



Case Number:	Environment and Land Case 16 of 2007
Date Delivered:	28 Nov 2019
Case Class:	Civil
Court:	Environment and Land Court at Machakos
Case Action:	Judgment
Judge:	Charles Gitonga Mbogo
Citation:	George Mwangela Munyeka v Joyce Mbenyi Mbilo & 5 others [2019] eKLR
Advocates:	Mr. Kamilu h/b for Mr. Nguli for the Defendants Mr. Masaku for the Plaintiff
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Machakos
Docket Number:	-
History Docket Number:	-
Case Outcome:	Suit dismissed with costs to the Defendants
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MACHAKOS (SITTING AT MAKUEND)

ELC CASE NO.16 OF 2007

GEORGE MWONGELA MUNYEKA.....PLAINTIFF

VERSUS

JOYCE MBENYI MBILO.....1ST DEFENDANT

WILLY MBILO.....2ND DEFENDANT

JOHN NYAMAI MBILO.....3RD DEFENDANT

PAUL MWANGANGI MBILO.....4TH DEFENDANT

SIMON MUTUA MBILO.....5TH DEFENDANT

MUTINDA MBILO.....6TH DEFENDANT

JUDGEMENT

1. By his amended plaint dated 10th November, 2009 and filed in court on 24th February, 2010 the Plaintiff prays for judgement against the Defendants jointly and severally for: -

a) A declaration that the registration of the 1st Defendants name as the co-owner was Fraudulent (sic), illegal and void for all purpose.

b) Rectification of the Register by ordering that the registration of the 1st Defendant as co-owner of Mweini Settlement Scheme be cancelled forthwith and in place thereof the said suit premises be registered in the Plaintiff's name with his wives Mbandi Mwangela and Martha Mwangela.

c) Costs of this suit.

d) Any other or further relief that this Honourable Court may deem fit and just to grant.

2. The Plaintiff has averred in paragraphs 3, 4, 5, 8, 9 and 10 of his amended plaint that at all material times to this suit he was a legal owner of land parcel No.257 in Mweini Settlement Scheme and the Defendants were licencees thereon, that in or about 1964, he moved to the suit premises which then was a government land, fenced it off and started living there, that in or about 1973, his young brother one Mbiilo followed him and requested him to allow him stay there as he (Mbiilo) sought to acquire his own land, that in or about 1989, the 1st Defendant's husband and father to the other Defendants died and with an agreement that they were only being licenced to bury the deceased in the suit premises without any claim of ownership, that in or about July 2006 or thereabouts, registration and or adjudication of Mweini Settlement Scheme was done and the suit premises were recorded in the names Mbandi Mwangela Munyeka, Martha Mwangela Munyeka and Joyce Mbiilo, that in or about July 2006, the 1st Defendant without the knowledge, consent or authority of the Plaintiff fraudulently registered her name as a co-owner of the suit premises. He (Plaintiff) avers that registration and or putting of the 1st Defendant's name as an owner of the said suit premises was and is illegal, fraudulent

and void.

3. The Plaintiff's claim is denied by the Defendants vide their joint statement of defence dated 22nd May, 2007 and filed in court on even date.

4. In paragraphs 4, 5 and 6 of their defence the Defendants state that the said land (i.e. parcel No.257 in Mweini Settlement Scheme) was acquired jointly by the deceased Mbilo Munyeka and the Plaintiff herein which is the reason why the Plaintiff never raised any objection during land adjudication process and permitted the land to be registered in the joint names of his wives and the 1st Defendant, that the disputed land was government land before adjudication was done and all the parties herein including the Plaintiff were mere squatters and, therefore, have got no cause of action against them, that they have been living in the said land for over 25 years and they have got permanent houses or homes built therein.

5. Hearing of the Plaintiff's case commenced on 23rd September, 2009 before I. Leonaola, J (as he then was). It was later heard by Ngugi, J on the 31st January, 2012. Later the file was placed before B.T. Jaden, J on 15th April, 2013 who gave directions that the case proceeds from where it had reached and hence the hearing of the case before me.

6. The Plaintiff who testified as PW1 told the court in his evidence in chief that plot No.251 Mweini Settlement Scheme is his property. He went on to say the land was previously government land and that he acquired it after independence. It was his evidence that he and others were arrested and sentenced to two months in prison for taking up the land. That when they were released, the District Commissioner ordered that Mweini and Ngulu Ranch be divided and that is how his land fell into Mweini. He said that he acquired the land alone and his brother, Mbilo, was then working with KPA Mombasa. That Mbilo later approached him and requested him to show him a place where to raise his children while he looked for his own land. The Plaintiff said that he agreed and showed Mbilo a place that he had already given to one Nyamai Kavie who was to move out so that Mbilo could settle. That soon thereafter, Mbilo's wife by the name of Kamene passed away and since the Plaintiff could not get a place to bury her, he called his uncles and they agreed to bury Mbilo's wife in his land. That by the time Mbilo remarried in 1978 or thereabout, he had not acquired a land of his own. That by the time of his death, Mbilo had acquired three (3) plots through the intervention of the Plaintiff. The plot numbers in question were No.129 Mweini Settlement Scheme, No.35932 Nguu Settlement Scheme and No.1080 Kitengei "B" Settlement which are all registered in the name of the 1st Defendant (P.Exhibit No.1). The Plaintiff went on to say that Mbilo died in 1989 and he was buried in the Plaintiff's land because he is Mbilo's elder brother and therefore he is like his father. He added that before Mbilo could be buried, an agreement dated 1989 (PMFI-2) was made by the family and those present included Muthini Ngumi and Mbevo Ngala. He said that it was agreed that Mbilo's family will never demand the Plaintiff's land which is registered in the names of his wives, Mbandi and Martha as well as the 1st Defendant. It was also his evidence that he had an eye operation and general malaise at the time of registration and that he was to discover later that he was not registered as owner of the land. That he also discovered that the 1st Defendant's name was also registered. That upon the said discovery, he protested to the District Land Adjudication office vide his undated letter produced in evidence as P.Exhibit No.3.

7. It was the Plaintiff's evidence that he never authorized the 1st Defendant's name to be included in the record. He went on to say that he was asked to institute this suit. He said that he previously had a case over the same land where one Mukenyi and another person were claiming a share of it. That the District officer held their claim to be baseless (P.Exhibit No.4). According to him, the Defendants have built temporary structures because the land does not belong to them.

8. The Plaintiff's evidence in cross-examination was that he acquired the land in 1964. He said that he and others were arrested because the land was initially government land. He said that he had no documents to show how he acquired the land. He also said that he did not have proceedings or documents to show that he was arrested for trespassing into the land. He said that he does not occupy ancestral land and that when he and others moved into the land, they had previously lived in Nzau area. He said that he and Mbilo never wrote agreement before he allowed the latter to move into the said land. He also said that he allowed Mbilo to put up a house in the land in 1975 because Mbilo was ill and he could not tell him to go to the ancestral land. He said that his wives failed to stop the registration of the 1st Defendant's name when the land was surveyed.

9. His evidence in re-examination was that the land in Nzau area was occupied by his father's family.

10. Mbevo Mwangela's (PW2) evidence in chief was that he lives in Nguu where he and the Plaintiff went to look for a shamba. That the area was a settlement area and that there were very few people at the time in the area. He said that the Plaintiff was alone when he went to look for land. He said that Mbilo Munyeka is a younger brother of the Plaintiff. That Joyce Mbenyi Mbilo is the

2nd wife of Mbilo. The witness added that when the Plaintiff went to look for land, he lived in the witnesses's house. That the Plaintiff bought land for Mbilo after the latter sent money to him. That when Mbilo's first wife died, she was buried in the Plaintiff's land since the former had no homestead in his land. He said that Mbilo had permission from the Plaintiff to bury his wife in the latter's parcel of land. That Mbilo too got sick and died and that since he had not built a homestead in his shamba, he was buried in the Plaintiff's land. This was in August, 1989 when Mbilo's sons agreed that they will not demand for land from the Plaintiff. According to him, the property belongs to the Plaintiff and not to Mbilo.

11. Mbevo's (PW2) evidence in cross-examination was that all the land including his belonged to the government and that survey was carried out two to three years from the date when he testified on 31st January, 2012. He said that neither he nor the Plaintiff bought their respective land but Mbilo having gone to the area after them bought his own. He said that during the survey, any person living on the land was registered as the owner. He said that he did not see Joyce sign the agreement made in 1989 before Mbilo could be buried. The witness said that survey was done openly and that the Plaintiff was present during the survey.

12. In his evidence in re-examination Mbevo (PW2) said that he was not sure if the Plaintiff was present during the survey. He maintained that Mbilo was buried on the Plaintiff's land.

13. Nyamai Kimeu's (PW 3) evidence in chief was that the Plaintiff is his brother in law while Mbilo is the Plaintiff's younger brother. He went on to say that he was living in Nguu in 1969 and that the Plaintiff was living in his own land. That Mbilo went to Nguu in the late 1970s and that he at first lived in the home of the Plaintiff as he did not have a shamba. That Mbilo later got his own land but he died in the 1970s before he could build a house. He said that when Mbilo's first wife died, she was buried in the Plaintiff's land as Mbilo did not own land at that time. The witness later changed his evidence and said that Mbilo had land but he was yet to build on it. The witness said that he wasn't there during survey exercise. He further said that he knows that the land is registered in the names of Mbandi Mwangela, Joyce Mbilo and Martha Mwangela. Mbandi and Martha are Mwangela's (Plaintiff's) wives.

14. His evidence in cross examination was that the Plaintiff is married to his sister. He went on to say that he is not out to help his sister. He said that Nguu was a settlement scheme and survey started about 3 years before he came to testify. According to him, the Plaintiff was sick during the survey. He further said that he wasn't there when the agreement to bury Mbilo in the Plaintiff's land was signed.

15. Masevu Ngumi Kithuma (PW4) in his evidence in chief adopted the statement that he recorded on 04th May, 2017 as his evidence.

16. His evidence is that the Plaintiff is his cousin whom he has known since childhood. That originally his father as well as the Plaintiff's father resided in their ancestral land in Nziu Makueni. That in 1964, the Plaintiff moved from Nziu to Katulani where he had acquired land. That in 1978 his brother, Mbilo Munyake who had gone to live in Mombasa in 1960 or 1961 went to seek for land from the Plaintiff. That he and other family members were called to a meeting where it was resolved that Mbilo be given a temporary place to stay while he looked for land of his own. That when Mbilo died in July, 1989, his family which includes the 1st Defendant sought permission to bury Mbilo on the Plaintiff's plot No.257 Mweini Settlement scheme as it is a taboo to bury someone on land that has no homestead. That Mbilo's family signed agreement to the effect that they would not claim any land from the Plaintiff despite the presence of two (2) graves on the land. He said that since the 1st Defendant and her children have their own parcels of land, the 1st Defendant's name should be removed from plot No.257.

17. His evidence in cross-examination was that his identity card shows that he was born in 1963. He agreed that in his statement, he indicated that he was five years old in 1963. He agreed that he had been told about whatever happened in the 1960s and 1970s. He also agreed that where the Plaintiff resides used to be government land from 1963 to 2006 and that title deeds have now been issued. He said that although he has indicated in his statement that the Plaintiff settled in the suitland in 1964, he had no documents to show that the land belongs to the Plaintiff. He agreed that all the Defendants have their homes in the suit property. He further agreed that some people who include the first wife of the Plaintiff's brother as well as the Plaintiffs died and were buried in the suit property. He said that he did not append his signature to the agreement of 13th August, 1989 that paved way for the burial of the Plaintiff's brother in the suitland. He admitted that he did not attend the adjudication process that took place in 2006 nor does he know anything to do with it. He said that the names in the register are those of the Plaintiff's two wives as well as the name of the 1st Defendant. He pointed out that the Plaintiff's name does not appear in the register. He further said that the Defendants have other parcels of land but there is no limit as to the number of parcels of land that one can acquire.

18. Masevu's (PW4) evidence in re-examination was that even though the agreement of 13th August, 1989 does not refer to plot No.257, it relates to the same land.

19. Martha Mwangela (PW5) adopted her statement that she recorded on 04th May, 2017 as her evidence. Her evidence was that plot No.257 belongs to the Plaintiff. She went on to say that the Defendants do not reside on the said plot even though the 1st Defendant has a house on the plot. She said that she could not tell the basis upon which the Defendants came to reside on the suitland and added that there are people who though not belonging to the Plaintiff's house are buried in the suitland.

20. Her evidence in cross-examination was that when she married the Plaintiff a long time ago, she found him and Mbilo residing on the suitland. She revealed that Kamene who was Mbilo's first wife was buried on the suitland and that Mbilo married the 1st Defendant upon Kamene's demise. She further said that she was living in the suitland when the survey officers visited it in 2006. She said that she, her co-wife as well as the 1st Defendant names were recorded in the register and that the Plaintiff did not object to the registration. She revealed that the Plaintiff was sick at the particular time and hence his name could not be inserted. According to her, the first Defendant is not a co-owner of the suitland.

21. Her evidence in re-examination was that she does not know how the 1st Defendant's name was included in the register.

22. On their part, the 1st Defendant, Joyce Mbenyi Mbilo, 4th Defendant, Paul Mwangangi Mbilo and their witness, James Mutinda Kavita (DW1) adopted their respective statements which they recorded on 04th July, 2018 as their evidence.

23. The 1st Defendant's evidence in chief was that she is the wife of the late Mbilo Munyake while the 2nd to 5th Defendants are his biological sons with his late first wife. That the 6th Defendant is her biological son with Mbilo. That the Plaintiff is Mbilo's elder brother and that when she married Mbilo in 1978, she found him settled and living in the suit property and that she and her co-Defendants have been living on it ever since. That the suit property did not have a title deed then nor had it undergone the adjudication process. That when her husband died in 1989, she buried him on the suit property and there was no dispute whatsoever on the issue of where he was to be buried. That the agreement dated 13th August, 1989 purportedly executed by the 2nd and 3rd Defendants conferring them rights to bury her deceased husband on the suit property while acknowledging that they had no legal claim over the said property was not signed by the 1st and 2nd Defendants. She said that at the time when the agreement was purportedly drawn, the body of her deceased husband was still lying in a mortuary in Mombasa and secondly, the suit property had not been adjudicated upon and that no one including the Plaintiff had any legal right over it. That the agreement did not specify the suit property as plot No.257 Mweini Settlement Scheme and thus it was vague for all intends and purposes.

24. It was also her evidence that in the year 2006, the government of Kenya commenced the process of adjudication of land in Mweini Settlement Scheme amongst other schemes. That the Plaintiff and his two (2) wives were present when officers from the land adjudication office Makueni who were working in conjunction with village committees visited the suit property. That her name and those of other Plaintiffs' two (2) wives were called out in the presence of the Plaintiff so that they could be registered. That it was the Plaintiff who voluntarily offered to have the names of his wives registered. She said that she was surprised to learn that the Plaintiff had written a letter to the District Land Adjudication and Settlement Officer – Makueni to complain that her name was erroneously included in the adjudication register and that only the names of his wives should have been entered. That when the adjudication office declined to have the register rectified, the Plaintiff approached this court. According to her, the Plaintiff's claim should fail since he has no proof whatsoever that the adjudication process was marred with fraud and/or misrepresentation on the part of the Land Adjudication and Settlement officers nor did he object during the adjudication process. She said that her name cannot be removed from the adjudication register on the grounds that she has other parcels of land in her name.

25. Her evidence in cross-examination was that when she married her husband, she found him residing in plot No.257. She said that she did not know that he had approached the Plaintiff in order to allow him to reside on it while he (her husband) looked for a parcel of his own. She revealed that she only saw the agreement that her sons signed before her husband could be buried on the suitland after this case was filed in court. She pointed out that she did not know that the agreement prohibited her and her co-Defendants from building on the suitland. She admitted that the adjudication committee recorded her name as one of the people who were to be allocated land. She said that she had another parcel of land which they purchased and pointed out that the committee did not enquire if she had other parcels of land. She disclosed that her parcels of land were bought by her late husband. She went on to say that she did not know if the Plaintiff was ailing in 2008 and could not tell why his name was omitted during registration.

26. Her evidence in re-examination was that the Plaintiff was present throughout the adjudication process and added that she did not

prevent him from being registered in the adjudication register.

27. The 4th Defendant, Paul Mangangi Mbilo gave evidence which was similar to that of the 1st Defendant.

28. His evidence in cross-examination was that he does not know how his father came to be on the suitland. He admitted that he and others have built on plot No.257 and added that he resides on another parcel of land. He said that he was aware that his father had other parcels of land. He further said that his mother represented the family during the adjudication process. He also said that James Mutinda (DW 1) used to accompany the adjudication committee during the adjudication process.

29. James Mutinda Kavita's (DW1) evidence in chief was that he knows all the parties in this suit at a personal level. That ever since he was born, he found the Plaintiff and his brother, Mbilo Munyeka living in the suit property and that at the particular time it had no title deed. That Mbilo died in 1989 and was buried in parcel number 257 Mweini Settlement Scheme and as far as he is concerned, there was no dispute whatsoever as to where the deceased was to be buried.

30. The witness went on to say that when adjudication process began in 2006, he accompanied the officers from the Land Adjudication Office as he had elected to chair Mweini Settlement Scheme village committee. He added that the purpose of the village committee was to direct the officers from the Land Adjudication Office to the people and the parcels of land that they had occupied. That when the team visited his village, the Plaintiff, his two wives and the 1st Defendant were present and that it was the Plaintiff himself who chose to have his two wives registered. He said that the 1st Defendant was also registered together with the Plaintiff's two wives. He added that nobody raised allegations of fraud, misrepresentation and/or illegality during the adjudication process. He said that he later came to learn that the Plaintiff had complained about the 1st Defendant's name being in the register and wanted the Defendant's name to be deleted.

31. James (DW 1) admitted in his evidence in cross-examination that the Plaintiff preceded his younger brother (Mbilo) in the area. He said that the Plaintiff allowed his brother to build on the suitland. He further said that he was present when Mbilo's first wife died. He said that he was aware of any agreement that preceded the burial of the husband of the 1st Defendant. He reiterated that the Plaintiff's two wives and the 1st Defendant were recorded in the register. He revealed that the Plaintiff was present when all this took place and that the Plaintiff was not sick. He further said that there was no bar for one to be registered even if they had other parcels of land and disclosed that he did not know that the 1st Defendant had other parcels of land.

32. His evidence in re-examination was that the Plaintiff was the one who directed the surveyor to record the names of his two wives.

33. In their written submissions, the Plaintiff's Counsel framed three issues for determination namely: -

(a) Whether the Defendants are mere licensees''

(b) Whether the suit premises is ancestral''

(c) Whether the registration of the 1st Defendant as a proprietor of the suitland was fraudulent''

34. On the other hand, the Counsel for the Defendants framed two issues namely:-

(a) Whether the Plaintiff was capable of granting a license in the suit property''

(b) Whether the Plaintiff has proved fraud, misrepresentation and/or illegally on the part of the 1st Defendant to warrant an order for rectification of the register''

35. On whether the Defendants are mere licensees, the Plaintiff's Counsel submitted that the Plaintiff allowed his younger brother to live in the suit property temporarily while he looked for his own parcel of land in the neighbourhood. The Counsel went on to submit that when the Plaintiff's brother died, he could not be buried on the suit property until an agreement was signed by his family acknowledging that they would not claim title to the said property. It was also submitted that the Plaintiff was indisposed

during the adjudication process and that the 1st Defendant's name was erroneously registered in the title for the suit property. That when the Plaintiff recovered and complained, he was advised by the adjudication committee to seek remedy in court. The Counsel submitted that it is trite law that a licensee cannot claim ownership against the licensor and cited the case of *Associated hotels of India Ltd vs. R. N. Kapoor (1959) A.R 1262 1960 SCR (1) 368* where the concept of licensee was summed as follows: -

“if a document gives only a right to use the property in particular way or under certain terms while it remains in the possession and control of the owner thereof, it will be a license. The legal possession, thereof, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property.”

The above authority is of persuasive nature and not binding on this Court.

36. The Counsel pointed out that the agreement dated 13th August, 1987 is proof that the Defendants were only in occupation of the suit premises with permission of the Plaintiff.

37. On whether the suit premises is ancestral, the Plaintiff's Counsel submitted that the Plaintiff in his evidence in cross-examination told the court that he acquired the suit property in 1964 from the government and as such, it cannot be ancestral land.

38. On the issue of whether the registration of the 1st Defendant as a co-proprietor of the suitland was fraudulent, the Plaintiff's Counsel submitted that the 1st Defendant misrepresented herself as co-owner to the adjudication committee. The Counsel pointed out that act of misrepresentation was fraudulent.

39. On the other hand, the Defendants' Counsel's submissions regarding the issue of whether the Plaintiff was capable of granting licence in the suit property were that **The Government Land Act** (now repealed) defined *“unalienated Government land' as Government Land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.”*

40. The Counsel went on to cite Part VI of the **Government Land Act** which at **Section 40** provided as follows: -

(i) Licences to occupy alienated Government land for temporary purposes may be granted by the Commissioner.

(ii) Unless it is expressly provided otherwise, a licence under this section shall continue for one year and thenceforward until the expiration of any three months' notice to quit: Provided that the notice to quit may be served upon the licensee at any time after the expiration of nine months from the date of the licence.

(iii) The rent payable under a licence under this section, the period and the agreements and conditions of the licence shall be such as may be prescribed by rules under this Act or as may be determined by the Commissioner.

(iv) The benefit of a licence under this section may, with the consent of the Commissioner, be transferred by the licensee, and the transfer and the consent thereto shall be endorsed on the licence.

41. The Counsel submitted that from the facts of this case, the suit property was an unalienated government land until the year 2006 when the adjudication process was conducted. The Counsel added that the Plaintiff gave evidence that in or about the year 1964 he moved into the suit property which was then government land, fenced it and started living on it. That in or about 1973, the Plaintiff's younger brother, one Mbilo, followed the Plaintiff and requested him to allow him stay on the suit property as he sought to acquire his own land. The Counsel went on to submit that the 1st Defendant gave uncontroverted evidence that at the time she married her late husband, Mbilo Munyeka, in the year 1978, she found him settled and living on the property. The Counsel further submitted that the 1st Defendant testified that her late husband constructed permanent houses on their own compound in the suit property and away from the Plaintiff's homestead where she lives to date with her children including her co-Defendants. The Counsel pointed that since the suit property was government land, the Plaintiff could not claim or assert any legal right over the land. It was also submitted that the Plaintiff has not proved to this court that he had a licence from the Commissioner of Lands so that he could benefit from section 40 (iv) of The Government Land Act. The Counsel stated that the Plaintiff lived on the suit property without a licence just like the 1st Defendant's deceased husband and his family and as such, the Plaintiff could not pass any

licence to any other person.

42. It was also the Counsel's submissions that the agreement dated 13th August, 1989 in which the Plaintiff claims that he gave licence to the family of the late Mbilo Munyeka to bury his body in the suit property is devoid of the tenets of any valid agreement in law. The Counsel pointed out that the 1st Defendant in her evidence vehemently denied knowledge of the said agreement. The Counsel asked the court to take note that the invalid and illegal agreement is the only document that the Plaintiff has put before this court to claim ownership and licensee rights on a public land.

43. On whether the Plaintiff has proved fraud, misrepresentation and/or illegality on the part of the 1st Defendant to warrant an order of rectification of the register, the Defendants' Counsel submitted that fraud must be proved through cogent evidence whose degree of proof must be higher than ordinary proof of balance of probabilities. The Counsel cited the case of *Koinange & 13 others vs. Koinange (1986) KLR 23* where it was held inter alia, that: -

"a) It is well established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud had the burden of proving it and had to discharge that burden.

b) Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities."

44. The Counsel submitted that the law relating to rectification of the land register is provided for in section 80 of the *Land Registration Act No.3 of 2012* as follows: -

"Rectification by order of court

80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default."

45. Arising from the above, the Defendant's Counsel submitted that though the Plaintiff has in his amended plaint enumerated particulars of fraud, the same does not show any slight form of the same. The Counsel further submitted that although the Plaintiff contends that he was ill and not present during the adjudication process when the name of the 1st Defendant Joyce Mbandi Mbilo, was erroneously entered in the adjudication register, he does not allege fraud on the part of the Land Adjudication officers. The Counsel went on to submit that Martha Mwangela (PW5) in her evidence in cross-examination told the court that it was the Plaintiff who requested the surveyor to enter the names of his two wives in the register since he was sick.

46. Having read the evidence adduced by the parties herein as well as the submissions that were filed, it is clear that the suit property was part of unalienated government land under The Government Land Act up to the year 2006 when adjudication process began. The Plaintiff is on record as having stated that when he moved into the suitland in 1964, he was arrested and imprisoned for trespass. From the evidence on record the Defendants were in the suitland as at the time of the adjudication. Even though the Plaintiff has indicated he was the one who allowed his late brother, Mbilo and who is the husband of the 1st Defendant and father to the 2nd to 6th Defendants to settle on the suitland while he looked for a land of his own, it is clear to me that the Plaintiff had no authority to licence his brother since the land was part of the unalienated government land. Consequently the agreement dated 1989 (P.Exhibit No.2) purporting to allow the Defendants to bury the late Mbilo on the suitland is of no probative value.

47. From the evidence on record, the Plaintiff was present when the adjudication process commenced. It is also a fact that he was the one who asked the adjudication officers/surveyors to register his two wives as co-owners of the suit property. Neither he nor his wives objected when the 1st Defendant was registered as a co-owner of said land. In any case, the Plaintiff has not by way of evidence shown that the 1st Defendant fraudulently had her name registered as a co-owner. There is no evidence to suggest that the 1st Defendant ought to have consulted the Plaintiff before she was so registered nor is there evidence to show how the 1st Defendant

misrepresented herself to the Registrar of Makueni Settlement Scheme that she was a co-owner of the suitland. That would explain the reason why the land officials refused to entertain the Plaintiff's complaint to have the 1st Defendant's name deleted from the register. I agree with the Defendants' Counsel that the Plaintiff has not proved allegations of fraud against the 1st Defendant to the required standard. The upshot of the foregoing is that the Plaintiff's suit against the Defendants must fail. In the circumstances, I hereby proceed to dismiss it with costs to the Defendants.

Signed, Dated and Delivered at Makueni this 28th day of November, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Kamilu holding brief for Mr. Nguli for the Defendants

Mr. Masaku for the Plaintiff

Mr. Kwemboi – Court Assistant

MBOGO C. G., JUDGE,

28/11/2019.



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