



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 322 OF 2017**

**JOHN MUTAVUTA NZUGA.....PLAINTIFF**

***VERSUS***

**MUSAU KASIMU.....DEFENDANT**

**JUDGEMENT**

1) This suit commenced by way of a plaint dated 15<sup>th</sup> August, 2017 and filed in court on the 16<sup>th</sup> August, 2017. The Plaintiff who has filed this suit in his capacity as the legal administrator of the estate of Nzunga Mutio has averred in paragraph 8 of his plaint that in or about the year 2015 he and his family were preparing to file a succession cause in respect of Nzunga Mutio's estate when they discovered that ownership of the land parcel number Mbitini/Kyemundu/40 had changed from that of Nzunga Mutio to the joint names of the said Nzunga Mutio and Kasimu Nthuku. The Plaintiff has further averred in paragraph 10 of his plaint that the Defendant misrepresented the facts that Kasimu Nthuku and Nzunga Mutio co-owned the said land parcel number Mbitini/Kyamundu/480 in two equal shares.

Arising from the above, the Plaintiff prays for judgment against the Defendant for:-

- a) **A declaration that the Defendant owns 1.5 Hectares of Mbitini/Kyemundu/480 and not ½ share of the same.**
- b) **An order directing the Land Registrar Makueni County to rectify the title deed of land parcel no. Mbitini/Kyemundu/480 indicating that Musau Kasimu owns 1.5 Hectares and 18.5 Hectares is owned by Nzunga Mutio.**
- c) **An order of permanent injunction restraining the Defendant by himself, his agent and/or servants, invitees and/or licensees from interfering and/or trespassing or in any other manner dealing with the 18.5. Hectares belonging to Nzunga Mutio.**
- d) **Costs of this suit and interest.**
- e) **Any other relief that the Honourable Court deems fit to grant.**

2) The claim is denied by the Defendant vide his statement of defence dated 30<sup>th</sup> August, 2017 and filed in court on 7<sup>th</sup> September, 2017. In paragraph 7 of his defence the Defendant has averred that the Plaintiff only administers 1/2 share of land parcel number Mbitini/Kyemundu/480 that belongs to his late father, Kasimu Nthuku Kyuki. Further, the Defendant has treated his plaint in ELC 311 of 2017 as the counter claim to the Plaintiff's suit. The plaint (and now treated as a counterclaim) is dated 13<sup>th</sup> July, 2013 and was filed in court on 14<sup>th</sup> July, 2017.

3) In paragraph 3 of his counterclaim, the Defendant has averred that at all material times he was the legal owner of all that parcel

of land known as Mbitini/Kyemundu/1107 having inherited it from his late father vide Machakos High Court Succession Cause No. 331 of 2015. He has also averred in paragraph 4 that the Plaintiffs entered into the aforementioned parcel of land without his permission, authority and or consent and have refused to vacate even after numerous requests made to them orally and in writing. He therefore prays for judgement against the Plaintiff for:-

**a) An order of injunction barring the Defendants whether by themselves, their servants and or agents from entering into, working on, excavating, cultivating, constructing on or in any other way interfering with land parcel number Mbitini/kyemundu/1107.**

**b) A declaration that land parcel number Mbitini/Kyenundu/1107 is the sole property of the Plaintiff.**

**c) An order that the Defendants give vacant possession of and/or be evicted from land parcel number Mbitini/Kyemundu/1107.**

**d) Costs of this sit.**

**e) Any other relief that the Honourable Court may deem fit and just to grant.**

4) During the hearing, the Plaintiff adopted his statement that he recorded on the 15<sup>th</sup> August, 2017 as his evidence. His case was that land parcel number Mbitini/Kyemundu/480 belongs to his late father, Nzunga Mutio. That his late father allocated one and a half (1 ½) hectares of land to the Defendant. That during the adjudication exercise in 1974, the land was registered in his father's name as a sole proprietor. That his father died in 1977. That when he went to the Deputy Commissioner's office on 27<sup>th</sup> March, 2017 to enquire about succession cause, he saw succession papers that indicated that the Defendant was the administrator of land parcel number Mbitini/Kyamundu/480. That there was indication that the Defendant was to take half of the land. He produced certificate of official search and a letter from the area chief as Pex Nos. 1 and 2 respectively.

5) On the other hand, the Defendant's case was that whereas the Plaintiff in this suit had sued him alone, he (the Defendant) had sued the Plaintiff jointly with two other persons. That he filed for probate and administration in respect of his father's estate upon which he was allocated the portion that belonged to his father. He said that his father was the younger brother of Mutio. That the latter died long before the survey exercise began upon which his son, Nzunga, was registered as co-owner of the property together with Kasimu who was his father.

6) The Defendant produced form P&A 54, minutes of land issue, form P&A 41, 2 copies of search, a copy of title deed and a letter dated 10<sup>th</sup> April, 2017 as Dex Nos. 1, 2, 3, 4, 5, 6 and 7 respectively.

7) The Plaintiff's evidence in cross-examination was that his father did not raise any objection in respect of land parcel number Mbitini/Kyemundu/480. He said that the reason why they did not file a succession cause was because his father had bequeathed the land to his two (2) wives. He said that although he knows Mzee Kasimu Nthuku, he did not know what the latter was to him. He said that Mutio Nthuku was his grandfather. He denied that Mbitini/Kyemundu/480 was owned jointly by his father and one Kasimu. He further denied the suggestion by the Defendant's counsel that the reason why Nzunga had the land registered in his name was due to the fact that his father was dead. He however agreed that Nzunga was registered as the inheritor of Mutio. He said that he came to be aware of the Defendant's registration as owner of half of land parcel number Mbitini/Kyemundu/480 on 27<sup>th</sup> March, 2017. He pointed out that he saw succession papers which showed that the Defendant had filed a suit on behalf of his father. He said that the area chief summoned his family to a meeting in the year 2014 where he heard one Peter Nthenge claim that he attended the survey exercise. He said that he disagreed with the findings (Dex No. 2) that the suit land was owned by Musau and Nzunga.

His evidence in re-examination was that he was not notified of the Machakos High Court Succession.

8) The Defendant's evidence in cross-examination was that he informed Kavuu (PW2) about his intention to file a succession cause but admitted that he had nothing to show that he ever informed her. According to him, the meeting that they had was to determine how the suit land was to be subdivided. He said that the Plaintiff and his relatives informed him that he did not own any portion. His evidence in re-examination was that his filing of the succession cause was prompted by the Plaintiff's declaration that he

(Defendant) did not own by portion of Mbitini/Kyemundu/480.

9) The Plaintiff called Katuni Ndetei (PW1) Alice Kavuu (PW2) and Monica Mukulu Nzunga (PW3) as his witnesses. The three witnesses adopted their respective witnesses' statements as their evidence.

10) Katuni's (PW1) evidence was that land parcel number Mbitini/Kyemundu/480 belonged to her.

11) Alice's (PW2) evidence was that the land in question belongs to Nzunga.

12) Katuni's (PW1) evidence in cross-examination was that she did not know the Defendant herein. Alice's (PW2) evidence in cross-examination was that land parcel number Mbitini/Kyemundu/480 belongs to Nzunga whose father's name was Mutio. She said that she and her children reside on the said parcel of land. According to her, the Defendant left the area when he was a young man. Monica's (PW3) evidence in cross-examination was that she inherited her father's land. She added that her father was known as Mutio. She said that Nthuku was related to Mutio and that he had his own parcel of land.

13) The Defendant called Nzioka Kasimu (DW1) as his witness. The latter adopted his statement as his evidence. He said that Kasimu was the younger brother of Mutio. That land parcel number Mbitini/Kyemundu/480 was surveyed and registered in the joint names of Nzunga Mutio and Kasimu Nthuku. That Nzunga's name was registered in place of his deceased father and that the suit land was ancestral. That Nzunga did not file any objection after the adjudication process. That the suit land is under the use of Nzunga and Mutio. He pointed out that Nzunga uses a larger portion than what he and the Defendant use.

14) Nzioka's (DW1) evidence in cross-examination was that he was a member of the adjudication committee in 1974. He said that the Defendant herein is his brother. He also said that the suit land is used by the household of Nzunga and that of Kasimu.

15) The Plaintiff's counsel in his written submissions recapped the evidence that was adduced by both parties and submitted that since 1984 when the suit land is said to have been registered in the joint names of the Defendant's late father and Nzunga Mutio, the former had never raised the issue of ever owning half the share of the suit land. The counsel further submitted that the Defendant did not inform the Plaintiff when he filed the succession cause number 331/15 at the High Court in Machakos. The counsel further alluded to the issue of the Defendant's claim being based on adverse possession which according to him is statute barred by virtue of sections 7 and 17 of the Limitation of Actions Act Chapter 22 the Laws of Kenya. The submissions by the Defendant's counsel were that the Defendant is not interested in claiming adverse possession of the share that was owned by his father since to do so would presuppose that the Defendant had illegal and exclusive, continuous and uninterrupted possession of the suit land. The counsel correctly submitted that the issue of adverse does not arise herein. The counsel further submitted that from the evidence on record, the suit was owned by the Plaintiff's father and the Defendant's father in equal shares and urged the court to so make a finding.

16) Having read the evidence on record as well as the submissions that were filed, I am of the view that the issues for determination are:-

**a) Whether or not Nzunga Mutio owns 18.5 hectares on land parcel number Mbitini/Kyemundu/480.**

**b) Whether or not the Defendant owns 1.5 hectares of land in land parcel number Mbitini/Kyemundu/480.**

**c) Whether or not the Plaintiff has trespassed into the Defendant's land parcel number Mbitini/Kyemundu/1107.**

17) From the evidence on record, both parties herein more or less rely on the same documents or exhibits. These documents were certificate of official search marked as Pex No. 1 by the Plaintiff and DEX no 4 and 5 by the Defendant. Both parties are in agreement that the Defendant is entitled to a portion of land out land parcel number Mbitini/Kyemundu/480, their only difference being the acreage that he is entitled to. None of them produced copies of green cards to show the history of proprietorship of the land in question. As such, my finding is that there is no evidence to show that one Nzangu Mutio owned 18.5 hectares of the suit land while the Defendant owned 1.5 hectares. Further, even though the Defendant has averred in his plaint (which he took as a counterclaim) that the Plaintiff has trespassed into his parcel of land number Mbitini/Kyemundu/1107, he has not adduced evidence to show when trespass by the Plaintiff began. The Defendant's evidence revolved around the issue of him being the owner of the

aforementioned Mbitini/Kyemundu/1107 and was silent on the issue of trespass. Granted, the Defendant acquired land parcel Mbitini/Kyemundu/1107 by virtue of certificate of confirmation dated 7<sup>th</sup> February, 2017 (Dex no. 1) in Machakos Succession Cause Number 331 of 2015. The Plaintiff says that he has challenged the grant at the High Court. I hold that the High Court is the proper forum to challenge the said grant and not this court. It seems to me therefore that the parties herein are litigating on an issue that touches on the estates of Nzunga Mutio and Kasimu Nthuku alias Kasimu Nthuku before this court instead of taking their dispute to the proper forum.

18) The upshot of the foregoing is that neither the Plaintiff nor the Defendant has satisfied this court that they have a cause of action against in each other that this court can adjudicate upon. In the circumstances, I will proceed to dismiss the Plaintiff's suit against the Defendant. I will also dismiss the Defendant's counterclaim (plaint) against the Plaintiff. The circumstances of this case dictate that each party should bear their own costs. I, therefore, order that each party to so bear their own costs.

**SIGNED, DATED and DELIVERED at MAKUENI this 21<sup>ST</sup> day of DECEMBER, 2018.**

**MBOGO C.G,**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Hassan for the Defendant

No appearance for the Plaintiff

Mr. Kwemboi Court Assistant.

**MBOGO G. C, JUDGE**

**21/12/2018**



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