



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC NO. 72 OF 2017**

**KANINI IKOVO NTHANZU.....PLAINTIFF**

**VERSUS**

**MUANGE NGAANGA KATHI.....1<sup>ST</sup> DEFENDANT**

**FRANCIS MUTUKU NGANGA KATHI.....2<sup>ND</sup> DEFENDANT**

**MUUNDA NGANGA KATHI.....3<sup>RD</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1) By her plaint dated the 19<sup>th</sup> August, 2016 and filed in court on the 19<sup>th</sup> August, 2016, the Plaintiff prays for judgement against the Defendant jointly and severally for;

- a) **The cancellation of titles numbers Kathonzweni/Muusini/55, Kathonzweni/Muusini/56 and Kathonzweni/Muusini/553.**
- b) **Re-demarcation of the Plaintiff's entitlement to the initial plot no. Kathonzweni/Muusini/553, Kathonzweni Location Muusini Adjudication section in accordance with the ruling of the land adjudication officer dated 28/7/1988 to be subdivided in equal shares.**
- c) **The 4<sup>th</sup> Defendant to be ordered to plot and survey an access road for the Plaintiff may have use of her land as demarcated.**
- d) **Costs of this suit and interest thereon.**
- e) **Any other or further relief as this court may deem fit.**

2) The claim is denied by the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants in their joint statement of defence dated 1<sup>st</sup> November, 2016 and filed in court on even date.

3) The affidavit of service sworn at Makueni by Ali SimbaKalii, the process server herein, is silent on whether or not the 4<sup>th</sup> Defendant was ever served with summons to enter appearance and to file his defence.

4) Parties herein adopted their respective witnesses' statements filed pursuant to the provisions of order 11 CPR as their evidence. The Plaintiff produced the first five documents in her list of documents dated 19<sup>th</sup> August, 2016 and filed in court on even date as PEX. Nos. 1,2,3,4 and 5 respectively. On the other hand, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants produced the five documents in their list of documents dated 17<sup>th</sup> May, 2017 and filed in court on 22<sup>nd</sup> May, 2017 as DEX Nos. 1(a) & (b), 2,3,4 and 5 respectively.

5) The Plaintiff's evidence in brief was that at the time of independence, the government told people to occupy land that had been uninhabited and unoccupied.

6) That as a result of government directive, the Plaintiff took her own portion of land in Kathonzweni from the road leading to Muusini to a

tank that was built by the Europeans. She went on to say that the tank borders NzulewaKyule and at other parts, her land borders those of KithukawaMbai and Kilonzo waKyambu. She said that after clearing and preparing the land, she went back to her paternal home where she took her mother and siblings, Muunda, Mutuku and Kaveke to the suitland. She pointed out that her brother MuangeNgangaKithii was at that time sick. She said that Muange had a problem with his legs and did not go to Kathonzweni as he was living with their aunt. That when Muange got a bit better after 2 years or so, he followed the rest of the family members to Kathonzweni where she provided for his education.

7) The Plaintiff went on to say that when her siblings grew up, there began some differences between her and them over the land she had occupied. She said that they started to chase her in an attempt to remove her from the land. That when adjudication exercise begun, her brothers, Mutuku, Muange and Muunda were adjudicated as the owners of the suit land. She revealed that she lodged objection proceedings number 67 of 1980. She went on to say that at that time, the suit land was known as plot number 55 and 56 Kathonzweni Location/Muusini adjudication section.

8) She said that the adjudication officer in his determination ruled that she had a portion of land in plot number 55. She pointed out that the adjudication officer directed the land surveyor to fix out the boundaries to her land as was to be shown by the elders and she was to get a new number for her plot being plot number 553.

9) The Plaintiff said that the elders never conducted the sub division exercise nor did the surveyor go to find out if the demarcation was done according to the land adjudication officer's finding, an issue which resulted in her brothers plotting their own subdivision. She said that when a title was later issued for her plot, now Kathonzweni/Muusini/553, she found out that she had been marginalized by her brothers' fraud. She revealed that her portion is smaller than that which was rightfully hers at the time of the objection proceedings. She went on to say that the subdivision had denied her the right of access to the road. She said that her brothers intimidate and kept her from accessing her portion of land.

10) Her prayer is that the adjudication and subdivision be conducted again in accordance with the ruling of the Land Adjudication Officer. She also prays for cancellation of titles to Kathonzweni/Muusini/55, Kathonzweni/Muusini/56 and Kathonzweni/Muusini553 and new title deeds be issued as per the determination as pointed out by the elders. She also seeks for an order to be directed to the Director of Survey and National Land Commission to draw and plot an access to road within the said parcels of land so that she can freely access her land without intimidation from the owners of the adjacent parcels of land.

11) The Plaintiff's evidence in cross-examination by Mrs. Nzau for the Defendants was that the first three Defendants were her brothers and pointed out that the first Defendant was older than her. She reiterated that she was the one who acquired the suit land.

12) She said that she was with one MutisyaKaindi when she did so. She went on to say that during the adjudication proceedings, she did not indicate that she acquired the land jointly with the first Defendant. She said that the Defendants registered the suit land in their names. The Plaintiff further told the court that Kathonzweni/Muusini/55 and 56 are in the names of the first and the second Defendants respectively. She said that she had enjoined the third Defendant because he lives in the land of the second Defendant. She added that when she complained about the adjudication that had taken place in her absence, she was allocated parcel number 553.

13) The Plaintiff's evidence in re-examination by MsChepkurui was that her claim is for rectification of her boundary. She further said that the board's findings were that she had a claim over the suit land.

14) MutheiNgwili (PW1) who was the Plaintiff's witness number one told the court that the Plaintiff claims that the suit land is hers.

15) Josephine GachungwaKitavi's (PW2) evidence in chief was that the Plaintiff was the one who acquired the suit land since the Defendants were either young or sick. The witness also adopted his statement filed in court on the 14th June, 2017 as her evidence.

16) Her evidence in cross-examination by Mrs. Nzau for the Defendants was that the Plaintiff was the one who acquired the suit land after she separated from her husband. The witness disclosed that she has neither been to the Plaintiff's land nor does she know its size.

17) MunywokiKikuvuNzoka's (PW3) evidence in chief was that the Plaintiff and one Mutisya were the ones who acquired the suit land. He pointed out that one Mutisya was the first to acquire the land. He went on to say that he is a neighbour of the Plaintiff and one Musyoki.

18) Nzoks's (PW3) evidence in cross-examination was that he was not present when the Plaintiff acquired the land in question. He said that he is aware of the land dispute between the Plaintiff and the first Defendant.

19) On the other hand, the evidence of the first three Defendants was that the suit land was acquired by the first Defendant and not the Plaintiff. The three Defendants also adopted their statements recorded on 17/5/2017 as their evidence.

20) The first Defendant's evidence in cross-examination by MsChepkurui for the Plaintiff was that he was aware that the dispute was resolved in 1988. He went on to say that the Tribunal directed that the Plaintiff should be given a parcel of land to enable her take care of her children. He agreed that the surveyor was directed to fix the boundary between his land and that of the Plaintiff. He also admitted that the Plaintiff was not invited to attend the subdivision exercise when the surveyor visited the site.

21) The first Defendant's evidence in re-examination by Mrs. Nzau was that the Plaintiff was present when the surveyor visited the site.

22) The second Defendant's evidence in cross-examination was that the first Defendant, their mother, the Plaintiff's daughter and himself were present when the surveyor visited the site.

23) The third Defendant in his evidence in cross-examination told the court he could not tell if his land was bigger than that of the Plaintiff.

24) The Plaintiff and the first three Defendants filed their written submissions on the 1<sup>st</sup> and 28<sup>th</sup> March, 2018 respectively.

25) In her submissions, the Plaintiff's counsel framed three (3) issues for determination. These were:-

a) **Whether the Plaintiff is entitled to equal shares of the suit parcel.**

b) **Whether the demarcation process was done in accordance with the ruling of the land adjudication officer dated 28<sup>th</sup> July, 1988.**

c) **Who should bear the costs of the suit.**

26) On the other hand the counsel for the first to third defendants was of the view that the issues for determination were two namely:-

a) **Whether or not the Plaintiff acquired the land in issue and is entitled to the prayers sought.**

b) **Whether or not the Plaintiff's suit is properly before this court.**

27) In my judgement, I will address the issues by both parties collectively.

28) On whether or not the Plaintiff is entitled to equal shares of the suit land, the submissions by the Plaintiff's counsel were that the Defendants discriminated against her. The counsel went on to submit that there is evidence to show that the Plaintiff has rights over the suit property. On the other hand, the Defendants' counsel submitted that the Plaintiff failed to prove on a balance of probabilities that indeed she was the one who acquired the suit land and thus she is not entitled to the prayers sought.

**On whether or not the demarcation process was done in accordance with the ruling of the land adjudication officer dated 28<sup>th</sup> July, 1998**

29) The Plaintiff's counsel's submissions were that from the evidence of all the parties, it is clear that this was not done and hence the court should intervene in the best interest of justice since the titles were obtained through unprocedural means which the court ought to frown at. The counsel referred the court to section 80 of the Land Registration Act No. 3 of 2012 which empowers courts to order for rectification of the register by directing that any registration be cancelled or amended if it is satisfied that the registration was obtained, made or omitted by fraud or mistake. The counsel went on to submit that it was clear from the facts that the titles were obtained unprocedurally. The counsel further cited Article 27(3), (4) and (5) which frowns at discrimination against any person and submitted that the 4<sup>th</sup> defendant ought to have ensured that the title was issued as per the orders of the adjudication officer. The counsel relied on the case of ***Esther Ndegi Njiru & another vs Leonard Gate [2014] eKLR*** where the court cancelled a title and the names of the Plaintiffs in that case were deleted from the register after it was found that the title which the Plaintiff had was not valid and or good.

30) And finally, the counsel submitted that the Defendants should meet the cost of the suit as they were party to the misrepresentation and/or fraud which occasioned the commencement of this suit.

31) On the other hand, the counsel for the 1<sup>st</sup> to the 3<sup>rd</sup> Defendants submitted that the Plaintiff has failed to prove on a balance of probabilities that she is the one who acquired the land in issue and that she had invited the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the same. The counsel went on to submit the Plaintiff was at the time married elsewhere which was far from the suit land. The counsel added that the Plaintiff did not state whether she acquired the land while married or after she separated with her husband or before her marriage. The counsel pointed out that as per objection number 67, the surveyor was to go and plot out a boundary fixed by family elders so that the Plaintiff could get a new number. The counsel went on to submit that an order in an objection number 67 was that the Plaintiff was barred from bringing her husband onto the portion she was given in the suit premises nor sell it to anybody without the 1<sup>st</sup> Defendant's consent. The counsel added that a new number 553 was issued to the Plaintiff and as such, the Plaintiff's counsel opined, this confirms the fact that the suit premises was basically owned by the 1<sup>st</sup> Defendant. It was also the counsel's submissions the objection number 67 was an adjudication process where the Plaintiff was given 60 days right of appeal but failed to do so.

32) The counsel further submitted that this court cannot reverse the decision in the objection number 67 in this suit since it is not a Judicial Review Proceedings.

33) From the evidence on record, the Plaintiff appears to have based her claim on the decision in objection number 67. In the said objection proceedings, the Plaintiff who was the objector said that she acquired the suitland jointly with the first Defendant. Her evidence in cross-examination was that she was married before she acquired the suit land.

34) The findings of the Land Adjudication Officer were that the objector had a homestead and Mango trees in the disputed land. That there were some family elders who accepted to point out a boundary and that a portion was to be given to the Plaintiff who was the objector. The Plaintiff was barred from taking her husband to the land that she was given. She was also barred from selling her portion without the consent of the first Defendant.

35) Nowhere in the objection proceedings is it indicated that the Plaintiff was to get equal shares with the first Defendant. I would agree with the Defendants' counsel that the restrictions placed on the Plaintiff on how she was to deal with her portion of land pre-supposes that

she was not the one who acquired the disputed land. I also agree with the first three Defendants' counsel that this is not a judicial review proceeding. The Plaintiff ought to have appealed against the decision of the Land Adjudication Officer as is provided by the Land Adjudication Act. Chapter 284 of the Laws of Kenya before approaching this court. The doctrine of exhaustion appears to have caught up with her.

36) Secondly, there is no evidence to support the Plaintiff's allegation that she has no road of access to her portion of land. She neither called the Surveyor nor the Land Registrar to come and shed the light on the issue of the access road. To my mind, there is no evidence before this court to enable it grant the orders sought. In a nutshell, my finding is that the Plaintiff has failed on a balance of probabilities to satisfy this court that she has a cause of action against the Defendants. Her claim against the Defendants must fail. As regards costs of the suit, the evidence before me is that the Plaintiff and the first three are siblings. In order to maintain harmony within the family, I am of the view that each party should bear their own cost.

37) Arising from the foregoing, I hereby dismiss the Plaintiff suit against the Defendants. Each party to bear their own cost.

**Signed, dated and delivered at Makuenithis 19<sup>th</sup> day of November, 2018.**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF:**

Ms Mwangeli holding brief for Ms Chepkori for the Plaintiff

1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant

No appearance for the 1<sup>st</sup> to 3<sup>rd</sup> Defendant

Mr. Kwemboi Court Assistant.

**MBOGO C.G**

**JUDGE**

**19/11/2018**