



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 72 OF 2008**

**ALEX KALA MUTISO**

**FREDRICK MUTUA MUTISO** (*Suing as the legal*

*representative of the Estate of the late*

**MUTISO MUMO KALAI.....PLAINTIFFS**

**VERSUS**

**NDONYE MUSUU.....1<sup>ST</sup> DEFENDANT**

**SAMMY NDUNDA.....2<sup>ND</sup> DEFENDANT**

**MUMBUA MWILU.....3<sup>RD</sup> DEFENDANT**

**MUSUU MUASYA.....4<sup>TH</sup> DEFENDANT**

**KIMUYU MUSUU.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 5<sup>th</sup> June, 2008, the Plaintiff... averred that he is the registered proprietor of land known as Muvuti/Kaani/1678 which was a sub-division of Muvuti/Kaani/928; that he purchased the said land from the late Muasya Muoki Wavai and that upon sub-division of the suit land, he was allocated 3.30Ha of Muvuti/Kaani/1678 and was issued with a title document.

2. The Defendants filed a Defence and Counter-claim in which they averred that Muasya Muoki Wavai (*deceased*) was their father; that they were not parties to the dispute that was before the Land Disputes Tribunal; that the Plaintiff filed HCCC No. 274 of 1994 against their late father which suit was dismissed and that the current suit is *res judicata*.

3. In the Counter-claim, the Defendants are seeking for an order annulling the proceedings in the Land Disputes Tribunal and the sub-division and transfer of parcel of land known as Muvuti/Kaani/928.

4. PW1 informed the court that his late father, Mutiso Mumo, died on 15<sup>th</sup> September, 2015; that a Title Deed in respect to parcel of land known as Muvuti/Kaani/1678 was issued to his late father in 2007 and that the issuance of a Title Deed to their father arose out of Land Case No. 96 of 1956.

5. It was the evidence of PW1 that his late father agreed with the 3<sup>rd</sup> Defendant that instead of paying costs of Kshs. 83,396.80, parcel of land number 928 was to be excised and 3.30 acres was to be given to their father; that when the Defendant's father refused to excise the 3.30 acres as agreed, he filed a dispute before the then Land Disputes Tribunal in 1998 and that the Tribunal decided the matter in his favour.

6. PW1 stated that they have never taken possession of the suit land despite the Defendants being ordered to vacate the land and that they have the original documents to support their claim. The witness produced in evidence the original proceedings in Land Case No. 43 of 1998; the proceedings and Ruling in PMCC Misc. Application No. 20 of 2002; the Decree in HCCC No. 86 of 2002; Gazette Notice No. 8058 of 24<sup>th</sup> August, 2007 and the Title Deed for parcel number 1678.

7. In cross-examination, PW1 stated that by the time the dispute before the Land Disputes Tribunal was filed, Mr. Mwabia was dead and that Mr. Mwabia was in possession of the Title Deed.

### **The Defendants' case:**

8. The 2<sup>nd</sup> Defendant, DW1, stated that the late Muasya was his uncle; that the 1<sup>st</sup> Defendant is the grandchild of the late Muasya while the 4<sup>th</sup> Defendant is the son of the late Muasya. It was the evidence of DW1 that the late Muasya died in 1997 and that the deceased was granted the Title Deed for parcel number 928 on 9<sup>th</sup> March, 1995.

9. It was the evidence of DW1 that they were not aware of the suit that was filed in the Land Disputes Tribunal and that the Defendants lost in HCCC No. 274 of 1996. DW1 informed the court that they have always lived on the suit land.

### **Submissions:**

10. The Plaintiffs' advocate submitted that William Mbithi Muoki represented Muasya Muoki in all the court proceedings; that the Land Disputes Tribunal in Land Case No. 43 of 1998 ruled in favour of the Plaintiff's father and that an attempt to challenge the decision of the Tribunal was dismissed by the court in Machakos HCCC No. 86 of 2002.

11. The Plaintiffs' advocate finally submitted that the actions by the Defendants of refusing to take out Letters of Administration for the Estate of the late Muasya Muoki Wavai are meant to frustrate the Plaintiffs' claim. In a rather strange manner, the Plaintiffs' advocate annexed copies of several court proceedings on his submissions which were not produced during trial. Those proceedings cannot form part of the record and the same are expunged from the record.

12. On his part, the Defendants' advocate submitted that the issues raised in the current suit were raised in the Minister's Appeal No. 993 of 1986; that in that matter, the late Muasya was declared the owner of parcel number 928 and that William Muoki was a different person from Mbithi Muoki who was the son of the late Muasya.

13. Counsel submitted that William Mbithi did not appear before the Tribunal and that he could not represent the Estate of the late Muasya and that all the cases which were conducted after 1986 were *res judicata*. The Defendants' advocate finally submitted that if indeed the Plaintiffs are the registered proprietors of the suit land, then the Defendants have possessory rights over the suit land.

### **Analysis and findings:**

14. The Plaintiffs in this matter are the legal representatives of the late Mutiso Mumo Kalai, while the Defendants are related to the late Muasya Muoki Wavai. It was the evidence of PW1 that in earlier proceedings, the late Muasya gave to his son, William Mbithi Muoki, authority to represent him in all proceedings.

15. The Plaintiffs' case is that the attachment of a portion of parcel of land number 928 belonging to the late Muasya Muoki arose out of a decree for payment of costs of Kshs. 83,396.80 in Land Case No. 96 of 1956 and that after the land was sub-divided, the deceased was issued with a Title Deed in respect of parcel of land number 1678. The said Title Deed was issued to Mutiso Mumo Kalai, thus this suit.

16. According to PW1, it is William Mbithi, who had the authority of the late Muasya, who agreed with Mutiso Mumo, to have parcel number 928 sub-divided with a view of settling the costs and that there are several court proceedings and decrees which were ruled in favour of the late Muasya.

17. The Plaintiffs produced in evidence the proceedings and Award by the District Land Disputes Tribunal in Land Case No. 43 of 1998 in which Mutiso Mumo Kalai (*the Plaintiffs' father*) was the claimant while the son of Mr. Muasya, William Mbithi was the Objector. In the said proceedings, the Plaintiffs' father informed the Tribunal that the issue of sub-dividing parcel number 928 had been settled in 1978. William did not participate in those proceedings. The Tribunal made the following award:

***“Therefore this Plot No. 928 should be sub-divided for Mutiso Mumo to get his share, with the title. We request the Land Control Board to sub-divide the land.”***

18. The Defendants' father, Mr. Muasya, challenged the Tribunal's decision in Machakos HCCC No. 86 of 2002. According to the Decree dated 28<sup>th</sup> January, 2004, the said suit was struck out with costs. Having challenged the decision of the Tribunal, the Defendants cannot now raise the same issues that should have been raised in HCCC No. 86 of 2002. Indeed, whether the Award of the Tribunal was lawful or not could only have been canvassed either by way of an Appeal or Judicial Review which was done in HCCC No. 86 of 2002.

19. It therefore does not matter at this stage that the late Muasya died in 1997 before the proceedings in the Tribunal were filed and that William Muoki, the Objector in those proceedings, was not his legal representative. This is the same position that the Magistrate took in SPMCC No. 20 of 2001 when William Mbithi attempted to have the decision of the Tribunal annulled.

20. Considering that the Title Deed that was issued to the Plaintiffs' father arose out of the decision of the Tribunal, which decision the Defendants have never set aside, and in view of the fact that this court cannot sit as an Appellate Court in these proceedings, I find that the Plaintiffs have proved their case on a balance of probabilities. I therefore allow the Plaintiffs' Plaint as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018.**

**O.A. ANGOTE**

JUDGE