffs are not claiming the five (5) acres.

19. In cross-examination, PW2 informed the court the entire plot number 140 reduced by 2 acres which was taken up by the road; that his land reduced from 5 acres to 4 acres and that her mother's land was 5 acres and not 10 acres.

20. PW3 informed the court that although the late Esther informed them that she was entitled to 10 acres, they discovered that she was only entitled to five (5) acres of land; that he is the Secretary of Atangwa Mulele clan and that he does not know why the 1<sup>st</sup> Defendant declined to give the suit land to the Plaintiffs.

21. Daniel Kaloki, PW4, informed the court that he is the son of the late Stephen Mule; that he was allocated five (5) acres in respect to his father's land and that the Plaintiffs are entitled to the five (5) acres that belonged to her mother.

22. According to PW4, the land the Plaintiffs are claiming is different from the land he is claiming.

23. The 1<sup>st</sup> Defendant's wife, DW1, stated that the Succession in respect of her late father-in-law was done in Machakos Succession Cause No. 353 "B" of 2003; that none of the Plaintiffs were beneficiaries to the said Estate and that in the meeting of 23<sup>rd</sup> February, 2012, her

mother-in-law took the land belonging to Daniel Kaloki Mule and added it on his own portion of land making the entire land to be 10 acres.

24. DW1 informed the court that her late mother-in-law sold to the 2<sup>nd</sup> Defendant 3 acres of her land and that the only available land is 3 acres.

25. DW2 stated that the Plaintiffs are his nephews; that he inherited 10 acres of his father's Estate and that after survey, his land reduced due to the road that was created. It was the evidence of DW2 that in the grant, his mother was entitled to 5 acres and that later on, her mother declared that the land belonging to Daniel Kaloki together with her portion should go to her five (5) grandchildren. DW3 stated that her mother sold 3 acres of her portion to cater for the sub-division of the suit land and that the land that the Plaintiffs are claiming is the same land that Daniel Koki is claiming.

#### **Submissions:**

26. The Plaintiffs' advocates submitted that the Defence had failed to disclose the identity of the 3 acres which they say are available for allocation to the Plaintiffs; that DW1 should be directed to transfer parcels number 11469, 11470 and 11471 to the Plaintiffs and that the proceeds of Kshs. 2,000,000 should be surrendered to the 2<sup>nd</sup> Plaintiff.

27. Counsel submitted that in the alternative, the 2<sup>nd</sup> Defendant's title to parcel of land number 11469 should be cancelled and have the same surrendered to the 2<sup>nd</sup> Plaintiff.

28. The Defendants' advocate submitted that the wife of the 1<sup>st</sup> Defendant does not have the capacity to transfer the suit land to the Plaintiffs; that the Plaintiffs should have filed a Succession Cause in respect of their grandmother's Estate and that the suit should be dismissed.

#### **Analysis and findings:**

29. The late Stephen Mule Muoka owned a piece of land known as Mavoko Town Block 2/140 measuring approximately 50 acres. Upon his death, his Estate was administered by his son Francis Mutisya Mule, the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant died during the pendency of this suit.

30. The Estate of Stephen Mule was administered in Machakos Succession Number 353 "B" of 2003. The Certificate of Confirmation of a Grant was issued by the court on 17<sup>th</sup> February, 2006.

31. According to the said Certificate of Confirmation, parcel number 140 was distributed amongst his ten (10) dependants and beneficiaries. The acreage that each dependant and beneficiary was entitled to is indicated in the Certificate of Confirmation. The said Certificate of Confirmation has never been revoked by the court.

32. The Certificate of Confirmation shows that the wife of the late Stephen Mule, who is the Plaintiffs' grandmother, was allocated 5 acres of parcel number 140 while his son, Daniel Kaloki, was also allocated 5 acres.

33. The evidence of the Plaintiffs is that their grandmother, who has died, gifted them with the five (5) acres that she was entitled to. This evidence was collaborated by the 1<sup>st</sup> Defendant's Replying Affidavit and all the other witnesses who stated that the three Plaintiffs, together with two other grandchildren, Stephen Makau and Faith Nzula, were entitled to an equal share of the five (5) acres belonging to their grandmother.

34. According to the evidence of the Plaintiffs, the 1<sup>st</sup> Defendant allocated the land meant for their grandmother to only two grandchildren: Stephen Makau and Faith Nzula and not them.

35. The 1<sup>st</sup> Defendant's case is that other than the five (5) acres indicated in the Certificate of Confirmation, the wife of Stephen took the land that had been allocated to Daniel Kaloki and combined it with her five acres, thus making her land to be 10 acres; that she then sold 3 acres to the 2<sup>nd</sup> Defendant to cater for the sub-division of the entire land and that her land measuring 2 acres was also taken up the road.

36. The Defence went further to allege that out of the remaining acres, two acres have been allocated to three grandchildren leaving 3 acres which can be allocated to the Plaintiffs. This, according to the Defence, will finalize the distribution of the 10 acres the wife of Stephen was entitled to.

37. However, Daniel Kaloki informed the court that her late mother never took his five (5) acres as alleged by the Defence, and even if she purported to do so, she had no legal capacity; that he has objected to the said expropriation of his land by his late mother or the Defendants in a Succession Cause No. 353 "B" of 2003 and that the five (5) acres that the Plaintiffs are entitled to is different from his five (5) acres.

38. From the evidence before me, it would appear that after the sale of 3 acres of a portion of land which the wife of the late Stephen was entitled to, and the 2 acres that went to the road, the 1<sup>st</sup> Defendant moved to the land that had been allocated to his brother Daniel, purportedly on his mother's instruction, with a view of sub-dividing it and allocating it to the Plaintiffs and the other two grandchildren of his mother.

39. If that is so, a position that the Plaintiffs and Daniel Kaloki have opposed, then it follows that the issue can only be litigated in a Succession Court, and more so in Machakos Succession Cause No. 353 "B" of 2003.

40. I say so because the issue of whether the wife of the late Stephen Mule could appropriate the land - that the court had already allocated to Daniel Kaloki -has to be determined by the court that issued the Certificate of Confirmation. It is only after that issue has been determined that the issue of which land was available to be distributed amongst Esther's grandchildren can be answered.

41. Furthermore, the said Esther, the Plaintiffs' grandmother, has since died. Consequently, the Succession of the land that she was entitled to can only be handled by the High Court in succession proceedings and not by this court.

42. In so far as the Plaintiffs' claim is based on the claim that they are entitled to the land belonging to their grandmother, who is dead, and in view of the contention that the land of Daniel Kaloki could not be allocated to the Plaintiffs, I find that this matter was filed in the wrong court. The issues raised herein should be raised in either Machakos Succession Cause No. 353 "B" of 2003 or in a different Succession Cause.

43. Consequently, I strike out the Plaintiffs' Originating Summons dated 28<sup>th</sup> July, 2014. This being a dispute amongst family members, I shall not award any costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**

**JUDGE**