



**Masaluk v Misoi (Environment and Land Case 81 of 2016)
[2024] KEELC 30 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 30 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 81 OF 2016
FO NYAGAKA, J
JANUARY 18, 2024**

BETWEEN

MUSA LOTACH MASALUK PLAINTIFF

AND

JULIUS K. MISOI DEFENDANT

JUDGMENT

1. By way of a Plaint dated 12/05/2016 and filed on that day, the Plaintiff filed suit against the Defendant seeking the following reliefs:
 - a. A declaration that the Defendant is holding the title to land parcel No. West Pokot/ Siyoi'A/4621 in trust for the Plaintiff as the Administrator of the Estate and can order terminating the trust;
 - b. An order for the title deed to be canceled and a fresh title deed issued in the joint names of the Plaintiff and the Defendant;
 - c. Costs;
 - d. Any other relief the court deems fit to grant.
2. The Defendant entered appearance on 28/06/2016. He thereafter filed his Statement of Defence dated 12/07/2016 on 15/07/2016. He denied the contents set out in the Plaint in toto and prayed that the suit be dismissed with costs.
3. The Plaintiff filed a Reply to Defence dated 28/07/2016 on 29/07/2016. He joined issue with the Defence and reiterated the averments in his Plaint urging this court to grant the reliefs sought.



The Plaintiff's Case

4. PW1 the Plaintiff was the nephew to the Defendant. He filed a witness statement dated 12/05/2016. He was born in 1955 on the suit land. He currently resides in Turkwel. His evidence was that land parcel No. West Pokot/Siyoi'A'/4621 was held in trust by the Defendant on behalf of the children of his deceased mother Chepkosgei Tamining. He further averred that he was the administrator of the said estate. He produced marked P.Exhibit 1 a copy of Grant of Letters of Administration Ad Litem issued on 12/04/2016. The Plaintiff stated that the deceased was a co-wife to Chelimo and Chepketer but stated in his testimony that they were the deceased's sisters.
5. According to the Plaintiff, the suit land belonged to his mother and her sisters, beneficiaries of his deceased grandmother TAPKIGEN MOKOTOI. He could not tell how it was acquired. But he claimed further that the three sisters lived on the said land with their children, the Plaintiff included. His claim was that the Defendant was adopted into the family as his grandmother was unable to sire sons. The Defendant was his deceased mother's brother.
6. He averred further that later discovered in 1997 that the Defendant surreptitiously and fraudulently registered himself as the proprietor of the suit land. He produced a copy of a Search Certificate dated 18/02/2016 and marked it as P.Exhibit 2. This was after he had been evicted from the said land in 1980. That following his eviction, the Defendant had him incarcerated by police officers as a result of which he was charged and imprisoned for a period of one month. He continued that all surviving beneficiaries of the estate of his grandmother have since been evicted. All the deceased persons, except Cheptoo Nokotoi, have since been buried in other plots. He testified that Chelimo passed away.
7. He averred that he Plaintiff attempted to amicably resolve the dispute between him and the Defendant through relevant authorities but all efforts were met with futility. He attempted to produce a letter dated 08/09/2015, from the Ministry of Interior and Co-ordination of National Government but did not. It was marked as PMFI 3. The dispute was heard by the elders on 08/09/2015. The Plaintiff was in attendance together with his sister and the Defendant. He informed the court that in the course of those proceedings, the Defendant promised to give a portion of the land to him.
8. The Plaintiff accused the Defendant of exclusively registering the suit property in his name to the detriment of himself and his siblings, misrepresentation and clandestinely obtaining registration of the suit land. He thus urged this court to grant the reliefs as sought. To that extent, he sought for acquisition of 3 ½ acres out of the thirty-two (32) acres of the said land and one plot at the highway.
9. The Plaintiff called his brother in law Joshua Sameoi PW2 to the witness dock. Relying on his witness statement dated 19/07/2016, his evidence was that he has been married to the Plaintiff's sister Mary Chelimo since 1965. He maintained that the Plaintiff's mother lived on the suit land with his sisters where the Plaintiff was born. That the Defendant was an adopted son of the Plaintiff's grandmother in accordance with Nandi custom because she could not bear a son. That the Plaintiff's deceased's mother's sisters were Cheboo Tapleko Bot and Bot Chepketer (now deceased). That the Defendant evicted the Plaintiff and his family from the suit land and unlawfully registered the suit land in his name.
10. PW3 Daniel Murio an elder and neighbour recorded a witness statement dated 19/07/2016. He reiterated that the Plaintiff resided on the suit land measuring approximately thirty (30) acres with his mother and sisters since 1959 but left in unclear circumstances. That they were issued with the said land through the Ministry in 1974. That the mother and her sisters had since died but none was buried on the suit land as they were evicted. That the land was unlawfully registered by the Defendant to the exclusion of the Plaintiff who has three (3) sisters.



The Defendant's Case

11. The Defendant DW1 confirmed that he was the uncle to Plaintiff and brother to the Plaintiff's deceased mother. That the Plaintiff was the brother to Chelimo and Chepketer who were alive. He relied on his witness statement dated 12/07/2016 to testify that he is the sole and lawful registered proprietor of all that parcel of land namely West Pokot/Siyoi'A/4621. The title deed, which he produced and marked D.Exhibit 1, was issued in his name on 30/08/2007 as a first registration, free from any encumbrance. He also produced the Certificate of Search dated 20/06/2016 and marked it as D.Exhibit 2 and the green card marked as D.Exhibit 3.
12. He recalled that in the 1950s, the suit land was issued to him by some twenty-six (26) elders where after, in 1960 a demarcation exercise took place. It confirmed the boundaries to the suit land. Further the Committee urged those who lay claim to complain within ninety (90) days. His evidence was that no one lay claim to ownership of the said land.
13. In 1972, once again parties claiming ownership were given three (3) months to raise their objections. Again, nobody challenged his ownership of the suit land. Subsequently, the Defendant was issued with a title deed. Since then, he had been in peaceful and quiet possession for over forty (40) years until 2015 when the Plaintiff lay claim as to its ownership.
14. The Defendant stated that the Plaintiff's mother had land in Ziwa and never claimed the instant one against him. That the Plaintiff's claim lay in his mother's estate since he is not the Plaintiff's father. He further dismissed the Plaintiff's allegations that the deceased had co-wives as false. It is for this reason that he instructed his Advocates to write a letter to the Assistant County Commissioner dated 18/01/2016 [D.Exhibit 5] informing him that he is the lawful registered proprietor.
15. He maintained that he had never evicted anyone and that the Plaintiff was given land by his father and that is where he resided to the time of suit. For these reasons, the Defendant maintained that he had never held the suit land in trust for the Plaintiff who he accused of being a busy body. He thus urged this court to dismiss the claim with costs.
16. He recalled that in 2015, during the hearing before elders, he did not concede to give a portion of the land to the Plaintiff. He recalled that the elders recommended that the dispute be filed in court. He denied that the Plaintiff's mother lived on the suit land. That the land was not clan land.
17. The Defendant also called DW2, Raphael Bor as a witness. The witness relied on his written statement dated 12/07/2016. He explained that in 1963, he left West Pokot where the Defendant resided on the suit land. The Defendant continued to live therein with his mother until she died. That the said land was acquired personally and is not family land. He thus accused the Plaintiff of painting a false picture of the true facts of the dispute. He reiterated the contents of DW1's statement. He testified that Chelimo is alive and is the sister to the Plaintiff's deceased mother.
18. DW4 (sic) Mary Chelimo Samoei testified that she was the Plaintiff's sister and that the Defendant is their uncle. That they are only two siblings. First, she testified that she was surprised that her brother stated on oath that she was dead yet she was alive. She added that Chepketer was their mother's younger sister and denied further that she (DW4) was the co-wife of Chepkosgei Tamming And Chepketer . She stated that the evidence of the Plaintiff and his witnesses was false.



Analysis and Disposition

19. At the close of pleadings, parties elected not to address me by way of either oral or written submissions. That notwithstanding I determine the matter on merits. I have carefully considered the pleadings, scrutinized the evidence and considered the law applicable.
20. The Plaintiff's case is that he is the rightful beneficiary of all that parcel of land namely West Pokot/Siyoi'A'/4621. That the same was held in trust for him and his siblings by the Defendant who testified that the suit land was acquired personally and not by way of inheritance. The main issues for determination are thus whether the Defendant is the lawful registered proprietor of the suit land, and secondly, whether the Plaintiff was entitled to ownership resulting out of a trust?
21. It is not denied that the Plaintiff and the Defendant are related. The Defendant is his uncle. According to the Plaintiff's uncontroverted evidence, the Defendant was adopted into the family as the Plaintiff's grandmother Tapkigen Mokotoi as she was unable to sire a son. It has also been established that the Plaintiff is the brother to DW4 Mary Chelimo who is married to PW2 Joshua Samoei, and she lives in Cherangani of Trans Nzoia. His other sister is called Chepketer . Thus, it is clear so far that the Plaintiff lied over their relationship.
22. It is further not controverted that the Defendant is the registered proprietor of all that parcel of land namely West Pokot/Siyoi'A'/4621. The title deed, D.Exhibit 1, the official search certificates dated 20/06/2016 and 18/02/2016, P.Exhibit 2 and D.Exhibit 2 respectively, and the green card, D.Exhibit 3, all supported this assertion.
23. According to the Defendant and DW2, the suit land was acquired in the 1950s upon successful hearing before (26) elders. Thereafter in 1960, a demarcation exercise took place. Members of the public were invited to lodge their claims (if any) as to ownership of the suit land within ninety (90) days. No one lay credence as to ownership of the said land. In 1972, once again parties claiming ownership were given three (3) months to raise their objections. Again, nobody challenged his ownership of the suit land.
24. That evidence was not challenged by the Plaintiff. On the contrary, the Plaintiff was unable to demonstrate how the property was allegedly acquired by the family. He claimed that he could not identify the process as he was too young. However, that would not have been his only evidence. As stated in Section 107, 108 and 109 of the Evidence Act, he who alleges must prove. It was thus incumbent upon him to prove that indeed the suit land was acquired for the benefit of his mother and her beneficiaries. I, therefore, find that on a balance of probabilities, the Defendant acquired the suit land solely for his personal gain.
25. According to the Defendant, through the process, the Plaintiff's mother never lay claim as to ownership of the suit land. In fact, she owed land in Ziwa. It is instructive to note that Plaintiff was the legal administrator of the estate of his deceased mother. He annexed the Grant of Letter of Administration Ad Litem, PExh.1, issued on 12/04/2016. It is evident however that the Plaintiff instituted the suit in his own name and not as an administrator. He claimed for a portion of the suit land in his name to the exclusion of his sisters. Thus, on what basis was his claim if his mother or her estate had never filed a suit against the Defendant yet he claimed as a beneficiary? What was the nexus between his claim and the ownership of the suit land?
26. All the same, the Plaintiff was not a truthful witness at all, and his witnessed deliberately intended, and fell prey, follow suit and mislead the Court by supporting not only a false pleading about the relationships and living status of his own sister. According to his pleadings, which parties are bound by, his deceased mother was a co-wife to Chelimo (DW4) and Chepketer . In fact, it was only in his



cross-examination that he admitted that they were not co-wives. Instead, according to the Defendant and his witnesses, DW4 is the Plaintiff's sister and Chepketer is the mother's younger sibling. He even went to the extent of perjuring that DW4 was dead. Unfortunately for his case, DW4 came to Court, in the flesh and blood, confirming and testifying as to her living status. This reminded the Court of the Biblical account of the Resurrection of Jesus Christ when many, including his own disciple, Thomas doubted as to whether he had risen. At one time, he had to call on his "doubting" Thomas to put his hand in His so that he would stop doubting and believe (John 20: 27). The witness stated that on her part she had never died.

27. The Plaintiff alleged that the Defendant elected to excise a portion of the suit land to the Plaintiff during a meeting before the elders that took place in 08/09/2015. This was vehemently denied and opposed by the Defendant. The Plaintiff failed to establish that fact on a preponderance of the evidence and it is thus dismissed.
28. The Plaintiff further alleged that all beneficiaries including his deceased mother's sisters and siblings were evicted sometime in 1980. That allegation was again denied by the Defendant. As at that year, the Plaintiff had already attained the age of majority. The question is, if indeed his claim was true, what hindered him or his mother, while she was alive, from laying claim, even before the elders, as he so does now against the Defendant? Furthermore, it was his evidence that in 1997, he discovered that the Defendant surreptitiously and fraudulently registered himself as the proprietor of the suit land. Yet again, he did prudently file suit as he purports to do so now. How so yet he claims that the parties were evicted?
29. On whether the Defendant held the suit land in trust for the Plaintiff, the Court of Appeal in [*Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others*](#) [2015] eKLR held:

“Dealing with the first issue, according to the [*Black's Law Dictionary, 9th Edition*](#); a trust is defined as: “1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).” ... Under the [*Trustee Act*](#), “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property.”
30. The Plaintiff failed to establish that the acquisition of the Defendant fell within the precincts of the definition of a trust. In this court's view, the Defendant acquired the property solely, lawfully and rightfully in his own name. The Plaintiff failed to establish any fraudulent activities on the part of the Defendant. I find that pursuant to Section 26 of the [*Land Registration Act*](#), the Defendant is the absolute and indefeasible owner of all that parcel of land namely West Pokot/Siyoi'A/4621.
31. Indeed, the Plaintiff has demonstrated nothing else but being a busy body. It is apparent that he brought the present suit maliciously with either intend to taint the image of the Defendant or greedily get from him part of his property using the Court process. The upshot is, I have come to the unwavering conclusion that the Plaintiff's suit lacks merit. It is hereby dismissed with costs to the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED IN KITALE VIA ELECTRONIC MAIL THIS 18TH DAY OF JANUARY 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE.

