



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 177 OF 2011**

**PETER K. WAMBUA.....1<sup>ST</sup> APPELLANT**

**JOSEPH MUTUA MUINDE .....2<sup>ND</sup> APPELLANT**

**DOMINIC MUSEI IKOMBO .....3<sup>RD</sup> APPELLANT**

**MITABONI/KATANI CO. LTD .....4<sup>TH</sup> APPELLANT**

**VERSUS**

**WILLIAM MUINDE KILUNDO (*Suing as the Administrator of the Estate of*  
KILUNDO NZIVO.....RESPONDENT**

***(Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in Civil Case No. 975 of 2011 delivered on 25<sup>th</sup> October, 2001 by Mr. Mungai - (SPM))***

**JUDGMENT**

1. The Appellants were sued by the Respondent in Machakos CMCC No. 975 of 2001.
2. In the Plaintiff that was filed by the Respondent in the lower court, the Respondent averred that Kilundo Nzivo (*the deceased*) held 300 shares vide a share certificate number 48 in Mitaboni/Katani Co. Ltd (*the company*); that out of the 300 shares held by the deceased, the company was to allocate to the deceased two (2) plots of the suit land and that after balloting for the plots, the deceased was allocated plot numbers 43, 188 and four (4) market plots.
3. It was the Respondent's case that during the issuance of the Title Deeds, the 1<sup>st</sup> Appellant conspired with the other Appellants to have the Appellant's mother, Mwongeli Wambua Nzivo, to be illegally allocated with half the said plots.
4. In the Plaintiff, the Respondent sought to have the names of Mwongeli Wambua Nzivo removed from the register of members of the company and as a co-owner of the suit properties. The Respondent also sought for the eviction of the 1<sup>st</sup> Appellant from the suit properties.
5. After hearing the matter, the learned magistrate found in favour of the Respondent/Plaintiff.
6. According to the Judgment of the lower court, the 1<sup>st</sup> Appellant and DW2 gave evidence that was

contradictory; that the 1<sup>st</sup> Appellant did not produce any document to establish how his late father contributed to the purchase of the shares in the 4<sup>th</sup> Appellant's company and that the Respondent had established his case on a balance of probabilities.

7. In the Memorandum of Appeal, the Appellant has faulted the Judgment of the lower court on fourteen (14) grounds, which can be summarized as follows: that the magistrate erred in disregarding the fact that the Respondent's suit was time barred; that the learned magistrate disregarded the fact that the suit was an abuse of the court process in view of Nairobi HCCC No. 889 of 1991 and that the magistrate erred in finding that the 1<sup>st</sup> Appellant was a trespasser on the suit property.

8. The Appeal proceeded by way of written submissions.

9. The Appellants' counsel submitted that the 1<sup>st</sup> Appellant entered upon the suit properties on or about 1988; that by the time the suit was filed, twelve (12) years had lapsed; that adherence to the timelines provided by the Limitation of Actions Act is a procedural requirement and that the learned magistrate disregarded the Defence in which the issue of limitation of time had been pleaded.

10. The Appellants' counsel submitted that the Respondent's father had filed Nairobi HCCC No. 889 of 1991 which had sought for similar prayers as those in CMCC No. 975 of 2001 and that the suit abated after the death of the Respondent's father.

11. Counsel submitted that the Respondent should have revived the previous suit instead of filing another suit seeking for similar orders.

12. The Appellants' advocate submitted that the Respondent did not discharge his onus of proof with regard to the allegations of fraud and that the evidence on record did not prove any fraud on the part of the Appellants.

13. It was submitted by the Appellants' advocate that the 1<sup>st</sup> Appellant was lawfully on the suit property by virtue of his late mother's title, which was still valid and which was never challenged in court; that the magistrate exceeded his jurisdiction by indirectly nullifying the said Title Deed and that Sections 27, 28 and 143 of the Registered Land Act confers absolute title to a registered owner of a parcel of land.

14. The title document having been validly issued, it was submitted that the eviction of the 1<sup>st</sup> Appellant from the suit property amounts to deprivation of property contrary to the 1<sup>st</sup> Appellant's rights under Article 40 of the Constitution.

15. The Respondent's advocate submitted that the right of action arose when the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, being officials of the 4<sup>th</sup> Respondent, illegally added the name of the mother of the 1<sup>st</sup> Appellant into the register; that the said decision was made in September, 1990; that the Title Deeds were issued in 1991 and 1992 and that is when the cause of action arose.

16. Counsel submitted that even if the 1<sup>st</sup> Appellant took possession of the land in the year 1988, time stopped running when the Respondent's father filed Nairobi HCCC No. 889 of 1991.

17. On the issue for whether the suit in the lower court was an abuse of the court process, counsel submitted that the specific parcels of land were not indicated in the pleadings that were filed in Nairobi HCCC No. 889 of 1991.

18. The Respondent's counsel submitted that as at the time the Nairobi suit was filed, balloting had not been done and that in any event, the Nairobi suit was not heard on merits.

19. Counsel submitted that the Respondent adduced evidence to show that it is only his father who bought shares in respect to the suit land; that the 1<sup>st</sup> Appellant did not adduce any evidence to show that either his

father or mother contributed anything in the purchase of the shares and that the Respondent's evidence was corroborated by PW2.

20. The Respondent's advocate submitted that the Respondent adduced evidence to proof the allegations of fraud and that it is the Respondent who is entitled to the suit properties.

21. So what was the evidence that was adduced in the lower court?

22. The Respondent, PW1, informed the trial court that Kilundo Nzivo was his father and that he died in 1994.

23. According to the evidence of the Respondent, his father was a member of Mitaboni Katani Company (*the company*) and had 300 shares; that the company had a total of 92 members; that each member was allocated two (2) plots and four (4) market plots and that his father was allocated plot numbers 43 and 87 and four (4) market plots after balloting.

24. Other than the share certificate and the ballot paper, PW1 produced in evidence a bundle of receipts totaling to Kshs. 7,800 being the amount of money that was paid by his father for survey and transfer of the suit properties.

25. It was the evidence of the Respondent that during surveying, plot number 87 changed to plot number 188.

26. When the letter informing the Respondent's father to collect the Title Deeds was received, PW1 informed the court that it indicated that Mwongeli Nzivo was to be registered as joint shareholder with his father.

27. According to PW1, it is the Chairman and Secretary of the 4<sup>th</sup> Defendants who presented the list of members of the company to the Ministry of Lands; that this list showed that plot numbers 43 and 188 was jointly owned and that the addition of the name of Mwongeli as a proprietor of the two parcels of land was done by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.

28. PW1 informed the trial court that the 1<sup>st</sup> Appellant's father did not contribute towards the purchase of the shares and that his name should not have been included in the list of the people to be issued with Title Deeds.

29. On the issue of whether the suit he had filed was *res judicata*, PW1 informed the trial court that it was not because by the time his late father filed the previous suit in 1991, the title documents had not been issued.

30. In cross-examination, it was the evidence of the Respondent that before people balloted for their land in the year 1990/1991, people occupied the land as squatters and that after balloting for the plots, each person occupied their respective plots.

31. PW2 informed the court that he was one of the founders of the company which was established in 1970; that he was the Secretary and that the company purchased land measuring 9,800 acres for grazing purpose.

32. According to PW2, members used to make payments before joining the company and that their target was 100 members; that 92 members paid up for their shares and that he ceased being the Secretary in 1973.

33. PW2 informed the court that he did know Mwongeli Wambua Nzivo and that he never saw her buying the shares. On the other hand, it was the evidence of PW2 that Kilundo Nzivo was a fully paid up member.

34. According to PW2, some members sold their shares and that is why the titles that were issued were more than the 92 registered shareholders.

35. The 1<sup>st</sup> Appellant on the other hand informed the trial court that the Respondent's father wanted to grab his father's land; that the Respondent's father sued his father in which plot numbers 43 and 188 were in dispute and that his father bought the said parcels of land jointly with the Respondent's father.

36. It was the evidence of the Appellant, DW1, that they have been grazing on the land since 1972 as members of the company and that although his father was not indicated as a member of the company, he contributed to the shareholding of the Respondent's father.

37. According to DW1, the balloting of the suit property was completed in 1990 and that the members were shown their respective plots. It was his evidence that he occupies Plot No. 188.

38. Although he was sued in Nairobi HCCC No. 889 of 1991 by the Respondent's father, it was the evidence of DW1 that the suit abated after the Respondent's father died in 1994.

39. One of the officials of the company, DW2, informed the court that he was the Secretary of the company; that the Respondent's father was one of the 192 members of the company and that the "trailers" were contributing jointly with the other members.

40. According to DW2, a dispute arose between the Appellant's mother (*the trailer*) and the Respondents' father; that they deliberated upon the dispute and that they decided that the two (2) parties had equal shares in the suit properties. That is when they forwarded the two (2) names to the Ministry of Lands for the issuance of Title Deeds.

41. According to DW2, a list of 325 people was forwarded to the Ministry of Lands for issuance of titles and that the number rose because of the "trailers".

42. DW2 stated that although the members were grazing on the land since 1972, it was not until 1992 that each member took up his respective portion of land.

43. The first issue that I will deal with is whether by filing Machakos CMCC No. 975 of 2001, the Respondent abused the process of the court. That issue was not addressed by the trial court although it was raised by the 1<sup>st</sup> Appellant in his pleadings, evidence and submissions.

44. According to the Complaint that was filed in Nairobi HCCC No. 889 of 1991 on 21<sup>st</sup> February, 1991, the Respondent's father, Kilundo Nzivo, sued the 1<sup>st</sup> Appellant, Peter Mbondo Wambua.

45. In the Complaint, the Respondent's father averred that at all material times, he was the owner of share certificate no. 48 in Mitaboni Katani Company Ltd pursuant of which he was allocated land measuring approximately 70 acres; that he took possession of the said land in 1985 and that the 1<sup>st</sup> Appellant herein trespassed on his land in 1990 and attempted to build a temporary structure and graze his cattle on the land.

46. The Respondent's father sought for an order of injunction as against the 1<sup>st</sup> Appellant herein and for an eviction order.

47. In his Defence, the 1<sup>st</sup> Appellant averred that in 1988, the company invited its members to ballot for plots; that the Respondent's father (*the Plaintiff*) balloted for Plot Nos. 43 and 87 on his own behalf and on behalf of the 1<sup>st</sup> Appellant's family and that the agreement between him and the Plaintiff should be enforced.

48. In his counter-claim, the 1<sup>st</sup> Appellant herein sought for an order of specific performance and for an order restraining the Respondent's father from evicting him from Plot Nos. 43 and 87.

49. That suit never proceeded for hearing and abated by the operation of the law when the Respondent's father died in 1994.

50. On 14<sup>th</sup> November, 2001, the Respondent herein filed a suit the subject of this appeal "*as the administrator of the Estate of Kilundo Nzivo*" against the Appellants. Kilundo Nzivo was the Plaintiff in Nairobi HCCC No. 889 of 1991.

51. In Nairobi HCCC No. 889 of 1991, the 1<sup>st</sup> Appellant was sued as the only Defendant while in Machakos CMCC No. 925 of 2001, the 1<sup>st</sup> Appellant was sued alongside the officials of the company.

52. In the Plaintiff that was filed in Machakos CMCC No. 925 of 2001, the Plaintiff therein (*the Respondent*) averred that the deceased was a shareholder of the 4<sup>th</sup> Defendant vide share certificate No. 48; that the deceased balloted for plots and was allocated plot numbers 43, 188 and four (4) market plots and that the 1<sup>st</sup> Defendant (*the 1<sup>st</sup> Appellant*) had entered into the Plaintiff's land and started putting up structures.

53. The Plaintiff (*the Respondent*) sought for the eviction of the 1<sup>st</sup> Defendant (*the 1<sup>st</sup> Appellant*) and for the cancellation of the names of the 1<sup>st</sup> Defendant's mother from the register of members of the company and as co-owners of plot numbers 43 and 188. The 1<sup>st</sup> Respondent also sought for orders of eviction.

54. The analysis of the Plaints that were filed in the two (2) suits shows that the issues that were raised were the same.

55. Indeed, the orders that the 1<sup>st</sup> Respondent was seeking in Machakos CMCC No. 975 of 2001 were the same orders that his father had sought in Nairobi HCCC No. 889 of 1991, that is, eviction of the 1<sup>st</sup> Appellant from the suit land.

56. To show that the issues and the suit properties in the two (2) suits were the same, the Respondent averred in his Plaintiff in Machakos CMCC No. 975 of 2001 as follows:

***"13. There has been HCCC No. 889 of 1991 over the suit land between the 1<sup>st</sup> Defendant and the Plaintiff's deceased father which has since abated."***

57. Indeed, in his evidence, the Respondent (PW1) informed the trial court that his father had balloted for two plots being Plot Nos. 43 and 87 and that Plot No. 87 changed to Plot No. 188 when the Title Deed was issued.

58. In the counter-claim that was filed in Nairobi HCCC No. 889 of 1991, the 1<sup>st</sup> Appellant had sought for orders restraining the Respondent's father from evicting him from Plot Nos. 43 and 87.

59. Having admitted in his Plaintiff that indeed the first suit had abated, and that the suit properties in the two (2) suits were the same, the learned magistrate erred by not holding that the subsequent suit was an abuse of the court process.

60. I say so because under Order 24 Rule 7(1) of the Civil Procedure Rules provides that where a suit abates or is dismissed under the Order, no fresh suit can be filed on the same cause of action.

61. Section 24 Rule 7(2) of the Civil Procedure Rules gives the Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff an opportunity to revive a suit that has abated. I am informed that the Respondent's Application to revive the Nairobi suit was dismissed by the court.

62. The provisions of Order 24 Rule 7 (1) of the Civil Procedure Rules have been complemented by the provisions of Section 8 of the Civil Procedure Act which provides as follows:

***“Where the Plaintiff is precluded by rules from instituting further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”***

63. The fact that the Respondent included the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants in the subsequent suit does not make the subsequent suit any different from the first suit.

64. I say so because the cause of action in the two (2) suits is whether the 1<sup>st</sup> Appellant’s mother or father was entitled to the two (2) suit properties. The inclusion of the three Defendants in the subsequent suit does not change the cause of action, which is that the 1<sup>st</sup> Appellant is not entitled to the suit property.

65. Indeed, the 1<sup>st</sup> Respondent’s father filed Nairobi HCCC No. 889 of 1991 seeking for the eviction of the 1<sup>st</sup> Appellant from the two suit properties after the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had already made a decision that the two properties should be shared equally between him and the 1<sup>st</sup> Appellant’s father. The inclusion of the 2<sup>nd</sup> and 4<sup>th</sup> Appellants in the subsequent suit did not change the substance of the first suit.

66. Having found that the filing of Machakos CMCC No. 975 of 2001 by the Respondent was an abuse of the court process and contra-statute, I will not delve into the merits of that suit.

67. For those reasons, I allow the Appellant’s Appeal and set aside the Judgment and Decree of the Subordinate Court. The Respondent will pay the costs of the Appeal and the costs of the suit in CMCC No. 975 of 2001 to the 1<sup>st</sup> Appellant.

**DATED AND DELIVERED AT MACHAKOS THIS 31<sup>ST</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**