



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

MAKUENI ELC NO.43 OF 2017

(PREVIOUSLY MACHAKOS ELC NO.211 OF 2014)

IN THE MATTER OF AN APPLICATION BY THE PLAINTIFFS FOR A DECLARATION AND ORDER THAT THE DEFENDANTS HOLDS PARCELS OF LANDS (a) MUTHETHENI/UTITHINI/487 (b) KITETA/KAKUSWI/324 AND (c) KITETA/KAKUSWI/851 IN TRUST FOR THE PLAINTIFFS/APPLICANTS AND THEIR SIBLINGS

BETWEEN

GREGORY MUTUA MUIA.....1ST PLAINTIFF/APPLICANT

JOHN KISILU MULI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

FRANCIS KIOKO MUIA.....1ST DEFENDANT/RESPONDENT

BERNARD MUTUNGA MULI.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

By their originating summons expressed to be brought under Order 37 Rules 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the law, Gregory Mutua Muia and John Kisilu Muli (hereinafter referred to as the first and the second plaintiffs/applicants respectively) pray for orders that a declaration do issue that the properties known as:-

1)

a) Muthetheni/Utithini/487 registered in the joint names of Francis Kioko Muia and Bernard Mutunga Muli.

b) Kiteta/Kakuswi/324 registered in the name of Francis Kioko Muia.

c) Kiteta/Kakuswi/851 registered in the name of Bernard Mutunga Muli are all held in trust for the plaintiffs/applicants and other siblings of the estate of Muia Kithumbi and Muli Kithumbi.

2) That the said properties namely; (a) Muthetheni/Utithini/487 (b) Kiteta/Kakuswi/324 (c) Kiteta/Kakuswi/851 be settled for the benefit of the plaintiffs/applicants in such manner and proportions as this court may deem fit and just.

3) That the Defendants/Respondents by themselves, their agents and/or servants be restrained from alienating or encumbering or in any other way manner disposing of (a) Muthetheni/Utithini/487 (b) Kiteta/Kakuswi/324 (c) Kiteta/Kakuswi/851 with the Defendants/Respondents being ordered to pay the cost of the application and incidental thereto.

The application is predicated on the grounds on its face and is supported by the affidavit of Gregory Mutua Muia, the first Plaintiff/Applicant herein.

On the 05/03/15, the court directed that this matter be heard by way of viva voce evidence and hence its hearing on 13/04/17 after the court file was transferred to this court from the Environment and Land Court Machakos.

I wish to point out that even though the defendants were served with summons, they did not file any reply. During the hearing, the first Plaintiff/Applicant informed the court that he was relying fully on the affidavit dated 10/12/14 that he swore in support of the originating summons.

The first Plaintiff/Applicant told the court in his evidence in chief that the suit at hand involves family land that was owned by his late grandfather, one Kathumbi Nzomo. He revealed that the late Kithumbi Nzomo had two sons whose names were Muia Kithumbi and Muli Kithumbi. The former was the firstborn while the latter was the last born. He went on to say each of the two sons of the late Kithumbi Nzomo had four (4) sons and added that the children are captured in the chief's letter marked as exhibit No.1. The chief's letter is the one marked as annexure GMM-1 to the first Plaintiff's/Applicant's supporting affidavit to the originating summons as well as the notice of motion application. It shows the children of Muia Kithumbi as Jostina Ndile Kyengo said to be married, Francis Kioko Muia and Gregory Mutua Muia while those of Muli Kithumbi are Nguna Muli who is said to be the only wife.

Bernard Mutunga Muli, John Kisilu Muli, Mutinda Kitheka and Wambua Muli. The first plaintiff went on to say that it was agreed by the family that the first sons of Muia and Muli be registered to hold the land in trust for the family. He said that all along, they resided in the same parcels of land while thinking that they were held in trust for them until the year 2014 when the clan was summoned to sub divide the land according to the surviving children. He said that it was one Gregory Kivuva Mululi who was sent by the clan to sub divide the land and that as they were erecting beacons, the sons of the first born sons of Muia and Muli while in the company of other people stopped the exercise on the allegation that the land in question belongs to them.

The first plaintiff said that by the time the family land was surveyed in 1973/74, Kithumbi Nzomo and his two sons had passed on. He also said that the late Kithumbi's land comprised of two (2) parcels of land one of which is situated in Muthetheni location while the other one is in Kiteta location. Their title numbers are Muthetheni/Utithini/487 and Kiteta/Kakuswi/324 and 851. The first plaintiff went on to say that the clan resisted the attempt to stop the survey exercise and that as they were writing their report, they were informed that the beacons had been uprooted and this forced them to report the matter to the head of their clan who referred them to the chief. He added that when the chief summoned Francis Kioko Muia and Bernard Mutunga Muli, only the former turned up but he disagreed with the chief as a result of which the chief referred the matter to the lands office. He said that when he visited the lands office in Machakos to enquire who the owners of the plots in question were, he learnt that parcel number Muthetheni/Utithini/487 was registered in the joint names off Francis Kioko Muia and Bernard Mutunga Muli. He went on to say that he also learnt that Kiteta/Kakuswi/324 was registered in the name of Francis Kioko Muia while Kiteta/Kakuswi/851 was in the name of Bernard Mutunga Muli and added that the three parcels of land were said to be owned by the two absolutely. According to the first plaintiff, the Land Registrar advised him to file this matter in court.

The first plaintiff/applicant said that he and others reside in the three parcels of land as is shown in annexure GMM-4 which are coloured photocopies of several homesteads and prayed that the parcels of land in question revert to trusteeship and thereafter be subdivided amongst the surviving family members. Regarding land parcel number Kiteta/Kakuswi/324, the first plaintiff prayed that it be taken by the siblings of Francis Kioko Muia while Kiteta/Kakuswi/851 should be subdivided amongst the four (4) siblings of Bernard Mutunga Muli. As for Muthetheni/Utithini/487, the first plaintiff prayed that it be divided in half between the Muia and Muli families.

The first plaintiff's/applicant's evidence was adopted by John Kisilu Muli, the second plaintiff/applicant.

The plaintiffs'/applicant's counsel filed written submissions which I have read together with the authority of James Chumo –vs- Zablon Kiplagat [2014] eKLR that the counsel relied on.

It is worth noting that the defendants/respondents neither entered appearance nor did they file their defence and as such, I am in agreement with the plaintiffs' counsel that the facts and the evidence remain uncontroverted. I also agree with the plaintiffs'/applicants' counsel that the plaintiffs have established the existence of a trust against the defendants/respondents. Suffice it to say, I am satisfied that the plaintiffs'/applicants have proved on a balance of probabilities that the defendants being the eldest sons of the two families held the parcels of land in question in trust for their siblings. As such, I will enter judgment for the plaintiffs/applicants and against the defendants/respondents and proceed to issue the following orders:-

1)

- a) Muthetheni/Utithini/487 registered in the names of Francis Kioko Muia and Bernard Mutunga Muli.
- b) Kiteta/Kakuswi/324 registered in the name of Francis Kioko Muia and
- c) Kiteta/Kakuswi/851 registered in the name of Bernard Mutunga Muli are all held in trust for the plaintiffs/applicants and other siblings of the estates of Muia Kithumbi and Muli Kithumbi.

2) That the said properties namely (a) Muthetheni/Utithini/487, (b) Kiteta/Kakuswi/324 and (c) Kiteta/Kakuswi/851 be settled for the benefit of the plaintiffs/applicants as follows:-

- i. Muthetheni/Utithini/487 be subdivided in two (2) equal halves between the Muia and Muli families.
- ii. Kiteta/Kakuswi/324 be subdivided in equal portions amongst the siblings of Francis Kioko Muia and the said Francis Kioko Muia.
- iii. Kiteta Kakuswi/851 be sub-divided in equal portions amongst the four (4) siblings of Bernard Mutunga Muli and himself.

3) The defendants/Respondents by themselves, their agents and/or servants are restrained from alienating or encumbering or in any other manner disposing of Muthetheni/Utithini/487, Kiteta/Kakuswi/324 and Kiteta/Kakuswi/851.

4) The defendants/respondents to bear the costs of this suit.

Signed, Dated and Delivered this 11th day of May, 2017.

MBOGO C. G.,

JUDGE.

Court: Judgment read aloud in open court in the presence of the first and second plaintiff, and in the absence of the first and second defendants, plaintiff's counsel absent. Mr. Kwemboi Court Assistant present.

MBOGO C.G.,

JUDGE.