



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 9 OF 2007

MOLE MBITHA MOLE.....PLAINTIFF

VERSUS

ANGORE MBITHA MOLE.....DEFENDANT

JUDGEMENT

MOLE MBITHA MOLE(the Plaintiff) has filed this suit against **ANGORE MBITHA MOLE** (the defendant) – the parties are brothers by an amended plaint dated 14th January 2004, the Plaintiff seeks for Judgement against the Defendant for;-

- (a) A declaration that parcel No.137, Mambui Malindi belongs exclusively to the Plaintiff.
- (b) A permanent injunction against the Defendant, his servants and or agents from further encroachment and/or interference with the Plaintiff`s right in respect of Plot No. 137, Mambui, Malindi.

The background to this claim is that the Plaintiff, the defendant and 27 others were previously squatters on plot No. 137, Mambui Malindi(CR 13530) then owned by **SULEIMAN BIN ALI – EL MAZRUI**. In 1972 through to 1974 the landlord offered to sell the land to the squatters. The Plaintiff states that all the other squatters including the Defendant declined to contribute towards the purchase of the land, whereby the Plaintiff bought Plot No. 137 Mambui – Malindi acre at a price of kshs.10,000/-. That upon purchase of the said plot in 1974, he caused it to be registered in the name of his eldest son **KADENGE MOLE** named after the Plaintiff`s late father who had passed away in 1962. The Plaintiff`s case is that in 1994 and in order to obtain a loan from Agricultural Finance Corporation (AFC) be registered a deed of rectification transferring the land from his son **KADENGE MOLE** to himself and is now the registered owner of the suit land with all rights and free from all encumbrances. The 27 squatters have all vacated the suit premises as the same was bought by the Plaintiff but the Defendant still encroaches on the Plaintiff`s land. The Plaintiff states that the Defendant has interfered and continues to interfere with the Plaintiffs right to the suit premises. The Plaintiff asserts that on several occasions in the recent past, the Defendant has encroached on this land, harassed him over the said plot thus denying him quiet possession and enjoyment.

The Defendant opposes the claim and has filed a defence and counterclaim in which he states that he has possessed the land known as Plot No. 137 Mambui(Malindi) Title No.Cr 13530 measuring about 101 acres since time immemorial, and he jointly with the Plaintiff purchased the said land from the registered owner in the name of their deceased father, **KADENGE MOLE** also known as **MBITHA MOLE CHANZERA**). Secondly, that, the Plaintiff`s claim, being a claim founded on the tort of trespass and

right to work land, should be adjudicated upon by the Land Disputes Tribunal under the Land Disputes Tribunal Act, being the body competent to hear and determine the dispute between them. Further, by dint of section 7, the Plaintiff's claim to recover half share of Plot No.137, Mambrui, Malindi, lawfully possessed and worked by the Defendant is time barred under the limitation of Actions Act and this court has no jurisdiction to hear the matter.

The Defendant states that he and the Plaintiff are blood brothers who purchased the property together, with funds realized from sale of their father's cattle and business, personal contribution and with the help of their mother. The land was on mutual agreement transferred in the name of their then deceased father. In 1994, the Plaintiff fraudulently caused a Deed of Rectification dated 14th November 1994, to be registered against the title of the land, with the effect that the Plaintiff's names were entered in the certificate of ownership in place of those of their late father.

The particulars of fraud are pleaded as:-

1) The Deed of rectification dated 14th November 1994 was executed by ALI SULEIMAN ALI instead of SULEIMAN BIN EL-MAZRUI. This impersonation is fraudulent as the said SULEIMAN BIN AL-MAZRUI was on that date deceased for even 7 (seven) years and no letter of administration had been obtained.

(i) The transfer effected by the illegal deed is aimed at disinheriting the defendant

(ii) The deed is fraudulent in so far as it is alleged that the conveyance to KADENGE MOLE was fraudulent

(iii) The Deed of rectification is not a deed for SULEIMAN ALI BIN EL-MAZRUI as he legally never executed it.

(iv) The deed of Rectification was made without consideration, valuable or otherwise and was signed without authority and under a mistake induced by the machinations of the Plaintiff

The Defendant's contention is that he has occupied, possessed and worked the land in issue for over 36 years and has acquired an impeachable right by adverse possession over the land. The Defendant has filed a counter claim seeking that the deed of rectification be declared null and void, and be expunged from the certificate of Title and the land do revert to **KADENGE MOLE**(also known as **MBITHA MOLE CHANZERA**. Secondly, that this court declares the land known as Plot No.137 Mambrui Malindi was jointly acquired by the Plaintiff and Defendant in equal shares.

(3) An injunction do issue to personally restrain the Plaintiff by himself, his servants, workmen or agents from harvesting the Defendant's crops on the land or in any manner interfering or disrupting the quiet possession of the land by the defendant, or in any manner from dealing with the land in any manner prejudicial to the Defendant's interest on the said land.

4) In the alternative, a declaration that the Defendant is entitled to ½ share in plot no. 137 Mambrui, Malindi by virtue of adverse possession and the Plaintiff's title if any, has been extinguished. The reason for defendant seeking these orders is that the Title which Plaintiff seeks to rely on is illegal as no error or fraud was demonstrated to the Registrar of Titles to warrant the making of the entry transferring the land to the Plaintiff. The Registrar acted without jurisdiction or on insufficient material and without hearing all the parties concerned. It is the Defendant's contention that he owns a half undivided share of the suit property because he contributed money towards the purchase. Alternatively, he has lived on and worked the land without interruption either from the Plaintiff or the late **SULEIMAN BIN EL-MAZRUI** that he has acquired by adverse possession a good Title over the suit plot.

At the hearing, **MR MABEYA** appeared for the Plaintiff, while **MR ODONGO** was the defendant. **AYUB MOLE MBITHA MOLE** (pw 1) is the Plaintiff who is an older brother to the Defendant. His evidence is that he bought the land in 1974 from **SULEIMAN BIN ALI MAZRUI** using

his own funds and no one contributed or made any donations towards purchase. He bought the land for Kshs.10,000(Ten thousand one hundred shillings only). At the time of purchase, his father had already died in 1962. Transfer was effected in the name of his child **KADENGE MOLE** mother whom he had named after his father. When PW1 purchased the land, people were in occupation demanded compensation and Pw 1 paid all the 27. At the time, Defendant lived in GONGONI in Plot No. 161. The Defendant moved onto the land and begun tilling it despite attempts by Plaintiff to stop him and he swears to carry on.

Plaintiff explains that he transferred the property into his name so as to obtain a loan and he had no obligation to inform Defendant about the re-transfer as he has no business with the land. The Deed of rectification was effected on 7th June 2001 and an Administrator of the Estate of the previous vendor signed it. However this Deed was not produced as the one the witness had in court was dated 11/1/05 witnessed by **M. ODHIAMBO** whilst the one in the list of documents is dated 14/11/94 and witnessed by **J.W.GATONYE**.

Anyway Pw 1 proceeded to point at another Deed of Rectification dated 14/11/94 as the one he relied on. There seemed to be a mix up in the documents and it was apparent that **MR MABEYA** had not adequately prepared for the matter, so it was adjourned to enable him put his act together. When Pw 1 resumed, he seemed to have abandoned the Deed of Rectification and together and instead introduced a letter dated 27/6/95 addressed to the District Land Registry confirming that he bought the land, and that previously, there had been 29 interested buyers. He bought the property in the names of **KADENGE MOLE**, then later changed the names to **MBOLE MBITHA MBOLE** as per the Deed Poll produced as exhibit 3 saying he would not use his son`s name to obtain a loan from AFC. **ANGORE MBITHA MOLE** who is his brother lives on plot No.166 which is near the plot in dispute. At some point **ANGORE** wanted to forcefully occupy his land and Plaintiff reported to the area chief and District officer, so they were both summoned by the District officer who heard the matter in 1996 and a decision was made in Plaintiff`s favour. He relies on a letter dated 26/1/97 (Exhibit 4) written by **M.K.MUNGIRIA** the Land Adjudication and Settlement Officer Malindi District who decided that the plot belonged to Plaintiff and no one should trespass on it. Plaintiff has produced a document dated 13/7/74(exhibit 6) saying **SULEIMAN BIN ALI EL MAZRUI** sold to him the land and gave him the document so as to enable him effect transfer, Plaintiff denies claims that the land is family land.

MOHAMMED SULEIMAN (Pw 2) is the son of **SULEIMAN ALI**(now deceased) and whom he says died in 1987. He obtained grant of letters of administration which he has produced as exhibit 7, and the search certificate produced as exhibit 8. His evidence is that he used to see Plaintiff visit his father over purchase of the land.

The following issues are not disputed;-

(a) That the parcel No.137 Mambrui-Malindi was initially owned by **SULEIMAN ALI EL MAZRUI** who transferred it to **KADENGE MOLE**.

The Plaintiff and Defendant were among persons who had occupied the parcel of land over a period of time, as squatters. The issues for determination are as follows;-

(a) Was this land transferred in the names of **KADENGE MOLE**(the father of the Plaintiff and Defendant) or **KADENGE MOLE**(the Plaintiff`s son).

(b) Did the Plaintiff single handedly pay Kshs.10,100/- for the property or did Defendant contribute towards the purchase and therefore entitling the latter to half share of the property.

(c) If the Plaintiff has now properly effected registration of the property to his name then is the defendant entitled to the same property by virtue of adverse possession.

The Defence counsel and defendant failed to attend court for hearing of the matter. The Plaintiff`s counsel submitted that the Defendant started interfering with the land in 1995 and that the Defendant`s counter

claim is merely a ploy to deny the Plaintiff the fruits of his labour and is an abuse of court process because all other family members are aware that Plaintiff bought the land and that it is not family land.

It is not denied that the parties father was **KADENGE MOLE** – the other evidence being presented is that the Plaintiff has a son named after this father and the land was transferred by **SULEIMAN BIN ALI EL-MAZRUI** on 25th June 1974 to his son. However apart from Plaintiff saying so, there isn't a single document produced such as an identity card or birth certificate confirming that apart from their late father there is another **KADENGE MOLE** existing. Secondly if that **KADENGE MOLE** exists, there isn't an iota of evidence proving that by 1974 he had been born. Thirdly the easiest thing was for Plaintiff to produce the said son to testify in court and confirm his existence – he did not. Fourthly it has not been explained why Plaintiff registered (that is the entire 101 acres) is only the son's name – did he not have other sons? The probability that the land was registered in names **KADENGE MOLE**(the father) and **KADENGE MOLE** (the son) remains on a constant 50:50 – the scale is not tilted adversely on either side.

(2) The Plaintiff has not produced a single document to prove that he made payment of Kshs.10,000/- single handedly – and just how was this payment made – was it in installments, did he pay the entire amount at once.

Was the payment made to a bank, by way of a cheque, direct deposit, or cash? Was the money handled over to **SULEIMAN EL MAZRUI** directly? Did the Defendant make any contribution? Again the Defendant too fails to meet any of these yardsticks in proving that he made any financial contribution to the purchase of the property – once again the balance of probability remains unshaken towards either party.

There are other 27 squatters who are said to have been paid compensation and they moved out – not a single one of the alleged squatters is mentioned by name, and not one has testified to confirm ever living on that land and being compensated so as a move out. And if they were compensated, then again there is not a shred of evidence as to how much each was paid and what was the criteria used for each payment made out. Alongside that is what appears to be a contradiction in the Plaintiff's case – in one breath he states he and the Defendant plus the 27 others had been squatters on the land, all the others moved out except defendant – yet on the other hand, and even submissions he alleges that defendant begun interfering with the land from 1995 – if defendant had been on that land prior to 1974 when purchase was made, then how can it be that twenty years later is when it dawned upon Plaintiff that Defendant was interfering with the land? There isn't a scintilla of evidence that after the alleged acquisition, the Plaintiff ever moved out of the suit property. It is also significant that no other family members testified – either to confirm that Plaintiff bought the land single handedly, or jointly with Defendant or that it was family land.

Then there is the Deed of Rectification – apparently there were two deeds, one dated 11/1/05 witnessed by **MAURICE ODHIAMBO** advocate, and another dated 14/11/94 witnessed by **J.W.GATONYE** advocate. There was no explanation offered as to why there existed two Deeds of Rectification witnessed at different times by different persons, and why the Plaintiff suddenly elected not to make reference to either. Infact when that confusion or contradiction was realized, the Plaintiff's counsel immediately sought an adjournment, and when the matter resumed, both Plaintiff and counsel acted as though there never had been a reference to that document. I read mischief in this and I doubt that the purported rectification was made in good faith – that is why no further reference was made to earlier one, and the Plaintiff and his counsel hoped that with the lapse of time after the adjournment, no one would not thus conduct – this is ill motive and militates against the Plaintiff.

Then wonder of wonders – Plaintiff had all along said that the land was registered in his names - the names of his son **KADENGE MOLE**, yet the **DEED POLL** produced as exhibit 3 reads that **KADENGE MOLE** is the same person as **MOLE MBITHA MOLE**, and that **KADENGE MOLE** had renounced use of that name and adopted a new name **MOLE MBITHA MOLE** - surely if what Plaintiff has told this court was the correct position, then it means he gave false information when signing that Deed Poll because there is not a shred of evidence to confirm that **KADENGE MOLE** is the same person as **MOLE MBITHA MOLE** and had abandoned the prior name and acquired a new name – the evidence

placed before this court is that they are two different people father and son. My perception of this Deed Poll is that it was tailored to suit Plaintiff's interests of obtaining the loan using the parcel of land as a collateral. Finally on the issue of adverse possession. The Plaintiff and Defendant had been on the land long before 1974 when Plaintiff allegedly purchased it. There is no evidence that before 1994, the Plaintiff had asked the Defendant **TO MOVE**. Adverse possession is not affected by sale of the land, it remains in continuity. But even if one were to reason, for the sake of argument that Plaintiff's ownership only begun in 1974, then there isn't a single document presented to show that defendant's occupation was ever interrupted for the first 12 years thereafter. Exhibit 2, a letter written by the area chief simply gave a background regarding alleged acquisition of the land, which he did not participate in but rather acted on information being given to him.

The first indication of an attempt to have the Defendant vacate the land was 13 years later in 1997, by which time Defendant had already adversely acquired the land. What is clear to me is that Defendant is entitled to claim a portion of the land which he has occupied and used for over 12 years by operation of the doctrine of recent possession, and I declare so. What is not clear to me is the extent of the portion used, and given the earlier observations as to whether Plaintiff acquired this land, and the lack of bona fides thereto then they must share the land in half equal portions.

The upshot is that the Plaintiff's suit fails and is dismissed with costs. The counterclaim succeeds and defendant is awarded costs of the counterclaim.

Delivered and dated this 20th day of June 2011

**H A OMONDI
JUDGE**