



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 171 OF 2008**

**INLAND BEACH ENTERPRISES LIMITED .....PLAINTIFF**

**VERSUS**

- 1. SAMMY CHEGE**
- 2. MR. KHAEMBA**
- 3. MISHI SAID MWANGOLO**
- 4. RAMAH MWANGOLO**
- 5. SELEMANI MATANO**
- 6. BINTI MWANGOLO**
- 7. SAID MWANGOLO**
- 8. KABWERE JUMBE**
- 9. WILLIAM SHIVACHI**
- 10. HEZRON INDIAZI**
- 11. JACOB MALUKI**
- 12. SAMMY KILONZO**
- 13. OSCAR MWADIME**
- 14. PASCAL MWAKAZI**
- 15. ALL ILLEGAL OCCUPANTS ON  
PLOT L.R. NO.MN/VI/3661, MOMBASA**

**.....DEFENDANTS**

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

The Plaintiff in an Amended Plaint dated 10<sup>th</sup> September 2010 seeks the following orders against the Defendants:-

*(a) A Declaration that the Defendants' actions are illegal null and void and amounts to trespass upon the plaintiff's property.*

*(b) A mandatory injunction compelling and/or directing the Defendants to vacate and quit from the Plaintiff's land known as L.R. No. MN/VI/3661 situated at Miritini Mombasa and a further order directing the Defendants to pull down all structures standing on the plaintiff's land.*

*(c) Costs of the suit.*

The Plaintiff, a Limited Liability Company pleaded in the said plaint that:-

- At the material times to the suit, it was the registered owner of all that parcel of land known as L.R. No. MN/VI/3661 situated at Miritini, Mombasa District measuring approximately 7.997 hectares.
- On diverse dates in the months of May, June, and July, 2007 the Defendants illegally entered upon and trespassed on to the plaintiff's parcel of land stated above and started erecting structures, thereon without any colour of right and/or consent of the Plaintiff.
- The Defendants have wrongly and illegally remained on the parcel of land thus continuing to trespass and putting up structures without the authority or consent of the Plaintiff thereby denying the Plaintiff the use of the land as the owner.
- The Plaintiff is apprehensive that the Defendants by their continued trespass and illegal occupation of the suit land in their misplaced belief that the same is public land intend to illegally disposses the Plaintiff of the same.
- The Plaintiff's claim against the Defendants jointly and/or severally is for an order to compel the Defendants to stop any further acts of trespass and vacate from the Plaintiff's land or any part thereof.
- There is no other suit pending and there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter.
- Despite Demand and Notice of Intention to sue herein been issued the Defendants have neglected and/or refused to vacate the Plaintiff's land making this suit necessary.

In the said suit, the Plaintiff named fourteen Defendants expressly.

However, the plaintiff also referred to "All illegal occupants of Plot No. L.R. No. MN/VI/3661/Mombasa". The Plaintiff does not give the names and numbers of the said alleged illegal occupants.

The record shows that the Plaintiff's process server was unable to serve the Defendants with the summonses and plaint on 27.05.2009, when he became apprehensive about his safety. He had to be escorted from the suit land by the Fourth Defendant.

As a result, the Plaintiff obtained leave of the Court to serve the Defendant by way of substituted service through Advertisement in the 'Standard Newspapers' and affixing copies of the summons on the Court Notice Board.

The plaintiff also obtained leave of the court to proceed with the suit as a Representative suit on behalf of the Defendants.

After the service of the summons through advertisement in the "Standard" of December 2, 2010, the Plaintiff requested for Judgment against the Defendants when they failed to enter appearance and file Defences within the prescribed time.

The court entered interlocutory judgment against the Defendants for failure to enter appearance or file defence as required by law. The plaintiff then set down the hearing of the case by way of Formal proof.

At the hearing the Plaintiff called a director and Shareholder of the Company as a witness, Mr. James Njenga Muigai.

P.W.1 testified on oath and showed how the company obtained a letter of allotment on 23.11.1987 and issued with a Title Deed after payment of the requisite premiums and other outgoings to the Registrar of Titles. He produced the original title document register as No. C.R. 19580/1 on 30.6.1989.

Upon consideration of the evidence on testimony and documents placed before the court, I do find that the Plaintiff Company is the registered owner of the suit premises as grantee from the Government of a lease for 99 years from 1.12.1987.

The fourteen Defendants were duly served as per the orders of this court but they failed to enter any appearance or file any defence. This court was obliged therefore, to enter interlocutory judgment. Upon the formal proof, I do find that the Plaintiff is entitled to possession of its land and to enjoy the same as protected by the Constitution of Kenya.

I would like to state and emphasize that the interlocutory judgment could only be entered against the fourteen (14) named Defendants and nobody else. There cannot be any Defendants who can be referred to as “All illegal Occupants on Plot No. L.R. No. MN/VI/3661/Mombasa”

First, the alleged Defendants are not named and are unknown. Secondly, no court of law has found those un-named and un-known persons as “illegal occupants”. This court cannot make orders against persons that have not reasonably and fairly been identified and named as Defendants.

In a plaint of the kind that was filed and seeking such substantial and drastic orders of Declaration and eviction, a Defendant must be named and reasonably and clearly identified so that he/she can know that he/she is the named Defendant to enable him/her respond to the summons and for this court to act appropriately. It would be very risky, if not dangerous for a court of law to grant an eviction order against an unknown person who had not been given an opportunity to defend himself in legal proceedings. The right to be heard in legal proceedings is a fundamental right. It is my view therefore that to grant a blanket order against so called “illegal occupants” would be in breach of the cardinal principles of natural justice and lead to a miscarriage of justice. Considering the nature of an eviction order, it would lead to serious, prejudice loss and suffering. For any person to be ordered to be evicted from a land by a court of law that person must be expressly named and served. It would have been different if the orders sought was as against anybody claiming under the title and the property under the title of the 14 defendants.

I do note the size of the subject land which is 7.887 hectares which works out to be about 19.5 acres. I have seen the photographs produced in evidence of the development and structures on the land. I form the view that there are many people on the land and not only the 14 named Defendants. The 14 cannot represent, the other un-named persons whose identities and numbers are unknown. I do find that while leave was given for the Defendants to be sued also in a Representative capacity this suit is not a true or genuine representative suit. For one to be sued on his own behalf and as or representative of others, he must have the consent of the others to represent them or he must be clothed with some legal capacity binding him to represent those others.

I cannot see how the 14 Defendants can represent those occupying the land who are unknown to this court. The questions also arises - who are they? How many are they? Who has found them to be illegal occupants?

In the premises, I decline to make any orders against any person who is not known to this court and who has not been named and served with summons. To this court, apart from the 14, there is no evidence of any against anybody else at this stage as they were not make parties and duly served. There is no basis to declare persons to be illegal occupants until they have been enjoined, identified and duly served with process.

I therefore, do hereby enter judgment in terms of the Amended Plaint as against the Fourteen (14) named Defendants only with costs to the plaintiff. Orders accordingly.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of May 2011.**

**M. K. IBRAHIM**

**JUDGE**

**Coram:**

**Ibrahim, J**

**Court clerk – Kazungu**

**Mr. Mutubia for the plaintiff**

**Judgment delivered in their presence.**

**Ibrahim, J**