



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 182 OF 2018**

1. AKARE KOMORA MAALIM
2. SAMUEL JOHN JILO
3. JOSEPH KOMORA JILO
4. JULIUS BARE GALIDO
5. ELIJA BARISA GALIDO.....PLAINTIFFS

**VERSUS**

1. AYUB JARHA
  2. BALAJI HUSSEIN
  3. JOSEPH ADE
  4. AMOS KARHAYU
- Sued in their capacities as members of Malindi Ya Ngwena Land Committee
5. ALII ATHUMANI BAADE
  6. ALII HATIBU
  7. OMAR MOHAMED KAMPATE
  8. ALII JARA MOHAMED
  9. USENI ALII HAMISI
  10. MOHAMED MCHOWALA JARA
  11. BAKARI BARISA DOGE
  12. ALII DEYE HASANI
  13. ABDALLA DOYO SHIMBIRE
  14. SAID MOHAMED MKARAJI
  15. ADE JARA
  16. DID-DIG MOTORS

**RULING**

1. By their suit dated and lodged herein on 19<sup>th</sup> September 2018, Akawe Kamora Maalim and four others (the Plaintiffs) pray for Judgment against the 17 Defendants for:

***a) An Order of permanent injunction restraining the Defendant by themselves, their Malindi Ya Ngwena Land Committee members, agents, servants and any person claiming through them, from selling, alienating and demarcating any portions within the suit property and from carrying out any construction thereon;***

***b) An order of vacant possession of the suit property and demolition of any structures erected by the Defendants within the suit property and their eviction therefrom; and***

***c) Costs of this suit and interest thereon at Court rates.***

2. Those prayers arise from the Plaintiffs' contention that on or about April 2017, they had a boundary dispute amongst themselves as members of the Jabha and Kinaghasere Clans but before the dispute could be resolved, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants proceeded to alienate and allocate various portions thereof to some unknown people who subsequently proceeded to sell the land to the 5<sup>th</sup> to 17<sup>th</sup> Defendants.

3. The Plaintiffs aver that pursuant to the alienation and sale, the 5<sup>th</sup> to 17<sup>th</sup> Defendants entered upon the suit property and commenced construction of buildings and other structures thereon thereby denying the Plaintiffs use of their land.

4. The 17 Defendants however deny the Plaintiffs claim. In a joint Statement of Defence dated and filed herein on 25<sup>th</sup> October 2018, they aver that the suit property is community based land regulated by the local administrative bodies and authority. The Defendants also aver that what they occupy is their ancestral land and that it is the Plaintiffs who have trespassed thereon with the intention of dispossessing them of the same.

5. While conceding that there was a boundary dispute, the Defendants assert that the same involved other clans and was far from the disputed parcel of land. The Defendants further assert that the Plaintiffs have not demonstrated any evidence of alienation and urge the Court to dismiss the suit with costs.

6. Subsequent to the institution of the suit and the Defendants' response thereto, and by a Notice of Preliminary Objection dated 30<sup>th</sup> August 2019 as filed herein on 3<sup>rd</sup> September 2019, the Defendants object to the hearing of the suit on the grounds that: -

***1. The same contravenes the provisions of Section 7 of the Civil Procedure Act.***

***2. That the suit is misconceived, frivolous, totally devoid of merit and mala-fide for reasons inter alia that the matter is directly and substantially in issue in previously instituted proceedings which were heard and determined hence an abuse of the Court process and the same ought to be struck out.***

7. The said Preliminary Objection proceeded by way of oral submissions before me. While the Preliminary Objection did not mention any particular proceeding, Mr. Magiya, Learned Counsel for the Defendants submitted that on 11<sup>th</sup> November 2011, there was a decision by the Land Dispute Tribunal which decision was later adopted as an order of the Court in ***Hola RMCC No. 11 of 2011***.

8. Counsel further submitted that while no appeal was filed by the Plaintiffs against the said decision, they proceeded to file another suit being ***Malindi High Court Miscellaneous Application No. 30 of 2011*** before again filing ***Malindi ELC No. 26 of 2014***. It was the Defendants' submissions that the Plaintiffs just keep on changing parties and that the practice amounts to an abuse of the Court process as the parties are the same ones litigating over the same subject matter.

9. In response to the objection, Mr. Shujaa, Learned Counsel for the Plaintiffs submitted that the parties are not the same and that the Preliminary Objection is misplaced. Counsel told the Court that other than the 5<sup>th</sup> Plaintiff, all the other parties are different and that they have not sued on behalf of the community but on their own behalf.

10. Counsel for the Plaintiffs further submitted that the suit property as described at Paragraph 4 of the Plaintiffs is different and that the Defendants have not produced the pleadings in the previous suit to enable the Court to determine whether the subject matter is the same.

11. I have considered the objection and response thereto. As was stated in ***Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696***: -

*"A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...."*

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the*

*assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”*

12. I have looked at the Defendants’ Statement of Defence, it does not make any reference to any other case between the same parties over the same subject matter. Similarly, the Preliminary Objection as filed does not state the previously instituted proceedings on the body thereof.

13. On the same dates that the Notice of Preliminary Objection was filed however, the Defendants also filed a List of Documents. That list includes a Judgment delivered by the Honourable Justice Angote in **Malindi ELC No. 26 of 2014** on 18<sup>th</sup> September 2017 and the Judgment of the Honourable Lady Justice Meoli in **Malindi JR Application No. 50 of 2011** delivered on an undisclosed date in November 2013.

14. A perusal of Paragraph 4 of the Plaint filed herein reveals that the subject land is simply described as an unregistered parcel of land measuring 40 acres or thereabouts, situated at an area commonly referred to as Gharia within Chewani Location in Hola within Tana River County. There was however nothing placed before me to demonstrate that it is the same parcel of land claimed by the 5<sup>th</sup> Plaintiff and referred to as a parcel of land known as “Ghabhia” measuring 30 acres in **ELC No. 26 of 2014**.

15. Similarly, and as stated by the Plaintiffs, it was clear that other than the 5<sup>th</sup> Plaintiff, all the other parties to the dispute herein were not the same as the parties in the previous suit.

16. Arising from the circumstances herein, it was clear to me that certain facts would still require to be ascertained if one was to conclude that the subject parcel of land is the same and that the parties are claiming under the same titles in the previous suits.

17. In the premises, I did find that the Preliminary Objection is premature and I dismiss the same with costs in the cause.

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

**J.O. OLOLA**

**JUDGE**