



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 243 OF 2016**

**BAHATI CHARO.....PLAINTIFF**

**VERSUS**

**1. JACKSON NZARO**

**2. MARIO MAINDA**

**3. ERIC NGUA (Sued in their capacity as Chairman, Secretary & Treasurer**

**respectively of Kalolo Kibaoni Baya Magonzi Upgrading Project**

**4. NORRIS VYANGU**

**5. FESTUS KIMBICHI.....DEFENDANTS**

**BACKGROUND**

1. By her Complaint dated and filed herein on 16<sup>th</sup> September 2016 as amended on 29<sup>th</sup> November 2017, Bahati Charo (the Plaintiff) prays for Judgment against the five listed Defendants jointly and severally for: -

- a) A declaration as above claimed (sic);***
- b) Permanent injunction against the Defendants as above claimed (sic);***
- c) Vacant possession of the suit property and eviction therefrom as above claimed (sic);***
- d) Costs of this suit and interest thereon at Court rates; and***
- e) Any other relief that this Honourable Court may deem just to grant.***

2. Those prayers arise from the Plaintiff's contention that on or about 2<sup>nd</sup> March 1978, she bought 28 cashew nut trees on an unregistered parcel of land measuring 100 by 70 feet situated at Kibaoni area in Kilifi Town which parcel is now known as Plot No. 84. Pursuant to that purchase, the Plaintiff took possession and proceeded to develop the said portion of land by building her residence and a business structure which she leased out to various tenants.

3. The Plaintiff avers that later on, a Squatter Upgrading Project named Kalolo Kibaoni Baya Magonzi Upgrading Project was started in the area with the mandate to identify the occupants of the land, mapping it out, demarcating the same and allocating it to the respective occupants. During the said mapping, the Plaintiff's portion of land was assigned as Plot No. 84 and the Plaintiff proceeded to pay to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the requisite fees and charges for the registration of the land into her name.

4. It is the Plaintiff's case that unbeknown to her, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants wrongfully and unlawfully proceeded to sub-divide her land by creating another plot measuring 50 by 50 feet which plot they assigned as No. 83 and proceeded to allocate to the 4<sup>th</sup> Defendant who then hurriedly sold the same to the 5<sup>th</sup> Defendant herein.

5. The Plaintiff avers that the Defendants actions amount to a violation of her rights as enshrined in the Constitution as the Defendants have

since envied intentions of permanently depriving her of the land. She therefore prays for a declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants actions in sub-dividing her land and allocating a portion thereof to other parties is null and void and urges the Court to restrain the Defendants from trespassing upon her land.

6. But in their Joint Statement of Defence dated and filed herein on 4<sup>th</sup> October 2016, Jackson Nzaro, Mario Mainda and Eric Nguwa sued herein in their capacity as Chairman, Secretary and Treasurer respectively of the said Kalolo Kibaoni Baya Magonzi Upgrading Project (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) deny the existence of the Plaintiff's parcel of land and invite her to strict proof.

7. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that the parcel of land in contention was part of a large piece of land measuring 0.2262 Ha which was initially allocated to Maendeleo ya Wanawake Women Group in June 1991. Upon formation of the Upgrading Project in 1998, it did take up the task of identifying areas for settlement of squatters as per its mandate. Upon survey of the area, six plots were created after the sub-division of the larger parcel thereby yielding plot Nos. 81, 82, 83, 84, 87 and 514.

8. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that the Plaintiff was not present during the sub-division and allocation as she was not a resident of the area. Later in the year 2003, the Plaintiff approached the Project and requested for consideration and allocation of a Plot. She was then allocated Plot No. 84 after following due procedure and payment of the requisite fees.

9. Morris Vwangu (the 4<sup>th</sup> Defendant) equally denies the Plaintiff's claim. In his Statement of Defence dated 18<sup>th</sup> May 2017 but filed herein on 11<sup>th</sup> September 2017, he avers that he is the owner of Plot No. KB/83 having been allocated the same by the Squatter Upgrading Project after paying all the dues.

10. The 4<sup>th</sup> Defendant further states that on or about 11<sup>th</sup> July 2016, being the registered owner of the said Plot No. KB/83, he entered into a Sale Agreement and sold the land to Festus Kalugho Kimbichi (the 5<sup>th</sup> Defendant) upon which the property was duly transferred to him. The 4<sup>th</sup> Defendant further avers that he has been on the said property for a very long time and that he has never seen the Plaintiff thereon. He accordingly urges the Court to dismiss the suit on account that the same does not disclose any reasonable cause of action against himself.

11. Similarly, Festus Kimbichi (the 5<sup>th</sup> Defendant) denies the Plaintiff's claim. In a Statement of Defence also dated 18<sup>th</sup> May 2017 but filed herein on 11<sup>th</sup> September 2017, he denies the existence of the Plaintiff's parcel of land and avers that he is presently the proprietor of Plot No. KB/83 having purchased the same from the 4<sup>th</sup> Defendant for a valuable consideration.

12. By way of Counterclaim, the 5<sup>th</sup> Defendant avers that he is the absolute owner of the suit property and accuses the Plaintiff of interfering with his use and possession thereof without any colour of right and justification. Accordingly, the 5<sup>th</sup> Defendant urges the Court to dismiss the Plaintiff's suit and to instead enter Judgment in his favour for:-

***a) A permanent injunction restraining the Plaintiff, her servants, agents, employees and whosoever (sic) from interfering with the 5<sup>th</sup> Defendant's peaceful enjoyment and use of the suit Plot No. 84 located in Kibaoni area which he lawfully acquired;***

***b) Costs of the suit;***

***c) Interest on (b) above; and***

***d) Any other relief this Honourable Court may deem fit to grant.***

#### **The Plaintiff's Case**

13. At the trial herein, the Plaintiff called two witnesses in support of her case.

14. PW1- Bahati Charo is a small scale business woman in Kilifi and the Plaintiff herein. She told the Court she purchased 28 cashew nut trees on an unregistered parcel of land at Kibaoni Area measuring 130 by 90 feet on 2<sup>nd</sup> March 1978. Following that acquisition, she took possession of the land and developed the same by building houses and some business structures which she leased out to various tenants.

15. PW1 testified that later on in the year 1996, a squatter upgrading project known as Kalolo Kibaoni Baya Magonzi Upgrading Project was formed with the mandate to identify the occupants in possession of the land. During the mapping and demarcation of the area, PW1's portion of land was assigned as Plot No. 84 and she duly paid the requisite fees to the Project for purposes of registration as the proprietor of the land.

16. PW1 further testified that unknown to herself, the Project officials wrongfully and unlawfully assumed ownership of her land and proceeded to sub-divide the same and hive off a portion measuring 34 by 90 feet which they then assigned as Plot No. 83 and proceeded to allocate to the 4<sup>th</sup> Defendant. On the said Portion assigned as Plot No. 83, PW1 told the Court she had erected a pit latrine for her use. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants subsequently wrote to her to remove the pit latrine claiming she was encroaching on Plot No. 83.

17. PW1 further told the Court that the 4<sup>th</sup> Defendant has since sold the said Plot No. 83 to the 5<sup>th</sup> Defendant who has now threatened to trespass on the suit property for purposes of erecting a building thereon.

18. On cross-examination, PW1 told the Court the suit property had no number when she bought it in 1978. She paid Kshs 810/- for the

Cashew nut trees but there was no documentation at the time. PW1 further told the Court she could not recall when the Upgrading Project went to the land. She denied that the sub-division was done in 2003.

19. PW1 further told the Court the Maendeleo ya Wanawake Group found her on the ground and denied that the suit property previously belonged to the Group. She further told the Court the portion hived off from her land measures 130 by 30 feet and not 100 by 70 feet as stated in her Complaint. She however told the Court she did not use a Surveyor to take measurements.

20. PW2- Ngowa Mramba Wanje is a Farm Labourer and a resident of Kilifi. He told the Court he has known the Plaintiff as the owner of the suit property and reiterated the Statement of PW1 herein.

21. On cross- examination, PW2 told the Court he knew the disputed property as he used to clear bushes therefrom. He however told the Court he did not measure the land. He had known PW1 since 2002 as the owner of the land. Recently on a date he could not recall, he saw some people come to survey the land.

### **The Defence Case.**

22. On their part, the Defence called a total of three witnesses in support of their case.

23. DW1- Jackson Nzaro Nguha is a businessman and the 1<sup>st</sup> Defendant herein. He told the Court he had come to testify on behalf of the Upgrading Project which he said was formed to assist people to get land. He told the Court he was formerly the Chair of the Project- KKB which was started in 1998 to help squatters get land.

24. DW1 told the Court the Plaintiff is claiming land which was formerly allocated to Maendeleo Ya Wanawake Women Group for development purposes by the Government. The Group had been issued with an allotment letter for 0.222 Ha. DW1 testified that the KKB Project brought a Surveyor on the land in 2002 after which they sub-divided the land. The plots were given to different people as per a list that had been prepared by an Allocation Committee.

25. DW1 testified that during the process, the Plaintiff asked for Plot No. 84 and they gave it to her. The Maendeleo Group was then re-allocated Plot No. 80. DW1 told the Court that Plot No. 83 being claimed by the Plaintiff does not belong to her.

26. On cross- examination, DW1 testified that Plot No. 83 belongs to the 5<sup>th</sup> Defendant after it was sold to him by the 4<sup>th</sup> Defendant. Those changes were recorded and are reflected in the Project's Register. DW1 further told the Court the Plaintiff had built a house in Plot No. 84 but had also put up something recently on Plot No. 83.

27. DW1 testified that he became the Project Chair in 2010 although the Project was started in 1998. He further testified that their purpose was to distribute the land and that people were not necessarily being given what they occupied as the Government had decreed that no one should be allocated more than 50 by 100 acres. In this respect, he told the Court, Plot Nos 81, 82, 83, 84 and even 514 are all 50 x 50 feet by measurement.

28. DW1 told the Court the initial letter of allotment to Maendeleo Ya Wanawake was revoked and the Surveyor was thereafter authorized to do the sub-division. Once a member finished paying for the plot, he would be given a Clearance Certificate. The Certificate did not however show the size as that only appeared in the Deed Plans.

29. DW2- Morris Mbaru Vwanga is a Pastor and the 4<sup>th</sup> Defendant herein. He told the Court he used to own Plot No. KKB/83 measuring approximately 65ft by 90ft. He built a mud-walled makuti house thereon following allocation by the KKB Project. On 11<sup>th</sup> July 2016, he sold the land to the 5<sup>th</sup> Defendant for Kshs 1.6 Million after which he transferred the Plot to the 5<sup>th</sup> Defendant. He told the Court the Plaintiff had never owned the land in question.

30. On cross- examination, DW2 told the Court he was given his portion of the land by KKB in 1983. He told the Court he had been living on the land long before it was allocated to him. He could not remember how much he paid for the allocation.

31. DW2 testified that he had no dispute with the Plaintiff before he sold the land to the 5<sup>th</sup> Defendant. The Plaintiff had not built the toilet by then in the said Plot No. 83.

32. DW3- Festus Kalugho Kimbichi is the 5<sup>th</sup> Defendant herein. He told the Court he purchased Plot No. KKB/83 measuring 65ft by 90ft on 11<sup>th</sup> July 2016 from the 4<sup>th</sup> Defendant. He paid Kshs 1.6 Million and was granted immediate possession. After acquiring the property, he paid Kshs 20,000/- to KKB Offices and the Plot was transferred to his name with a Clearance Certificate being issued to him on 1<sup>st</sup> August 2016.

33. On cross- examination, DW3 told the Court the 4<sup>th</sup> Defendant did not give him any documents of title before they went to do the transfer at the KKB offices. The KKB officials however showed him a register of members and told him the 4<sup>th</sup> Defendant had paid.

### **Analysis and Determination**

34. I have perused and considered the pleadings filed by the respective parties herein, the rival testimonies of the witnesses and the evidence adduced at the trial. I have similarly considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

35. By her Amended Complaint dated 29<sup>th</sup> November 2017, the Plaintiff sought a declaration that the acts of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in sub-dividing her parcel of land measuring 100 by 70 feet and thereby creating another portion of land known as Plot No. 83 are null and void. She also sought an order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from carrying on or effecting the sub-division as well as an order of vacant possession of all that parcel of land measuring 100 feet by 70 feet and known as Plot No. 84 situated at Kibaoni area in Kilifi.

36. In essence the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been sued in their capacity as the Officials of an association known as Kalolo Kibaoni Baya Magonzi Upgrading Project also known by its initials as KKB. The said KKB is said to have engaged in the sub-division of the Plaintiff's Plot No. 84 as a result whereof they hived off another Plot No. 83 which they then allocated to the 4<sup>th</sup> Defendant. Upon being allocated the said Plot No. 83, the 4<sup>th</sup> Defendant is said to have hurriedly then disposed of the same to the 5<sup>th</sup> Defendant.

37. The Defendants however deny encroaching upon and/or sub-dividing the Plaintiff's parcel of land. On the contrary, it is their case that the Plaintiff's Plot No. 84 resulted from the sub-division carried out by the KKB Upgrading Project which process also created Plot No. 83 which was allocated to the 4<sup>th</sup> Defendant before he later sold it to the 5<sup>th</sup> Defendant. The Defendants accuse the Plaintiff instead of being the one who encroached upon the said Plot No. 83 by erecting a pit latrine thereon.

38. It was the Plaintiff's case that on or about 2<sup>nd</sup> March 1978, she bought 28 cashew nut trees on an unregistered parcel of land which later became Plot No. 84 upon survey. After settling on and developing the land, the Squatter Upgrading Scheme later headed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as Chairman, Secretary and Treasurer respectively was formed with the mandate to identify the occupants in possession of the land situated in the three areas of Kalolo, Kibaoni and Baya Magonzi with a view to helping them acquire the same and to be registered as the owners thereof.

39. The Plaintiff told the Court that when the KKB engaged in the mapping and demarcation of the land occupied by the squatters, they unlawfully and without her knowledge sub-divided her parcel of land –Plot No. 84 by hiving off a portion measuring 50ft by 50ft and assigning the same as Plot No. 83. It is further her case that the KKB Officials then proceeded to allocate this new sub-division to the 4<sup>th</sup> Defendant who then sold the same to the 5<sup>th</sup> Defendants.

40. In support of her case, the Plaintiff produced a copy of the Sale Agreement executed on 2<sup>nd</sup> March 1978 between herself and one Kazungu Wa Monzo. The hand-written Agreement reads in Kiswahili as follows: -

***“Mimi Bahati Charo siku hii ya leo nimenunua Mikanju kwa Kazungu Wa Monzo Mikanju ishirini na Minane. Kwa kila Mukanju moja kwa bei shilling 30. Pesa nilio lipa leo shilling 500, baki ya pesa ilio bakia kwangu ni shilingi 310 nitamlipa mwezi wa tano tarehe tatu.”***

41. By an undated addendum to the Agreement it is apparent that the Plaintiff paid the balance as she thumbprints at the back of the Agreement that she had paid, a fact acknowledged by the Vendor Kazungu Wa Monzo through his own thumbprint. It is also apparent that on the basis of the said Agreement if her story is to be believed, the Plaintiff moved into and occupied what is now referred to as Plot No. 84 Kalolo Kibaoni Baya Magonzi.

42. That Agreement unfortunately does not specify the parcel of land on which the 28 Cashew nuts purchased by the Plaintiff were situated. Nor does it specify the extent or area occupied by the cashew nuts. While the Agreement was actually witnessed by two individuals, neither the Vendor nor the witnesses were called at the trial to corroborate the fact that the cashew nut trees stood on the now disputed parcel of land.

43. More importantly, that Agreement neither referred to any land nor did it give the Plaintiff authority to take possession thereof and to proceed to develop the same. That omission, whether deliberate or otherwise was rather consequential in my view. As it were, the Plaintiff does not lay claim on the said Plot No. 84 as a beneficiary thereof by virtue of her ancestry.

44. From her own pleadings and testimony before the Court, she all along knew that the parcel of land she occupied was Government land. While she questions the mandate of the KKB Upgrading Project, it was apparent to me that that was a vehicle created by the Government to enable squatters like herself acquire what was then for all intents and purposes, Government land.

45. It is also clear to me that the Plaintiff herself recognized the mandate of KKB from as far back as the year 2003. From a perusal of her own List of Documents, she annexes a Copy of her Statement dated 5<sup>th</sup> August 2003 on the Project contribution as sent to her by the then Chairman of the Project indicating that she owed a sum of Kshs 10,200. The Plaintiff consequently made payments amounting to Kshs 10,200 as evidenced by three receipts issued in her name on 16<sup>th</sup> April 2008.

46. Subsequently by a Clearance Certificate dated 16<sup>th</sup> April 2010 in regard to Plot No. KB/84, the KKB Officials confirmed that they had identified the Plaintiff as the rightful owner of the structure on the said Plot and cleared her for showing of beacons and to be issued with a Beacon Certificate.

47. Indeed, contrary to the Plaintiffs assertions, it was apparent that her own Plot No. 84 emanated from the sub-division of a parcel of land earlier on allocated by the Government to the Maendeleo Ya Wanawake organization in 1991 measuring 0.2226 Ha. That much was clear from a Letter of Allotment produced by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants dated 7<sup>th</sup> June 1991. It was also apparent that following the intervention of the Project Officials, they were allowed to sub-divide that parcel of land as a result whereof they created six parcels of land assigned as Plot Nos. 81, 82, 83, 84, 87 and 514.

48. From the material placed before me, it was therefore clear that Plot No. 83 was not hived off Plot No. 84 as claimed by the Plaintiff.

From her testimony herein, it was apparent that the Plaintiff was unsure of the measurements of her parcel of land both before the alleged creation of Plot No. 83 and even after.

49. On the other hand, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who are former officials of the KKB Project gave clear testimony on how Plot Nos. 83 and 84 came to be and how Plot No. 83 was allocated to the 4<sup>th</sup> Defendant before, following their laid down processes, being transferred to the 5<sup>th</sup> Defendant on sale.

50. In the premises, I am persuaded that the Plaintiff's case is without any basis. I was on the other hand persuaded that the Defendants had acted properly within the law and that accordingly the 5<sup>th</sup> Defendant had proved his Counterclaim on a balance of probabilities.

51. That being the case, the Plaintiff's case is hereby dismissed with costs. Judgment is instead entered for the 5<sup>th</sup> Defendant in terms of his Counterclaim with costs.

**Dated, signed and delivered at Malindi this 22<sup>nd</sup> day of January, 2021.**

**J.O. OLOLA**

**JUDGE**