



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 36 OF 2013**

**M N.....PLAINTIFF**

**VERSUS**

**K M.....1<sup>ST</sup> DEFENDANT**

**K M.....2<sup>ND</sup> DEFENDANT**

**J K.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. In the Plaint dated 5<sup>th</sup> August, 2013, the Plaintiff averred that he is the registered owner of land known as Konza South Block [...] (*the suit land*); that he allowed over M M (*deceased*) who was the 1<sup>st</sup> Defendant's husband and the 2<sup>nd</sup> Defendant's father to farm the suit land with the understanding that the said M will give vacant possession on demand and that when M died, the Defendants alleged that the suit land belonged to him.
2. It is the Plaintiff's case that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have gone ahead to sell a portion of the suit land to the 3<sup>rd</sup> Defendant and that the Defendants should be ordered to vacate the suit land.
3. In their joint Defence, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that their late father, M M had a joint share holding with the Plaintiff in Konza Ranching and Farmers Co-operative Society and that they agreed to share the suit land and any other parcels of land that were to be allocated to the Plaintiff.
4. The matter proceeded for hearing on 22<sup>nd</sup> February, 2017.
5. The Plaintiff, PW1, informed the court that he is a member of Konza Ranching and Farming Co-operative Society Limited (*the Society*); that he has been member number 939 since the early 1970s and that when the Society sub-divided its land, it allocated him 24 acres.
6. It was the evidence of PW1 that the 24 acres comprised four (4) parcels of land which included the suit land measuring 10 acres; that he was subsequently issued with a Title Deed for the said land and that he had a surrogate "wife" known as "Iweto" in Kikamba.
7. The evidence of PW1 was that under the Kamba Customary Law, Iweto bears children with a chosen man, whose children belonged to his household; that the chosen man has no claim over the children or any property in the home and that Mbili Mbula was invited to bear children with the "Iweto."

8. Due to the relationship with the “*Iweto*”, PW1 stated that the late M would occasionally spend time at the home of the “*Iweto*” and would do some farming on the land; that the deceased was the husband of the 1<sup>st</sup> Defendant and father of the 2<sup>nd</sup> Defendant and that the suit land never belonged to the late M.
9. PW1 informed the court that his son, M M, was holding the original documents in respect to the land without his consent; that the Defendants are in-laws to his sons and that the Defendants are colluding with his son to acquire the suit land.
10. The 1<sup>st</sup> Defendant informed the court that her deceased husband, M M, bought shares jointly with the Plaintiff in the Society; that it is the Plaintiff’s name that was entered in the register of the Society and that her late husband paid for 2½ shares of Kshs. 1,250 through the Plaintiff.
11. According to DW1, in 1975, the Plaintiff and her late husband agreed that they would share the suit land equally and that her son K and M and her daughter started developing the land in the year 1982.
12. DW1 stated that other than the suit land, the Plaintiff also owned three (3) other parcels of land jointly with her late husband.
13. In cross-examination, DW1 stated that the Plaintiff’s wife died; that her husband had an intimate relationship with the Plaintiff’s wife and had children and that the Plaintiff approved the relationship between his wife and her late husband.
14. DW1 stated that she does not reside on the suit land and that it is her son, K, who lives on the land.
15. DW1 denied that she has invaded the suit land. It was her evidence that J M M is her son-in-law and that by the time her son K settled on the land, J had already married her daughter.
16. It was the evidence of DW1 that K settled on the land after her late husband agreed with the Plaintiff that he should be allowed on the land.
17. The 2<sup>nd</sup> Defendant, DW2, informed the court that he is the son of M M (*deceased*); that his father owned the five(5) shares jointly with the Plaintiff and that his father paid for 2½ shares at a cost of Kshs. 1,250.
18. It was the evidence of DW2 that he has been living on the suit land since 1993.
19. It was the evidence of DW2 that before his father died in the year 2009, there was no dispute between him and the Plaintiff.
20. In cross-examination, DW2 stated that his late father and his mother lived in Kioi; that his mother still lives there; that he moved from Kioi to the suit land and that his late father owns plot numbers 145, 98, 139, 1527 and 185. However, DW2 stated that all those plots are still in the name of the Plaintiff.
21. DW2 informed the court that his father’s ancestral home is in Kioi and that he is currently in occupation of the suit land.
22. DW3 informed the court that he attended a meeting in 1975 in respect to the suit land; that the meeting was between the Plaintiff and M and that M M agreed to share his land equally with the Plaintiff.
23. According to DW3, the late M M gave to the Plaintiff Kshs. 500 to buy the shares from the Society.
24. In cross-examination, DW3 stated that he is a member of the Society and that he was allocated a share in the Society in 1978 measuring 10 acres.
25. The Plaintiff’s son, DW4, stated that his father bought shares in the Society jointly with the late M M;

that he was in a meeting with his father and the late M in the year 2002 when they agreed to share the suit land and that since the year 2002, he is the one who has been collecting dividends from the Society after which he shared between the two families.

26. In cross-examination, DW4 stated that his father had three (3) wives, including an *Iweto* who was married to his step-mother.

27. According to DW4, an *Iweto* cannot sire children with the man of the house but with a man from outside; that it is the woman who has “married” an *Iweto* who chooses the man and that it is the late Mbili whom he used to see in their homestead.

28. DW4 stated that the man who sires children with an “*Iweto*” cannot inherit anything in the homestead; that the “*Iweto*” had two sons and that they cannot share their father’s property while he is still alive.

29. DW4 stated that he is the one in possession of all the Title Deeds that are in his father’s name and that he has settled on his land.

30. The Plaintiff’s advocate filed brief submissions and authorities which I have considered.

31. It is not in dispute that the Plaintiff is the registered proprietor of a parcel of land number Konza South Block [...] measuring 4.0Ha (*the suit land*).

32. According to the copy of the Title Deed, the Plaintiff was registered as the proprietor of the said land on 8<sup>th</sup> May, 1998.

33. The Plaintiff also produced in evidence the membership card that was issued to him on 20<sup>th</sup> September, 2000 by Konza Ranching and Farming Co-operative Society Limited (*the Society*). It is on the basis of being a member in the Society that the Plaintiff was allocated the suit land.

34. The evidence of the Plaintiff was that the 1<sup>st</sup> Defendant’s husband, who was also the father of the 2<sup>nd</sup> Defendant, used to farm a portion of the suit land by virtue of being the man who sired children with an “*Iweto*” in a woman to woman marriage under the Kamba Customary Law.

35. The evidence of the Plaintiff and DW4 was that the Plaintiff had two (2) wives. However, the second wife married an “*Iweto*” under the Kamba Customary Law for the purpose of siring children for her.

36. According to the evidence of DW4, who is the Plaintiff’s son, it was his step-mother, as required under the Kamba Customary Law, who invited the 1<sup>st</sup> Defendant’s husband, the late M M, to sire children with her “*wife*.” DW4 stated that out of that relationship, his step-mother had two children.

37. The arrangement between the Plaintiff’s wife and Mr. M M was with the consent of the Plaintiff. Indeed, the 1<sup>st</sup> Defendant confirmed that she was aware that her late husband sired children with the Plaintiff’s wife.

38. The evidence of the Plaintiff was that under the Kamba Customary Law, a man who sires children in an “*Iwote*” arrangement does not own anything in the said homestead, including children and land.

39. Although the late M M utilized the suit land by tilling it, I am satisfied with the Plaintiff’s testimony that he was on the suit land with the Plaintiff’s permission due to the fact that he was living with one of his “*wives*” “*wife*” under the woman to woman marriage, and not under any other arrangement.

40. The Defendants’ Defence is hinged on the deceased’s alleged contribution to the purchase of the share in the Society by the late M M. However, the Defendants did not produce any Letters of Administration to show that they are entitled to the share of the late M in the suit land, if at all.

41. In any event, no evidence was placed before me to show that the late M contributed towards the buying of shares jointly with the Plaintiff in the Society.

42. The Plaintiff produced a membership card for share number 939 which was issued to him in the year 2000. Indeed, there is no evidence of the alleged payment of Kshs. 500 by the late Mbili in 1975 or at all.

43. The totality of the evidence before me shows that the late Mbili, who has his ancestral land in Kioi, was in possession of the suit land due to the marital status that existed between him and the “Iweto” under the Kamba Customary Law. Indeed, by virtue of that arrangement, his son, the 2<sup>nd</sup> Defendant, must have joined him on the land too with the permission of the Plaintiff. That arrangement did not, either under the Kamba Customary Law or otherwise, allow the late M and his siblings to own the land.

44. Considering that the Defendants have not claimed the suit land under the doctrine of adverse possession, which would not have succeeded in any event because the late M was allowed on the land by the Plaintiff and his wife, and in view of the fact that the Defendants did not prove that the late M M contributed towards the purchase of the suit land, I find that the Plaintiff has proved his case on a balance of probabilities.

45. As was held in the case of *Murtahar Ahmed Dahman & Another versus- Athuman Sudi, (2013) eKLR*, where a party enters upon the land of another, and erects a building with the permission of the land owner, such leave, tenancy or licence can be determined by giving a notice, requiring the house owner to remove his house and restore the land to the state it was before entry. The Defendants should give way.

46. For those reasons, the court allows the Plaint dated 5<sup>th</sup> August, 2013 as follows:

***a. A permanent injunction be and is hereby issued restraining the Defendants either by themselves or through their agents, servants, proxies, employees or any one acting on their behalf from entering, trespassing, farming, disposing, selling or in any other way dealing with all that parcel of land known as Konza South Block [...].***

***b. An order be and is hereby issued directing the Defendants to vacate the parcel of land known as Konza South Block 2/185 within sixty (60) days from the date of this Judgment.***

***c. The Defendants to pay the costs of the suit jointly and severally.***

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

**O.A. ANGOTE**

**JUDGE**