



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 53 OF 2012**

**SWAFIYA SWALEH MAHDI (AKA SWAFIYA ABDALLA)**

**FATUMA SWALEH MAHDI ( *suing as administrators & legal representative of Swaleh Mahdi (deceased)* ).....**PLAINTIFFS****

**=VERSUS=**

**CHARLES CHARO**

**JANE (AKA ROSE**

**PONDA).....**DEFENDANTS****

**J U D G M E N T**

**Introduction:**

1. This suit was commenced by way of a Plaint dated 22<sup>nd</sup> November 2012 and filed on the same day.
2. In the Plaint, the Plaintiffs averred that the Estate of Swaleh Mahdi Swaleh is the registered owner of the remainder of all that land known as Plot 358 Malindi, originally measuring 112 acres.
3. The Plaintiffs have further averred that on dates unknown to them, the 1<sup>st</sup> Defendant, purporting to have an interest in part of plot number 358 Malindi sold or pretended to sell a portion of the suit property measuring approximately two acres to the 2<sup>nd</sup> Defendant.
4. The Plaintiffs are seeking for a declaration that the sale of part of the suit property by the first Defendant to the second Defendant is null and void for being contra statute and for want of interest; an order of eviction to issue directing the removal of the Defendants and for a mandatory injunction to be issued against the 2<sup>nd</sup> Defendant compelling her to remove the developments on the suit property.
5. The Plaintiffs have particularized what they consider to be acts of fraud on the part of the Defendants in their Plaint.
6. The 1<sup>st</sup> Defendant entered appearance through his advocate and filed a Defence.
7. In the Defence, the 1<sup>st</sup> Defendant averred that he was born on the suit property in 1949; that in Mombasa HCCC No. 155 of 1993 (os), the court ordered that he should be compensated for his house and developments which has never been done to date and that he has always lived in the suit property with the 2<sup>nd</sup> Defendant.
8. In reply to the 1st Defendants' Defence, the Plaintiffs averred that the Defendants are not related by blood or by marriage and that the 2<sup>nd</sup> Defendant entered the suit property with the permission

of the 1<sup>st</sup> Defendant.

**The Plaintiffs' case:**

9. The surveyor, PW1, informed the court that in the year 2013, he received instructions from the Plaintiffs' advocate to carry out the survey of plot number 5499 Malindi, original number 1738/3, and to identify the boundaries of the said property and encroachments.
10. It was the evidence of PW1 that he found out developments and fencing inside the said plot.
11. PW1 informed the court that originally, the whole land was known as plot number 258. However, when a road was created, the plot changed its number from 258 to 1738/3.
12. In cross-examination, PW1 stated that when he visited the suit property, he did not find the Defendants.
13. It was his evidence that the suit property measures 15.13 Ha and the same is not fenced. PW1 informed the court that the house he identified as per the instructions given to him is the one boarded red in his report. It was his evidence that the said house stood on land measuring 1/8 of an acre and was surrounded by a wire fence.
14. The process-server, PW2, stated that he served the Defendants with notices to vacate the suit property on 22<sup>nd</sup> November 2012.
15. It was his evidence that he visited the suit for the purposes of service. On the first day, he met the 1<sup>st</sup> Defendant with his wife. When he went back on the second day, he found the 2<sup>nd</sup> Defendant cultivating her portion of land which had a barbed wire fence with one house inside the said fence.
16. The 1<sup>st</sup> Plaintiff, PW3, informed the court that his late father purchased plot number 358 in 1987.
17. It was the evidence of PW3 that the land in question has squatters, coconut trees, mango trees, a mosque and madrasa.
18. PW3 stated that his late father sold some portions of the land to people and also leased part of the land to Safaricom and Airtel.
19. According to PW3, his late father was sued in Mombasa Miscellaneous Civil Suit Number 155 of 1993 (o.s) in which the 1<sup>st</sup> Defendant, amongst other squatters, were ordered to vacate the suit property.
20. PW3 informed the court that in November 2012, he received a call from the 2<sup>nd</sup> Defendant requesting to purchase a portion of the suit property. However, he later on learnt that the 2<sup>nd</sup> Defendant had purchased a portion of their land from the 1<sup>st</sup> Defendant whereafter she sunk a well and fenced it.
21. The evidence of PW3 was that the 2<sup>nd</sup> Defendant did inform him that the agreement between herself and the 1<sup>st</sup> Defendant was witnessed by the Chief and when she realised that the 2<sup>nd</sup> Defendant had taken possession of a portion of their land he caused a demand letter to be served upon her.
22. It was the evidence of PW3 that instead of the 1<sup>st</sup> Defendant vacating the land as ordered by the court, he is selling it.
23. In cross-examination, PW3 stated that the 1<sup>st</sup> Defendant was to vacate their land pursuant to the order of the court in Mombasa HCCC No. 155 of 1993 (os) after being compensated for the developments that were on the land.
24. PW3 stated that once the valuation of the developments by the squatters on their land has been done, they shall compensate them as ordered by the court.
25. PW3 denied that the 2<sup>nd</sup> Defendant is the 1<sup>st</sup> Defendant's wife.

**The 1<sup>st</sup> Defendant's case:**

26. The 1<sup>st</sup> Defendant informed the court that he was born on the suit property in 1949 and has cultivated the land since then.
27. It was the evidence of the 1<sup>st</sup> Defendant that his parents also lived on the suit property and that when they died, they were buried on the suit property.
28. DW1 informed the court that the court in Mombasa HCCC No. 155 of 1993 (os) ruled that they should be compensated by the Plaintiffs herein before they could move out of the suit property.

29. According to DW1, the 2<sup>nd</sup> Defendant is his sister. It was his evidence that the 2<sup>nd</sup> Defendant divorced her husband and that is why she went back to the suit property, which is her parents' home.
30. DW1 denied ever selling the suit property to the 2<sup>nd</sup> Defendant. It was his evidence that although the land is occupied by fifteen family members, the Plaintiff chose to sue him and the 2<sup>nd</sup> Defendant.
31. DW1 informed the court that he was willing to vacate the suit property once the Plaintiffs compensate him for the developments that he has put up on the suit property.
32. In cross-examination, DW1 stated that he was aware of the Judgment in HCCC NO. 155 of 1993 (OS). It was his evidence that he was willing to purchase the two acres that he is occupying.
33. It was the evidence of the 1<sup>st</sup> Defendant that the 2<sup>nd</sup> Defendant is her step sister by virtue that they had one father but different mothers.
34. DW1 informed the court that he invited the 2<sup>nd</sup> Defendant, as her step sister, on the suit property. DW1 admitted that indeed the 2<sup>nd</sup> Defendant fenced off the portion that he had shown her and put up a structure.
35. DW1 stated that he has since chased away the 2<sup>nd</sup> Defendant from the suit property.
36. The 2<sup>nd</sup> Defendant did not testify.

#### **The Plaintiffs' Submissions:**

37. The Plaintiffs' advocate submitted that the Plaintiffs' case is for ejectment of the Defendants from the portion of land they wrongfully occupy.
38. Counsel submitted that the Judgment of the High Court in Mombasa has not been set aside; that a squatter whose suit for adverse possession has been refused and dismissed acquires no title to land on which he is squatting and that the 1<sup>st</sup> Defendant could not deal with the suit land in any manner inconsistent with the Plaintiffs' title.
39. Counsel submitted that the act of the 1<sup>st</sup> Defendant inviting the 2<sup>nd</sup> Defendant to occupy and work on part of the suit property was wrongful ab initio; that the 2<sup>nd</sup> Defendant having failed to defend the suit, the evidence by PW3 should be believed and that the evidence of DW1 is unbelievable.
40. The Plaintiff's counsel submitted that an action for recovery of land is the remedy available against a trespasser by reason of the decree in a previous suit and that there cannot be concurrent possession.
41. Counsel submitted that the special procedure governing adverse possession does not admit a counter-claim; that a party cannot raise a counter-claim in such an action and that the present cause of action is in respect to new trespass.

#### **The Defendants' submissions:**

42. The Defendants' advocate submitted that this suit is bad in law and that the same is res judicata.
43. Counsel submitted that the only cause of action that was available to the Plaintiffs was to file an application in Mombasa HCCC No. 155 of 1993 (OS) pursuant to the provisions of Section 34 of the Civil Procedure Act.
44. The 1<sup>st</sup> Defendant's counsel submitted that any order of eviction issued herein will amount to this court sitting as an appellate court considering that in Mombasa High Court Misc Suit No. 155 of 1993 (O.S), the court ordered the Defendants to be compensated before they could move out of the suit property.
45. The 1<sup>st</sup> Defendant's advocate finally submitted that the Plaintiffs failed to produce any sale agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant; that this court cannot nullify what does not exist and that the only place the 2<sup>nd</sup> Defendant knows as her home was the suit property.

#### **Analysis and findings:**

46. It is not in dispute that the Estate of the late Swaleh Mohammed Swaleh is the registered proprietor of portion number 358 measuring 112.8 acres. After the creation of the road that passed

- through portion number 358, the number changed to portion number 1738 Malindi.
47. It is also not in dispute that on 12<sup>th</sup> November 2002, Waki J, as he was then, delivered a Judgment in Mombasa Misc Civil Suit No. 155 of 1993 (os).
48. The said suit was filed by the 1<sup>st</sup> Defendant herein, together with eight other squatters against the late Swaleh Mohammed Swaleh in respect to the suit property.
49. In that suit, the 1<sup>st</sup> Defendant, together with the eight other squatters were seeking for the determination of the question of whether they have become entitled by adverse possession to the suit property.
50. The court dismissed the suit but directed that reasonable compensation be paid to the Plaintiffs therein for “residential structures of whatever nature and commercial plants on the small portions they occupy.”
51. The question of the proprietorship of the suit property viz-a-viz the continued occupation of the same by the 1<sup>st</sup> Defendant was therefore conclusively dealt with in Mombasa Misc. Civil suit number 155 of 1993 (O.S).
52. The first issue that I am supposed to address is whether this suit is res judicata.
53. Section 7 of the Civil Procedure Act provides as follows:-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

54. Although the Plaintiffs and the 1<sup>st</sup> Defendant were parties in Mombasa High Court Misc. Civil Application No. 155 of 1993 (O.S), the 2<sup>nd</sup> Defendant was not a party to that suit.
55. Although the evidence of DW1 was that the 2<sup>nd</sup> Defendant is his step sister, it cannot be said that the 2<sup>nd</sup> Defendant is now litigating under the same title.
56. Consequently, it cannot be said that this suit is res judicata considering that the 2<sup>nd</sup> Defendant, who has been accused of trespass on the suit property, was not a party to the suit in Mombasa.
57. The second issue that I am supposed to determine is whether the Plaintiffs are entitled to the orders sought in the Plaint.
58. According to the evidence of the 1<sup>st</sup> Plaintiff, PW3, the 2<sup>nd</sup> Defendant called him and showed her interest in purchasing a portion of the suit property. However, before they could complete the transaction, the 1<sup>st</sup> Plaintiff she was informed that the 1<sup>st</sup> Defendant had sold to the 2<sup>nd</sup> Defendant a portion of the suit property for Kshs.800,000.
59. The surveyor, PW1, informed the court that when he visited the suit property to investigate whether indeed the 2<sup>nd</sup> Defendant was in occupation of a portion of the suit property, he found that she was indeed in occupation of an area measuring 0.383 Ha within the suit property.
60. PW1 prepared a report and a survey plan which he produced in evidence. The survey plan showed the area that the 2<sup>nd</sup> Defendant occupied as at the time of the visit by the surveyor.
61. The evidence of PW1 was corroborated by process-server, PW2, who informed the court that when he went to serve the 2<sup>nd</sup> Defendant, she found her on the farm working.
62. It was the evidence of the PW2 that the 2<sup>nd</sup> Defendant had a house on the farm which was surrounded by a barbed wire fence.
63. The 1<sup>st</sup> Defendant, DW4, informed the court that he invited the 2<sup>nd</sup> Defendant on the suit property after she divorced her husband.
64. According to DW1, the 2<sup>nd</sup> Defendant was her step sister and he did not see anything wrong allowing her on the land.
65. The 2<sup>nd</sup> Defendant neither filed a Defence nor testified. The allegations against her by the Plaintiffs are therefore uncontroverted.
66. As I have already stated, the issue of the proprietorship of the suit property was settled by Waki J, as he was then, in Mombasa High Court Misc. Civil Application No. 155 of 1993 (O.S).

67. In that case, the court found that the 1<sup>st</sup> Defendant had no known legal right over the suit property. The only thing that the 1<sup>st</sup> Defendant was entitled to was compensation for the structure(s) that he had on the land and the crops.
68. Consequently, the 1<sup>st</sup> Defendant could not invite and apportion to the 2<sup>nd</sup> Defendant part of the suit property because he had no legal mandate to do so.
69. If indeed the 2<sup>nd</sup> Defendant was the 1<sup>st</sup> Defendant's step sister, then he should have stayed with her in his house and not to allocate her a separate piece of land as he purported to do.
70. For that reason, I find and hold that the sale or alienation of the suit property to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant was unlawful. The 2<sup>nd</sup> Defendant should give vacant possession of the portion of the suit property she is occupying forthwith.
71. The 1<sup>st</sup> Defendant is still occupying the suit property by virtue of the decision in Mombasa High Court Misc. Civil Suit No 155 of 1993 (OS).
72. The Plaintiff produced in evidence the order of Mukunya J in the said suit which shows that the process of compensating the 1<sup>st</sup> Defendant, together with the other Plaintiffs in Mombasa High Court Misc. Application No. 155 of 1993 (O.S) has been put in motion.
73. Consequently, the 1<sup>st</sup> Defendant cannot be evicted from the suit property vide this suit notwithstanding that he purported to allocate a portion of the land to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant can only be ejected from the suit property after the process of compensation has been finalised as ordered by the court in Mombasa High Court Misc. Civil Suit No. 155 of 1993 (O.S).
74. For those reasons, I partially allow the Plaintiff's Plaint dated 22<sup>nd</sup> November, 2012 in the following terms:

**(a) A declaration be and is hereby issued that the sale or alienation or apportionment of part of plot number 358 Malindi measuring approximately 2 acres by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant is null and void ab initio.**

**(b) An order of eviction, be and is hereby issued, directing the removal of the 2<sup>nd</sup> Defendant from the suit land, or any part of plot number 358 Malindi.**

**(c) A mandatory injunction be and is hereby issued compelling the 2<sup>nd</sup> Defendant by herself, or through her employees, workmen, agents, or otherwise howsoever to remove at her expense the fence and any development on that part of plot number 358 Malindi, so as to restore the land to the state it was in before her entry thereon.**

**(d) The Defendants to pay the costs of the suit.**

Dated and delivered in Malindi this 17<sup>th</sup> day of April, 2015.

**O. A. Angote**

**Judge**