



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 220 OF 2010**

**JOSEPH NDAVA NTHUKA .....1<sup>ST</sup> PLAINTIFF**

**RUTH KAMENE NDUVA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RAPHAEL MUSILA MUTISO.....1<sup>ST</sup> DEFENDANT**

**MATHEW MUTISO .....2<sup>ND</sup> DEFENDANT**

**KALOKI MUSILA .....3<sup>RD</sup> DEFENDANT**

**NZIOKA MUSILA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In the Plaint dated 26<sup>th</sup> October, 2010, the Plaintiffs have averred that they are the proprietors of land known as Mavoko Town Block 3/2729; that prior to the said registration, they were the beneficial owners of plot number 27 within Lukenya Ranching & Farming Co-operative Society Limited and that in 1999, the 1<sup>st</sup> Defendant trespassed on plot number 27 and erected a semi-permanent house thereon.
2. According to the Plaintiffs, in the year 2004, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, who are the 1<sup>st</sup> Defendant's sons, also trespassed on the suit land and erected illegal structures and that the 2<sup>nd</sup> Defendant joined them in the year 2007.
3. The Plaintiffs are seeking for an order of eviction of the Defendants from the suit land and for general damages.
4. In their joint Defence, the Defendants stated that they have overriding interests over the suit; that the Plaintiffs are holding the suit land in trust for the Defendants because the land was to be shared amongst the two families and that they are in occupation of their respective parcels of land.
5. The Defendants finally averred that the suit is time barred and that there is another suit in respect to the same property being Machakos CMCC No. 586 of 2001.
6. The 2<sup>nd</sup> Plaintiff, PW1, informed the court that the 1<sup>st</sup> Plaintiff is her brother-in-law; that the suit land belonged to her father-in-law and that currently it is registered in the names of the two of them.
7. When the 1<sup>st</sup> Defendant settled on the land in 1999, PW1 stated that they made a report to Lukenya Co-

operative Society and that he declined to honour summons from the said Co-operative.

8. It was the evidence of PW1 that the 1<sup>st</sup> Defendant's sons joined him on the land in the year 2004 and 2007 and that they should be evicted from the land.

9. It was the evidence of PW1 that she was married in 1956 and that she witnessed her father-in-law buy the land and that her husband and herself contributed towards raising the purchase price.

10. PW1 denied that the Defendants' family contributed in purchasing the suit land and that by the time of the said purchase, the 1<sup>st</sup> Defendant's father had already died.

11. According to PW1, they used to give to the sub-chief money in installments, including giving him cows for the land and that the land does not belong to the entire family.

12. The 1<sup>st</sup> Plaintiff's son, PW2, stated that his parents moved on the land in 1990 and that before then, they used to till the land since 1978.

13. According to PW2, his uncle, the 1<sup>st</sup> Defendant, moved on the suit land in 1999 and his cousins joined him later on the land.

14. PW2 stated that the suit land belongs to his grandfather who left it to his father and that the Defendants' families are not entitled to the land.

15. PW2 stated that his father is now very old and that it is his grandfather who paid for the land and was given a share certificate by the Co-operative Society and an allotment letter.

16. Although the Co-operative Society summoned the 1<sup>st</sup> Defendant to explain the illegal entry on the suit land, PW2 stated that the 1<sup>st</sup> Defendant did not obey the said summons.

17. In cross-examination, PW2 stated that his father and the 1<sup>st</sup> Defendant belong to the Masuni family; that Nthuka Mutala and the 1<sup>st</sup> Defendant were step-brothers and that in 1999, the 1<sup>st</sup> Defendant lodged a complaint with the clan in respect to the suit land.

18. PW2 stated that his family had three shares in the Co-operative Society which represented three parcels of land measuring 40 acres, 20 acres, 5 acres and two commercial plots.

19. According to PW2, the clan decided that the Defendants should be given ten (10) acres and that they did not comply with that decision

### **The Defence case:**

20. The 1<sup>st</sup> Defendant informed the court that his father was known as Mutiso Mutala; that the Plaintiffs' father and his father are step-brothers and that the Masuni family was unified by one Eliud Mbithi Mueke who had a project for the family involving coffee.

21. DW1 informed the court that the said family project involved 32 family members and that when the family was informed about the availability of land in Lukenya, the family agreed to contribute the money and purchased the same.

22. According to DW1, the late Mutala gave to Nthuka Mutala, the trustee, two cattle towards the purchase of the land and that these two cattle were given by his mother in 1965; that the two houses of Mutala agreed to purchase the suit land jointly and that they were then allocated share number 619. Since his father had died in 1950, DW1 stated that it was agreed that the shares should be registered in the name of Nthuka Mutala, his uncle, to hold their share in trust and in accordance with the Kamba customs.

23. After the purchase price was paid by selling the cows, it was the evidence of DW1 that they were entitled to 20 acres of the suit land together with the commercial plots and that before Nthuka could divide the land to each house, he died in 1990.

24. When the Plaintiffs' family started selling the land, DW2 stated that he reported the matter to the Chairman of the clan who after hearing the matter decided that his family should be allocated 10 acres of the 65 acres. It was after the said verdict, according to DW1, that he moved into the suit land.

25. DW2 informed the court that he is from the Masuni family; that in 1991, he was the Chairman of the Masuni family committee and that the 1<sup>st</sup> Defendant reported to the committee that the Nthuka's family had refused to sub-divide the family land.

26. DW2 informed the court how the two step-brothers contributed funds and cows towards the purchase of the suit land.

27. When the initial amount of Kshs. 1025 was paid to Lukenya Co-operative, it was the evidence of DW2 that each family had made an equal contribution; that when the balance of Kshs. 4000 was required by the Society, the Mutiso family made their contribution by selling a cow. The Nthuka family paid its share of the balance in cash.

28. As a committee member, DW1 stated that they reached a verdict that the two families should share the land and allocated the Defendant's land 10 acres.

29. The other family member of the Masuni family, DW3, informed the court that he is a grandchild of Mbiti and that Mbiti was the son of Masuni.

30. It was the evidence of DW3 that in 1965, the Masuni family was united in various projects and that when they agreed to join Lukenya Ranching Co-operative, they chose Nzioki Makau as their leader.

31. Afterwards, according to DW3, it was decided that each member of the family was to purchase share at the Co-operative and that the share was costing Kshs. 1025; that Nthuka and Mutiso purchased a single share as a family and that their share was registered in Nthuka's name because his elder brother had passed on.

### **Submissions:**

32. The Plaintiffs' advocate submitted that the Defendants have not adduced any evidence to show that the 1<sup>st</sup> Plaintiff's father held the suit land in trust for the Defendants' father; that while the alleged agreement was being entered into, the elder brothers of the Defendants were adults and members of the Co-operative Society and that the said brothers never entered the suit land.

### **Analysis and findings:**

33. The Plaintiffs are seeking for the eviction of the Defendants from land known as Mavoko Town Block 3/2729 which is registered in their favour.

34. On the other hand, the Defendants have averred that the Plaintiffs are holding the suit land, together with Plot No. 185/57 measuring 5 acres, Plot No. 83 measuring 20 acres and Plot No. 620 as trustees.

35. It is not in dispute that the Plaintiffs and the Defendants are related.

36. According to the evidence before me, the 1<sup>st</sup> Plaintiff is the son of Nthuka Mutala, who was a step-brother of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's father. The 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are therefore cousins. The 2<sup>nd</sup> Plaintiff is the sister-in-law of the 1<sup>st</sup> Plaintiff while the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the sons of the 1<sup>st</sup> Defendant.

37. The evidence of the Plaintiffs and the Defendants was that parcel of land number Mavoko Town Block 3/2729 was initially known as plot number 27 Lukenya Ranching and Farming Co-operative Society Limited.

38. According to the evidence of PW1 and PW2, the land was initially owned by their late father who had shares in the Society.

39. The Plaintiffs produced in evidence the share certificate number 619 which was issued to the late Nthuka by the society on 9<sup>th</sup> March, 1975,

40. The Plaintiffs also produced in evidence the letter of allotment that was issued to Nthuka Mutala in respect to Plot No. 27. The said letter of allotment is dated 8<sup>th</sup> March, 1991 and was signed by the Chairman and Secretary of the Society.

41. When the late Nthuka Mutala died, the Society issued a Title Deed in respect to the said plot, whose number had changed to Plot No. 27 to Mavoko Town Block 3/2729, to the Plaintiffs.

42. When the 1<sup>st</sup> Defendant entered the suit land in 1999 claiming ownership of the same, it was the evidence of the Plaintiffs that they reported the matter to the Co-operative Society, who, by way of a letter dated 26<sup>th</sup> October, 2000, summoned the two families to appear before it over the dispute. However, according to the Plaintiffs, the Defendants declined to honour the said summons.

43. The 1<sup>st</sup> Defendant informed the court that in 1965, he was 15 years old; that by that time, his father was already dead and that he witnessed his mother give a cow for the purchase of the shares in the Society.

44. DW1 informed the court that he was informed by the elders that the two houses were to purchase a single share in the Co-operative as the Mutula family and that the share was valued at Kshs. 1025. However, in 1978, they were told to pay Kshs. 6000 for the said share and that they were required to top up the balance. In his statement, DW1 stated as follows:

***“A cow was being sold for Kshs. 275/=. My family then paid in bits until only Kshs. 4,000 remained as balance. A dividend of two cows was given by the Lukenya Co-operative. The Nthuka family paid Kshs. 2000. We did not have money and they sold one cow, paid to the Mutiso family by the Co-operative as dividend and paid our balance of Kshs. 2000.”***

45. The evidence by the Defendants and his witnesses detailing how the Defendants’ family contributed towards the purchase of the shares in the Co-operative Society is so incoherent that it does not add up at all.

46. DW1 claims that his household gave cattle to be used to pay for the shares. It is not clear to whom the cow was given to and how the sell of the said cattle was done and by who.

47. At one point, DW1 states that his household was to pay Kshs. 2000 as their contribution for the share and stated that a cow was going for Kshs. 250. So how many cows did they give to raise the amount that they were required to pay? Clearly, the Defendants averments that they contributed towards the purchase of the shares that were registered in favour of the 1<sup>st</sup> Plaintiff’s father does not sound true.

48. The evidence before this court shows that on 17<sup>th</sup> March, 1978, the 1<sup>st</sup> Plaintiff’s father paid to the Society Kshs. 2000. On 30<sup>th</sup> May, 1978, he paid Kshs. 1000 and paid a further sum of Kshs. 1000 on 6<sup>th</sup> June, 1978. All these payments were made to the Society by the 1<sup>st</sup> Plaintiff’s father in respect to his share which was number 619.

49. Prior to 1978, the 1<sup>st</sup> Plaintiff’s father had made payments of Kshs. 720 and Kshs. 392 in 1973 and

1974.

50. Indeed, before the 1<sup>st</sup> Plaintiff's father made the payments in 1978, he had been informed by the Co-operative Society to pay up the balance so as to be given the share certificate by way of a letter dated 4<sup>th</sup> March, 1976.

51. Although DW2 and DW3 stated that the committee of the Mutala family came to the conclusion that the Plaintiffs and the Defendants had contributed equally to the purchase of the suit land, no evidence in terms of the Minutes of the Committee were availed to this court.

52. Indeed, DW2 and DW3 did not explain why, if indeed the two families had contributed to the purchase of land measuring 53 acres, equally, they decided that the Defendants' family should be allocated only 10 acres. That, in my view, shows that the clan members were not satisfied that the Defendants' family had contributed to the purchase of the said land. The allocation of the 10 acres by the clan must have been done out of compassion, other than evidence.

53. The evidence before me shows that it is the Plaintiffs' father who paid for the shares and was subsequently allocated the suit property.

54. There is no evidence to show that indeed the Defendants' family contributed towards the purchase of the said shares, either by way of cattle or in cash.

55. Consequently, the Defendants have not proved the claim that the Plaintiffs are holding the suit land, amongst other parcels of trust, in trust for the Defendants.

56. Being the absolute registered owners of the suit land, the Defendants should give way.

57. For those reasons, I dismiss the Defendants' Amended Counter-claim dated 12<sup>th</sup> June, 2012 and allow the Plaintiffs' Plaint in the following terms.

***a. The Defendants be and are hereby evicted from parcel of land known as Mavoko Town Block 3/2729.***

***b. A permanent injunction be and is hereby issued, restraining the Defendants whether by themselves, their agents and/or servants or whatsoever from entering, remaining, tilling or in any other manner howsoever from interfering with the Plaintiffs' quiet and peaceful possession of parcel of land known as Mavoko/Town Block 3/2729.***

***c. The Plaintiffs to pay the costs of the suit and the Counter-claim.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2017.**

**O. A. ANGOTE**

**JUDGE**