



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 23 OF 2017**

**OMAR HASSAN HAJI.....1<sup>ST</sup> PLAINTIFF**

**HASSAN ABDALLA HASSAN.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

- 1. SAFARI KAZUNGU**
- 2. MARTIN KATANA**
- 3. BAHATI NGUMBAO**
- 4. CHANGAWA KATANA**
- 5. KAHINDI KAZUNGU**
- 6. KAZUNGU KATANA**
- 7. KATANA KITSAO**
- 8. JUMA SHABANI**
- 9. KAHINDI CHENGO**
- 10. RAMADHAN KAZUNGU**
- 11. KENGA KITSAO**
- 12. RASTO NYALI**
- 13. ATHMAN RAMADHANI**
- 14. MUHAMAD BAYA**
- 15. KITSAO MASHA**
- 16. OMAR C. CHENGO**
- 17. KAZUNGU MWARUA**
- 18. KAVINDU KAZUNGU**
- 19. CHARO KAZUNGU**
- 20. KATANA HINZANO**

21. THOMAS KATANA
22. RIZIKI HINZANO
23. MUSA SALIM
24. NGOWA PAUL
25. MWAVUO MUMBA
26. MWALIMU HINZANO
27. KATANA NGALA
28. KADENGE KATANA
29. GEORGE KATANA
30. KITSAO HINZANO
31. SHILLINGI HINZANO
32. KAHINDI KADENGE
33. KHAMIS HINZANO
34. UBA MANSOOR
35. SHIDA DOLO JAILANI
36. CHAROL KARISA WAMWERI
37. MOHAMED BAHERO
38. KARISA TUMBO
39. BAHATI KAHINDI
40. KAI HARRO
41. RASHID BAHERO
42. SALIM ALI KARISA
43. JAMHURI CHARO
44. CHARO KAPINI
45. KARISA NYANJE
46. KAZUNGU THOYA
47. RAJAB HASSAN
48. MWAGURE KALU
49. KITI KENGA
50. MWADZI KONO.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By their Plaintiff dated 3<sup>rd</sup> February 2017, Omari Hassan Haji and Hassan Abdalla Hassan (the Plaintiffs) prays for Judgment to be entered against the 50 listed Defendants jointly and/or severally for:

**i. A declaration that the Defendants' occupation, possession and or use of Plot Nos 268, 269, 276, 299 and 300 all of Section III Mainland North is illegal, unlawful and or wrong;**

**ii. An order that the Defendants, their assignees, agents, servants, family member and or employees do immediately quit, vacate and or handover vacant possession of Plot Nos 268, 269, 276, 299 and 300 all of Section III Mainland (North) to the Plaintiffs herein;**

**iii. In the alternative to Prayer (ii) above, for an order of eviction against the Defendants, their assignees, agents, servants, family members and or employees from Plot Nos 268, 269, 276, 299 and 300 all of Section III Mainland North;**

**iv. A permanent injunction against the Defendants, their assignees, agents, servants, family members and or employees from trespassing, entering and or occupying Plot Nos 268, 269, 276, 299 and 300 all of Section III Mainland (North) to the Plaintiffs herein (sic);**

**v. General damages; and**

**vi. Costs of this suit.**

2. Those prayers arise from the Plaintiffs' contention that they are the Trustees of the Estate of Hassan Bin Haji by virtue of a Trust Deed dated 19<sup>th</sup> December 2013. The Plaintiffs aver that as at the time of his death in 1957, the said Hassan Bin Haji left behind the suit properties all situated at Shariani Village within Kilifi County.

3. The Plaintiffs assert that during his lifetime, the deceased had allowed certain families to cultivate short term or seasonal crops on some of the said properties on condition that they took care of his long term plants such as coconuts, cashew nuts and mango trees until such a time that his heirs would require to use and or occupy the properties.

4. Contrary to the said arrangement, the Defendants have since 2004 refused to vacate the suit properties and have instead invited other people to use and occupy the same. The Plaintiffs assert that the Defendants actions have caused them and the lawful heirs of the deceased loss and damage and hence the orders sought herein.

5. But in their joint Statement of Defence dated and filed herein on 17<sup>th</sup> March 2017, the 50 Defendants deny that the Plaintiffs are the Trustees of the Estate of Hassan Bin Haji and or that the deceased owned the suit properties and/or entered into any tenancy arrangements with the Defendants as stated.

6. The Defendants, assert that the Plaintiffs have intentionally misrepresented facts to the Court and accuse them of failing to disclose that the decision reached by the Kadhi *in Kadhi Court Case No 106 of 2015* was only between members of a family who failed to inform the Court of the arrangements reached between them and the deceased. The Defendants aver that there are more than 3000 residents on the suit properties. Some were invited and/or allocated the land by representatives of the Sultanate in the 1850s while others bought from the Plaintiffs' family members.

7. The Defendants assert that their forefathers, grandparents and parents have lived on the properties since the 1860s and have developed the same to its current status. They deny interfering and or forcefully encroaching upon any portion of land occupied by the Plaintiffs or any members of their families.

### **The Plaintiffs' Case**

8. In support of their case, the Plaintiffs called two witnesses at the trial.

9. PW1- Hassan Abdalla Hassan Haji is a resident of Shariani and the 2<sup>nd</sup> Plaintiff herein. He told the Court he is a Trustee of the Estate of Hassan Bin Haji by virtue of a Trust Deed dated 19<sup>th</sup> December 2013. PW1 testified that at the time of his death in 1957, the deceased left behind Plot Nos.268, 269, 276, 299 and 300 in which he used to cultivate maize, cassava, coconuts, cashew nuts and mangoes. The land also had a burial site.

10. PW1 told the Court that during his lifetime, the deceased had allowed certain families to cultivate short-term or seasonal plants and crops on his farms on condition that they took care of his long term plants such as coconuts, cashew nuts and mango trees. That arrangement was to be in place until such a time that the deceased or his heirs would require the properties for their use, possession and occupation.

11. PW1 told the Court that by that arrangement, the Defendants became the deceased's tenants at Will and that the arrangement lasted until the year 2004 when the Defendants refused to comply and were summoned to the area Chief's Office. In the year 2005, some family members went to the Kadhi's Court seeking the distribution of the deceased's properties and a decision was made on 18<sup>th</sup> April 2011.

12. PW1 further told the Court that the Defendants were now in breach of their occupation agreement and that the efforts to resolve the dispute through the Provincial Administration had failed to bear any fruit as the Defendants had now resorted to inviting other people to take possession and occupy the property.

13. On cross-examination, PW1 told the Court he was born in 1989 and that he was only told about the arrangements that were in place before he was born by his parents. He conceded that there were permanent houses built by the squatters on the land and also agreed that there were graves thereon. He further told the Court they could not come to Court earlier as he was yet to be made a trustee of the estate.

14. PW2- Omari Hassan Haji is a resident of Takaungu and the 1<sup>st</sup> Plaintiff herein. He reiterated the testimony of PW1 and told the Court he is also a Trustee of the Estate of Hassan Bin Haji by virtue of the Trust Deed dated 19<sup>th</sup> December 2013.

15. On cross-examination, PW2 conceded that those presently occupying the suit properties are probably more than 100 people. Some of them had permanent houses while others had temporary structures. He told the Court that one Mohamed Hassan Haji was his brother but he had passed on. He however told the Court he was unaware that his deceased brother had been selling portions of the land since 1995. He testified that his brother had no right to sell the land.

16. PW2 further told the Court that the Defendants just invaded the land and refused to leave even after they reported the matter to the area Chief.

### **The Defence Case.**

17. On their part the Defendants called five witnesses who testified in support of their case.

18. DW1- Charo Karisa Mweri is a farmer in Shariani and the 36<sup>th</sup> Defendant herein. DW1 told the Court that he was 67 years old and that he had been born and brought up on the suit property. DW1 testified that his father Karisa Mweri who died in 1965 owned the portion of the suit property on which they still lived to-date.

19. DW1 further testified that his father had acquired the property from the Governors/Colonialists and that even his grandfather is buried on the land. He told the Court that he has continuously resided on the land and developed it by building a house in which he lives with his family. He told the Court he occupies two acres.

20. On cross-examination, DW1 told the Court his Statement that his father got the land from the Government was incorrect. He told the Court his father inherited the land from his grandfather. He further told the Court he knows the Plaintiffs but knew nothing about their entitlement to the land.

21. DW2- Mwangure Kalu Jefa is a fisherman in Shariani and the 48<sup>th</sup> Defendant. DW2 testified that he had two plots in Shariani. One was sold to him on 2<sup>nd</sup> September 2013 by one Fazil Mohamed who is a grandson of the 1<sup>st</sup> Plaintiff. They executed an Agreement in that respect. The other plot was sold to him on 25<sup>th</sup> October 2013 by Amina Mohamed who had also been sold the land by the Plaintiffs' relatives. He told the Court he has built his house on some part of the land.

22. On cross-examination, DW2 testified that the first plot was empty when he bought it while the second plot had a demolished house. The sellers had however no documents of title.

23. DW3- Kazungu Katana Mwambire works as a Security Guard and resides in Shariani. He told the Court he was born on the suit property in 1967 and that his father Katana Mwambire was equally born on the land. They had since developed the farm in which they grow coconuts. They occupy four acres.

24. On cross- examination he told the Court he inherited the land from his grandparents. He did not however know the number of the parcel of land in which he lived. He denied invading the land and told the Court his grandfather was buried thereon seven years earlier.

25. DW4- Bahati Ngumbao Karisa is also a farmer in Shariani. He told the Court his father moved onto the land in 1927 and that he was born thereon in 1966. DW4 testified that he had developed the land by building a house. He also planted coconuts and mangoes on the portion measuring about four acres.

26. On cross-examination, DW4 insisted that his grandfather Karisa Nyange was the first person to settle on the land. Both his grandfather and father had passed away and he conceded that he had no evidence to show that they were buried on the land. He told the Court he lived on Plot No. 300 having known about the number when they were summoned to the Chief's Office.

27. DW5- Kahindi Kiti Kinga works as a Security Guard and resides in Shariani. He told the Court he was also born on the suit property in 1966 and that his parents had arrived on the land in the 1920s. DW5 testified that they stayed on four acres of the land which they had developed by building a permanent house. They used part of it to rear livestock and to cultivate coconuts and other fruits.

28. On cross-examination, DW5 told the Court he did not know where his grandparents were living before they settled on the suit property in 1920. His father died in 1987. He conceded he had no documents to show that the land belonged to himself and that they had not applied to any Government Office for allocation of the land.

### **Analysis and Determination**

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

30. The two Plaintiffs herein have brought this suit in their capacity as the trustees of the Estate of Hassan Bin Haji who is said to have passed away sometime back in the year 1957. The Plaintiffs have urged the Court to declare that the occupation of the suit properties by the Defendants is illegal, unlawful and wrong. The Plaintiffs also seek an order requiring the 50 Defendants to vacate the suit properties failure to which they be evicted therefrom. They also want to be awarded damages and a permanent injunction restraining the Defendants from any further trespass and or encroachment upon the said properties.

31. According to the Plaintiffs, the late Hassan Bin Haji acquired the suit properties listed as Plot Nos. 268, 269, 276, 299 and 300 all of Section III Mainland North long before his death in 1957. At the time of the said death, the deceased is said to have been residing on Plot No. 269 while he cultivated the others planting various crops including coconuts, mango and cashew nut trees.

32. The Plaintiffs told the Court that in the course of time, the deceased entered into an unwritten understanding with some families who were allowed to farm the land by planting short-term or seasonal crops on condition that they would look after and take care of the deceased's crops which were long-term such as coconut and mango trees and that those families became the deceased's tenant at will as the arrangement would come to an end whenever the deceased and/or any of his heirs desired to use and or occupy the land.

33. It was the Plaintiffs' case that the said arrangement continued even long after the deceased's death until sometime in the year 2004 when the Defendants herein reneged on the arrangement and refused to vacate the suit properties or hand over vacant possession.

34. The Defendants on the other hand deny that they had any such arrangement and/or understanding with the deceased. On the contrary, a number of them assert that their forefathers entered and occupied the suit properties as of right almost a century ago and that they have since developed the land by building their residential houses and cultivating the land. A number of them on the other hand assert that they purchased the portions they occupy from various members of the Plaintiffs' family.

35. From the material placed before me, there was no doubt that the suit properties were initially registered in the name of the deceased-Hassan Bin Haji. It was apparent that since his death in 1957, nothing much was done to collect and distribute his estate until the Plaintiffs herein instituted **Succession Cause No. 106 of 2005** at the Kadhi's Court at Mombasa.

36. That Succession Cause was concluded by the consent of the beneficiaries recorded before the Honourable Chief Kadhi Sheikh Twalib B. Mohammed at Mombasa on 18<sup>th</sup> April 2011 and the estate was distributed to various heirs. From a number of correspondences produced by the Plaintiffs, it is apparent that they were unable to distribute the same as the Defendants had long taken physical possession of various portions of the suit properties whereupon they erected permanent and semi-permanent houses.

37. On 19<sup>th</sup> December 2013, the heirs appointed the two Plaintiffs herein as trustees of the deceased's estate for purposes of effecting the distribution as reflected in the orders issued by the Honourable Kadhi. It was also evident that pursuant to the Trust Deed registered on 19<sup>th</sup> December 2013, the Plaintiffs are now the registered proprietors of the suit property. They produced before me copies of the said Title Deeds reflecting their registration as proprietors in trust for the heirs.

38. It was submitted before me by the Defendants that many of them have lived on the land for a period in excess of 100 years and that some of them had acquired their portions of the land by way of purchase from the intended beneficiaries. By virtue of the long physical possession, they asserted that they have since become the owners of the land.

39. From the material placed before me, it is apparent that the Plaintiffs started demanding that the Defendants vacate the suit property from as early as the year 2004. The parties were summoned to the Office of the Junju Location Chief in Shariani on a number of occasions but nothing came out the attempts by the Provincial Administration to resolve the dispute. And while they knew that they did not have any documents in support of their claim to the land, the Defendants never took any lawful steps to strip the ownership of the land from the registered owners.

40. While the nature of the defence adverted to in their pleadings put so much reliance on long possession and occupation, they neither filed a claim for adverse possession nor a Counterclaim herein. I am unfortunately for them, unprepared to accept the submission that a group of people can just move into a piece of land registered in the name of another person and by virtue of that entry and building of unauthorized structures claim the land to be their own.

41. While it was possible as evidenced by some of the sale agreements placed before me that some of the Plaintiffs relatives were engaged in the sale of portions of the land to some of the Defendants, it was clear to me such parties had no documents of title that they could lawfully pass to those Defendants as they were not the lawfully appointed Administrators of the estate of the late Hassan Bin Haji.

42. As it were Section 24 of the Land Registration Act, 2012 bestows upon a person who is registered as the proprietor of land absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto. As the registered proprietors of the land, the Plaintiffs are such absolute owners and are entitled to enjoy the rights and privileges arising from such registration.

43. Under Section 26 of the said Land Registration Act, this Court is enjoined to recognize the Certificate of Title issued by the Registrar upon registration and to consider the same as evidence that the person named as proprietor of the land is such an owner. The Plaintiffs before me have produced such evidence of their registration and the only way that the Defendants can deprive them of such rights is not by building more houses or claiming that a number of them have not been sued, but by proving to the Court that such registration was obtained by way of fraud, misrepresentation or a corrupt act.

44. The Defendants before me have neither claimed nor proven that the Plaintiffs titles were so tainted. In the result, I am persuaded that the Plaintiffs have proved their case on a balance of probabilities.

45. Accordingly, I hereby enter Judgment for the Plaintiffs in the following terms: -

**i. A declaration is hereby issued that the Defendants' occupation, possession and or use of Plot Nos 268, 269, 276, 299 and 300 all of Section III Mainland North is illegal, unlawful and wrong.**

**ii. An order is hereby issued that the Defendants, their assignees, agents, servants, family members and or employees do immediately quit, vacate and or hand over vacant possession of Plot Nos 268, 269, 276, 299 and 300 all of Section III Mainland North to the Plaintiffs herein.**

**iii. In the event of failure to comply with Order No. (ii) hereinabove and upon expiry of 45 days from the date hereof, an order of eviction to issue forthwith against the Defendants, their assignees, agents, servants, family members and or employees removing them from Plot Nos 268, 269, 276, 299 and 300 all of Section III Mainland North.**

**iv. Upon expiry of the said 45 days, a permanent injunction to issue against the Defendants, their assignees, agents, servants, family members and or employees restraining them from trespassing, entering and or occupying Plot Nos. 268, 269, 276, 299 and 300 all of Section III Mainland North.**

**v. The Plaintiffs shall have the costs of this suit.**

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

**J.O. OLOLA**

**JUDGE**