



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 34 OF 2014

DAVID MUTISO MUKWILU.....1ST PLAINTIFF

PIUS MUKWILU MULI2ND PLAINTIFF

JOHN NGUNGU MBANGU3RD PLAINTIFF

VERSUS

FRANCIS KYENGO KALOKI1ST DEFENDANT

PHILOMENA WANZILA KAMIA2ND DEFENDANT

(Claiming through William Kamia Kaloki (Deceased))

CHRISTINE NZULA MAKENZI3RD DEFENDANT

(Claiming through Peter Makenzi Kaloki (Deceased))

JUDGMENT

Introduction:

1. This suit was commenced by way of an Originating Summons dated 14th April, 2014 in which the Plaintiffs are seeking for the following reliefs:

a. That the Defendants and all the descendants of the late Mukwilu Muthoka and who claim under the same title as the Defendants and are currently holding the suit lands be declared to be doing so as trustees of themselves and the other heirs and beneficiaries of the late Mukwilu Muthoka who include the Plaintiffs.

b. That the suit lands which are the products of the demarcation of land previously owned by Mukwilu Muthoka the common ancestor of the parties herein be merged and thereafter be re-distributed equitably to all his heirs under the Akamba customary land tenure and inheritance laws.

c. That the District Land Adjudication Settlement Officer, Yatta and Machakos Districts be directed to carry out the necessary demarcation in order to effect the said re-distribution with due regard to the existing settlements and developments of the respective beneficiaries.

2. The 1st Defendant responded to the suit by filing a Replying Affidavit. The suit proceeded by way of *viva voce* evidence.

The Plaintiffs' case:

3. In his Affidavit in support of the Originating Summons, the 1st Plaintiff deponed that his Co-Plaintiff's, the Defendants and himself are the descendants of the late Mukwilu Muthoka; that before his demise, the late Muthoka was the custodian of their ancestral land in Kinyau Sub-location and that at the commencement of the land adjudication process in mid 1970's, the demarcation officers, in the absence of the Plaintiffs, proceeded to unilaterally demarcate the land into portion numbers 801, 802, 803, 804, 806, 856, 883, 796, 797, 798 and 799.

4. According to the Plaintiff's, several persons who were entitled to the suit land were then minors and lacked capacity to make any representations and that only a selected few were allocated the land.

5. In his evidence, PW1 informed the court that the late William Kamia Kaloki was his father, that his father died in 1955 and that when the adjudication process commenced in 1974, he was not present.

6. According to PW1, the suit property was to be sub-divided amongst his father's three (3) wives and that the suit land should be shared by the beneficiaries of the deceased alone.

7. PW1 informed the court that after the adjudication, he was allocated plot numbers 856 and 798; that the said portions are very small and that the demarcation process should be re-done.

8. In cross-examination, PW1 stated that the 2nd and 3rd Plaintiffs are his sons; that the 2nd Defendant is his sister-in-law and that he is a son from the 3rd House.

9. According to PW1, the 1st house has five (5) children, the 2nd house has seven (7) children while his mother's house has five (5) children, with the total number of children being 18.

10. PW1 stated that all the suit property, except two portions, are in the name of dead people; that the said portions are still registered in the names of the deceased and that he lodged several Objections.

11. According to the Plaintiff, the 2nd and 3rd Defendants are wives of the deceased and they do not have letters of administration; that the whole land is 30 acres and that his land is 2½ acres.

The Defendant's case:

12. The 1st Defendant informed the court that the 1st Plaintiff is his uncle while the 2nd Plaintiff and the 3rd Plaintiffs are his cousins.

13. DW1 informed the court that the 3rd Defendant is the wife of his late brother.

14. It was the evidence of DW1 that the suit property was owned by his late grandfather, Muthoka, who had three (3) wives, that his father, Kaloki Mukwilu is deceased and that neither him, nor the 2nd and the 3rd Defendants were involved in the adjudication process.

15. According to DW1, the Plaintiff has two portions of land, that is plot nos. 798 and 856 and that they are eight (8) acres.

16. DW1 informed the court that they have never had any dispute over their respective portions of land; that all the portions are occupied and that on 24th November, 1974, there was an agreement by the family members which was authored by the 1st Plaintiff.

17. According to DW1, the 1st Plaintiff filed Objections in 1990 in which he sought to be allocated more land; that his father owns plot no. 796 and that no succession proceedings have been undertaken in respect to his fathers' estate.

18. In cross-examination, DW1 stated that his father died in 1985; that the 1st Plaintiff was allocated 8 acres while his father was allocated 9 acres, but with two his brothers and that each house was to distribute its portions of land to its members.

19. The 1st Plaintiff's cousin, DW2, informed the court that he was aware of the agreement that was done in respect to the sharing of the land belonging to the late Mukwilu Muthoka.

20. According to DW2, he signed the agreement in which the family members agreed on how to distribute the land amongst themselves.

21. In cross-examination, DW2 stated that he is the son of Sila; that the late Mukwilu Muthoka distributed land to his children and brothers and that the land was shared according to Mukwilu's wishes.

22. DW3 informed the court that she is the daughter-in-law of the late Mukwilu Muthoka; that she witnessed the signing of the agreement of 1974 and that by then, each family had settled on its own portion of land.

23. According to DW3, she has ten (10) great grandchildren who are all settled on the suit land.

24. In cross-examination, DW3 stated that the agreement of 1974 was drawn by the 1st Plaintiff and was in respect to the sharing of the land between five (5) families, that is Mukwilus' wives and his two brothers.

25. According to DW3, the land was shared in accordance with each family's occupation.

Submissions:

26. The Defendants' advocates submitted that the Agreement of 24th November, 1974 was for the division of the whole land of the late Mukwilu Muthoka; that the agreement involved all his wives and two brothers and that the 1st Plaintiff did not call any witness to show that the agreement of 24th November, 1974 was solely for the purposes of separating the land of Mr. Mukwilu and his uncle Sila.

27. Counsel submitted that the Plaintiffs raised Objections during the adjudication process which were heard and determined; that the time of filing objections having expired, the register was closed and that the suit is time barred.

28. The Defendants' counsel finally submitted that the suit should have been filed against the owners of the suit properties as per the consent given by the Adjudication officer and that the Plaintiffs were aware that the 2nd and 3rd Defendants are deceased.

29. The Plaintiff's advocates submitted that the land belonging to Mukwilu Muthoka was not sub-divided equally among all the dependants.

Analysis and Findings

30. It is not in dispute that the Plaintiffs and the Defendants are the descendants of the late Mukwilu Muthoka.

31. According to the evidence before this court, the 1st Plaintiff is one of the surviving sons of the late Mukwilu while the 2nd and 3rd Plaintiff's are his sons. The 1st Defendant is the nephew of the 1st

Plaintiff.

32. The 1st Defendant (*deceased*) is the grandson of the late Mukwilu while the 2nd and 3rd Defendants are the daughters –in-law of the late Mukwilu.

33. The facts of this case are that in the 1930's, the late Mukwilu Muthoka moved to the suit properties. At the time of his death in 1955, he had three wives and two brothers. The 1st Plaintiff is a son from the third house.

34. It is not in dispute that on 24th November, 1974, the 1st Plaintiff, on behalf of the family members authored an agreement that was signed by the family members of the late Mukwilu. The agreement was witnessed by an elder and neighbours. The agreement was signed by the brother of Mr. Mukwilu, Joseph K. Sila and has indicated the people who were present during the fixing of boundaries.

35. The evidence before this court shows that around the same time that the agreement for the "*Division of the land for Mukwilu*" was being conducted, the land adjudication process was going on.

36. Indeed, several Objections were raised including objection No. 391 and 392 in respect to plot Nos. 887 and 883 and Objection No. 390 for plot No. 797. The decisions in those objections were made in 1989 and the adjudication process proceeded to completion.

37. Evidence has been produced in this court to show that the 1st Plaintiff filed Objection No. 618 in respect to plot No. 798 in which he sued one of his brothers, Mishack Kituku Mukwilu.

38. The 1st Plaintiff's Objection was allowed by the Land Adjudication Officer and plot No. 798 was sub-divided into two, thus increasing the land that had initially been allocated to the 1st Plaintiff. This decision was made on 24th May, 1990.

39. The 1st Plaintiff lodged another Objection in respect to plot No. 856. In the said Objection, he sued his two brothers, Raphael Nzuki Muthuka and David Mishack Kituku Mukwilu claiming that the said land should be sub-divided into three portions and one portion to be allocated to him.

40. After hearing the dispute, the Land Adjudication Officer allowed the 1st Plaintiff's claim on 24th May, 1990.

41. Another Objection in respect to plot No. 798 was filed by the 1st Plaintiff. Again, the 1st Plaintiffs' Objection was allowed by the Land Adjudication officer.

42. The evidence before this court shows that the 1st Plaintiff was aware of the adjudication process in respect to the land of his late father as early as in 1974, and filed numerous Objections thereof pursuant to the provisions of the Land Adjudication Act.

43. Having filed the Objections in 1990, and decisions having been made, the 1st Plaintiff cannot wait until when his brothers have died to seek to re-open the issue of the division of the land belonging to his late father.

44. Section 27(3) of the Land Adjudication Act provides that when all Objections have been determined and the time for appeal has expired, the adjudication officer shall send the adjudication register to the Director of Adjudication for registration and issuance of titles by the Chief Land Registrar.

45. The 1st Plaintiff raised several Objections during the period provided under the Act, and those objections were heard and determined. The time frame for the objections in respect to adjudication having expired with no appeals, the register was closed. The 1st Plaintiff is bound by the register as it appears now. Neither him nor his sons can re-open the issue of adjudication or division of the patriarch's

land at this stage.

46. It is for those reasons that I find the Plaintiffs' Originating Summons dated 14th April, 2014 to be unmeritorious and I dismiss it with costs.

DATED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE