



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MACHAKOS

ELC 26 OF 2006

DANIEL M. MUTISO.....PLAINTIFF

VERSUS

1. REUBEN MUNYAO.....1ST DEFENDANT

2. BEN MWELI.....2ND DEFENDANT

3. JULIUS WAMBUA.....3RD DEFENDANT

4. CHARLES MUNYAO.....4TH DEFENDANT

5. JAMES KIOKO.....5TH DEFENDANT

6. HENRY KITHOME.....6TH DEFENDANT

7. FRED NZIOKI.....7TH DEFENDANT

8. FRANCIS KIIO.....8TH DEFENDANT

9. FLORENCE KASWII.....9TH DEFENDANT

JUDGEMENT

1. Daniel Masila Mutiso (hereafter referred to as the Plaintiff) is a farmer and a resident of **Kabaa** Sublocation, **Mbiuni** Location in **Machakos** County. His case is that he bought land parcels number **Mbiuni/Kabaa/910** from the late **Thomas Munyao Kithome** and **Mbiuni/Kabaa/973** from **Charles Munyao Kithome** (hereafter referred to as the **4th** defendant). That when the defendants declined to transfer the two parcels of land to him, he had the transfer done through a court process. He says that the defendants have exhausted the legal process of trying to retain ownership of the two parcels of land. He prays this court to order that the defendants be evicted from the two parcels of land.

2. By his plaint dated **13th March, 2006** and filed in court on **14th March, 2006**, the plaintiff prays for judgment against the Defendant jointly and severally for the following orders;

a. A declaration that the plaintiff is the sole absolute owner and entitled to immediate possession and use of land title members Mbiuni/Kabaa/910 and Mbiuni/Kabaa/973 and the defendant are trespassers.

b. A permanent injunction to restrain the Defendants whether by themselves, their servants or agents or otherwise howsoever from entering, remaining or continuing in occupation of the said land.

c. Cost of the sui.

d. Any further or other relief that the court may deem fit and just to grant.

3. The claim is denied by the **2nd** to **7th** and **9th** Defendants in their joint statement of defence and counterclaim dated **28th March, 2006**

and filed in court on the **12th April, 2006**.

4. The Defendants have averred that during the period between **1976 to 1979** they together with **Thomas Munyao Kithome** who is their deceased father and husband respectively, jointly acquired parcel numbers **Mbiuni/Kabaa/63** and **Mbiuni/Kabaa/64** from whence the suit lands were created through subdivision. The Defendants have further averred that they had the two parcels registered in the name of **Thomas Kithome** who was the head of their family. They aver that they have been in open and continuous occupation and use of the suit lands as beneficial owners.

5. The defence and counterclaim is denied by the plaintiff's reply to defence and counterclaim dated **3rd May, 2006** and filed in court on even date.

6. This case lay dormant from the year **2006** until the **14th February, 2017** when parties were served with notice of dismissal of the suit under order **17** rule of 2 of the Civil Procedure Rules. They were required to appear in court on the **22nd March, 2017** to show cause why the suit should not be dismissed. Only the plaintiff and his counsel appeared on the said **22nd March, 2017**. He told the court that he had witnesses statements which he was ready to file. As such, the plaintiff was given a chance to prosecute his suit. He was directed to serve the Defendants with a hearing notice after the matter was fixed for hearing on the **15th May, 2017**. Only the Plaintiff appeared in court during the hearing date. He filed an affidavit of service dated **12th May, 2017** showing that the Defendants Counsel on record, **Ms F.M Mulwa and Company Advocates** was served with the hearing notice on the **24th March, 2017**. The hearing notice is dated the **23rd March, 2017**. Hearing, therefore, proceeded in the absence of the Defendants.

7. The Plaintiff's evidence was that he bought land parcel number **Mbiuni/Kabaa/910** from one **Thoma Munyao Kithome** who is now deceased. He went as to say that he also bought land parcel number **Mbiuni/Kabaa/973** from **Charles Munyao Kithome** who is the **4th** Defendant herein between **1993** and **1994**. It was his evidence that the two parcels of land were transferred to him through a court process after the Defendants declined to transfer the two parcels to him. He said that they had instead opted to refund the purchase price to him which he appears to have declined since he says that he sued the Defendants before the District Land Tribunal in case number **11/97**. The Tribunal ruled in his favour as can be seen from the Tribunal's decision dated **16th June, 1997(PEX NO 1)**. He went on to say that when the Defendants failed to appeal against the Tribunal's decision, he approached the Principal Magistrate's court vide **Civil Miscellaneous Application Number 9 of 1998**, whereupon on the **10th February, 1998**, the court confirmed the tribunal's decision(See *PEX no. 2*)The Plaintiff went on to say that the Defendants later appealed to the Provincial Land Disputes Appeals Tribunal vide appeal number **17/1997** and pointed out that the appeal was dismissed as can be seen from the Appeals Tribunal's decision produced as *PEXno.3*.

8. The plaintiff went on to say that the Defendants later filed an appeal at the High Court, the same being **Civil Appeal number 78 of 2002 at Machakos**. The appeal was dismissed on the **8th February, 2008(PEX. No.4)**

9. The plaintiff said that following the magistrate's court order, the Land Control Board transferred the two parcels of land to him and he produced copies of title deeds as **PEx nos.5** and **6** respectively. He said that the Defendants have been in occupation of his land since 1993 and prayed for an order of eviction. Regarding the defence and the counterclaim that the defendants filed,(the plaintiff asserted that it is not correct to say that the two parcels of land do not belong to him. He denied having obtained the title deeds illegally and urged the court to dismiss the counterclaim and enter judgment in his favour.

10. By the time of writing this judgment, the plaintiff's counsel had not filed his submissions.

11. Having read the evidence on record and the pleadings filed by the parties, my finding is as follows;

I. Firstly, no evidence was led by the Defendants in support of the counterclaim. In the circumstances, therefore, I will dismiss it with costs to the plaintiff.

II. Secondly, no evidence was led to rebut the Plaintiff's evidence. As such, I have no doubt in my mind that the Plaintiff is the registered owner of land parcels numbers Mbiuni/Kabaa/910 and Mbiuni/Kabaa/973. No evidence was led to the contrary.

III. Thirdly, I will not consider whether or not the Tribunal in making the award dated 26th November, 1997 had jurisdiction to do so in view of section 3(1) of the repeated Land Disputes Tribunals Act as this is not an issue for determination before me. I have taken cognizance of the fact that Defendants Civil Appeal number 76 of 2002(see *PEXno.4*) was dismissed for want prosecution under order 41 rule 31(1) of the Civil Procedure Rules. The Defendants attempts to have the order for dismissal set aside were unsuccessful. I will not speculate what the outcome of the appeal would have been had the same been heard on merit. In the circumstances, I am satisfied that the plaintiff has on a balance of probabilities satisfied this court that he has a cause of action against the Defendants. I will, therefore, dismiss the defence and proceed to enter judgment for the Plaintiff and against the Defendant jointly and severally in terms of prayers (a), (b) and (c) of the plaint.

MBOGO C.G

JUDGE

10/7/2017

COURT: Judgment read aloud and dated in open court in the absence of the plaintiff and his advocate, Court clerk, Mr. Kwemboi

MBOGO C.G

JUDGE

10/7/2017.