



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 145 OF 2015**

**1. YERINE H. MAGHERE**

**2. ROBERT BONAYA**

**3. FUNANA D. MAGHERE.....PLAINTIFFS**

**VERSUS**

**SAMUEL HAMENA MTETEMO.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaintiff dated 31<sup>st</sup> August 2015 as filed herein on 1<sup>st</sup> September 2015, Yerine H. Maghere, Robert Bonaya and Funana D. Maghere (the Plaintiffs) pray for Judgment against the Defendant for orders framed as follows: -

*1) A declaration that the unsurveyed plot known as Elisha Maghere Family Plot at Tana Delta where the Defendant is constructing a permanent house belongs to the Plaintiffs;*

*2) An eviction order to issue to remove the Defendant together with any of his materials from the suit premises known as Elisha Maghere Family Plot; and*

*3) Costs of this suit together with interests.*

2. Those prayers arise from the Plaintiffs' contention that they inherited the unsurveyed plot situated at Ngao Location in Tana Delta from their father the late Elisha Maghere Dullu. Sometime in the year 1991, the Defendant approached the Plaintiffs' elder brother Nehemiah Maghere who allowed the Defendant to build a temporary house and to cultivate a portion of the land as the Defendant had just lost his job.

3. The Plaintiffs aver that when their brother Nehemiah died shortly thereafter, the Defendant proceeded to construct a permanent house on the land despite opposition from the Plaintiffs and he has since refused and or neglected to vacate the same.

4. But in his Statement of Defence dated and filed herein on 29<sup>th</sup> March 2017, Samuel Joseph Hamena (the Defendant) denies that the Plaintiffs inherited the land from their deceased father and or that the portion of land on which he has built was given to him on a temporary basis by the Plaintiffs' elder brother Nehemia as stated.

5. On the contrary, the Defendant avers that the suit property is crown land and that it is governed by the Village Elders who allotted the same to himself upon payment of the requisite fees. The Defendant asserts that upon settling on the land, he has enjoyed quiet and uninterrupted possession thereof for a period in excess of 12 years and that if the Plaintiffs' were to be adjudged as the lawful owners of the un-demarcated land, then he should be considered to have acquired the same under the doctrine of adverse possession from the Plaintiffs.

6. The Defendant states that he has for a period in excess of 24 years now invested in the suit property being his only home and asserts that the Plaintiffs' claim is malicious, vexatious, frivolous, an abuse of the process of law and that it discloses no reasonable cause of action.

**The Plaintiffs' Case**

7. At the trial herein the Plaintiffs called a total of six (6) witnesses who testified in support of their case.

8. PW1- Yerine Hayugu Maghere is the 1<sup>st</sup> Plaintiff and a resident of Ngao Village in Tana Delta. She told the Court she is the 4<sup>th</sup> born daughter of the late Elisha Dulu who died in 1972. She further told the Court that she was born on the suit property and that they continued living thereon with her mother and siblings after the father passed away.
9. PW1 testified that in 1982, her brother Robert Bonaya (the 2<sup>nd</sup> Plaintiff) got a separate plot of land to which he moved with his wife and their mother. Her brothers Funana Dulu (the 3<sup>rd</sup> Plaintiff) and Nehemia Maghere remained on the land. The 3<sup>rd</sup> Plaintiff later got a job and moved away leaving Nehemiah on the land. PW1 was already married and had also moved away.
10. PW1 further testified that when the 3<sup>rd</sup> Plaintiff later came back home, he found a small shop built thereon. The siblings then sought an explanation from Nehemiah who had been left behind. Nehemiah explained to them that the Defendant herein had borrowed the portion of land to build a shop to sustain himself as he had just lost a job and was homeless. PW1 told the Court they knew the Defendant as their distant relative and they decided to allow him to remain thereon as he looked for his own place to stay.
11. PW1 told the Court that after sometime, the Defendant got his own parcel of land but he did not vacate the Plaintiffs' land. He then built another mud house claiming he had nowhere to go. In 2011, Nehemiah passed away and the Defendant started asserting his claim to the land and started building more houses.
12. PW1 further told the Court that they tried to sort out the matter with the village elders and the area Chief but they had failed to arrive at a solution.
13. On cross-examination, PW1 told the Court the land was initially unsurveyed and that they had no titles. She further told the Court they never took out Letters of Administration. PW1 told the Court the Gaza Committee in the area is meant to settle disputes among residents but they were unable to settle this one. She further told the Court she was unaware if the Defendant had paid the Committee any money for the land. The title for the area is held by the Gaza Committee.
14. PW2- Robert Bonaya Maghere Elisha is a farmer in Ngao Village and the 2<sup>nd</sup> Plaintiff herein. PW2 testified that the Defendant built on their father's parcel of land. The Plaintiffs were born on the land and PW2 later left to go work in Mpeketoni. When he came back, PW2 found that his brother Nehemiah had given a portion of their land to the Defendant to build on. He urged the Court to restore the land to their family.
15. On cross- examination, PW2 conceded that he together with the other Plaintiffs were absent when their brother Nehemiah gave the land to the Defendant. She told the Court one Lydia Nzai was present and witnessed when the land was given to the Defendant to build a kiosk. He further told the Court they had no Certificate of Death showing that their brother Nehemiah had died.
16. PW3- Nathaniel Gwiyo Mwaninjwa is a retired village elder. He told the Court the village elders had given the suitland to the Plaintiffs but the Defendant later went and took over the space.
17. In cross- examination, PW3 told the Court he did not know the size of land in dispute. He further told the Court that though the disputants belong to the same Clan, the suit property was not their ancestral land but belonged to the Plaintiffs' father.
18. PW4- Mbelele Mwao Kaini is a farmer and resident of Ngao Village. He told the Court the land belonged to the late Elisha who was the father to her husband. She further told the Court the 1<sup>st</sup> Plaintiff is her sister-in law.
19. PW4 testified that the Defendant approached her and her husband as a homeless person from Lamu. They gave him a piece of land to put up a residence. When his structure broke down, he left but came after sometime and started building a permanent house using force.
20. On cross- examination, PW4 testified that he was married in Ngao Village in 1967 and that her husband had died sometime back. She denied that the Defendant had been on the land for more than ten years.
21. PW5- Subo Komora Hilkie is a resident of Ngao and a retired teacher. He told the Court the land belonged to Elisha Dulu and that the Plaintiffs had inherited it. Thereafter, the Defendant refused to vacate having been given the land for temporary use.
22. PW5 told the Court that when a meeting of the elders was called, he was appointed Secretary and recorded the minutes. He told the Court the Defendant confirmed that the Plot belonged to the Plaintiffs and that he had only borrowed it on a temporary basis. He further told the Court the Defendant confirmed he had paid a token (Kadzama) to the rightful owners of the land as per their custom. Later the Defendant tried to purchase the land but the owners refused saying it amounted to a taboo.
23. On cross- examination PW5 told the Court the area residents have no individual titles and that there is one block title for the whole area.
24. PW6- Shari Bonaya Joab is also a farmer in Ngao Village and a Cousin of the Plaintiffs. He told the Court that the Defendant who is also his uncle built on land belonging to the Plaintiffs.
25. On cross examination, PW6 told the Court the Plaintiffs have always been on the suitland and that the Defendant used to live on a different Plot. He further told the Court the whole area has no individual titles and that the Gassa Committee deals with land issues in the area.

### **The Defence Case.**

26. On his part, the Defendant called a total of four witnesses who testified in support of his case.
27. DW1- Samuel Joshua Hamena is the Defendant himself. He told the Court he is a Senior Driver with a Security Firm and that he is the owner of the suitland situated in Ngao Village Tana Delta.
28. DW1 testified that he got the land in 1991 after the same was given to him by a Committee in the Village which is tasked with the purpose of land allocation. DW1 told the Court the Chairman of the Committee (presently one Yona Kongwe) has a block title deed for the entire village which is an area measuring 13 acres.
29. DW1 testified that the present complaint was brought about by the 1<sup>st</sup> Plaintiff after her daughter's marriage to DW1's son collapsed. Previously, they were all living together on the same plot of land as they come from the same clan.
30. While conceding that the land previously belonged to the Plaintiffs' father, DW1 told the Court that according to the regulations of the village, the plots can be given to anyone after the previous occupant's house collapses.
31. On cross- examination, PW1 conceded that he was previously residing at his father's place in a neighbouring parcel of land. He however requested for the land previously occupied by the Plaintiffs' father and the Gasa Village Committee gave it to him. When he was called at the DO's office, DW1 told the Court he had presented himself and was given the land.
32. DW2- Yana Kongwe Galgalo is a retired Teacher and the Chair of what he described as the Supreme Council of Elders-otherwise known as Gasa. He is also the Vice- Chair of the Sub- Location Committee and his responsibilities include taking care of their cultures and traditions.
33. DW2 testified that he is aware the Defendant is a resident of Ngao Village. Their tradition is that elders would allocate land to various individuals. Where one's house collapses and it has not been cleared for six months, it can be given to someone else. In this respect, DW2 told the Court the suitland was previously occupied by the Plaintiffs' father. When he died, his son Nehemia lived on the land but did not build anything thereon.
34. DW2 further testified that when the Defendant came from Lamu, the Village Committee consulted and gave him the Plot. Nehemiah who was not using the land agreed to give it out. The Defendant had then been on the land since 1991. DW2 told the Court he had a copy of the original title for Ngao Village and produced the same in Court. He told the Court there were no individual titles for land in the village.
35. On cross- examination, DW2 conceded that the land initially belonged to the Plaintiffs' father Elisha and that the Defendant lived on a neighbouring plot. However, after his marriage and when he returned from Lamu, the Defendant asked for a plot of land from the Village Committee. He paid Kshs 500/- to the Committee and was allowed to build on the Plot.
36. DW3- Joshua James Kitumbili is the Assistant Chief, Ngao Sub- Location. He told the Court he has occupied that position since 1997. DW3 testified that Ngao Sub-Location is managed by the Community and Village Elders. When one wants to build, he is given the land to use by the Village Committee. If upon expiry of six months one is unable to develop it, the land is given to someone else.
37. DW3 told the Court the Defendant was given the suitland by the Committee in similar fashion. At that time, DW3 was not the Assistant Chief of the area but he learnt about it when the dispute was taken to his office.
38. On cross- examination, DW3 testified that the Defendant has been a resident of their village since he was born even though he resided on a different plot.
39. DW4- Stephen J. Hiribaya is a farmer and a village elder in Ngao Village. He told the Court that on 21<sup>st</sup> August 2015, he was summoned to the area DO's office together with the area Chief and the Gasa Committee Chairman over the dispute herein. The meeting agreed that the Plaintiffs abandon their complaint and the Defendant was allowed to build on the land.
40. On cross- examination, DW4 conceded that the Defendants father previously occupied a different plot of land. He told the Court that he knew Nehemiah Elisha had died along time back but asserted that land in their village does not get inherited but is allocated in public. One is required to pay Kshs 500/- to the Village Committee elders to resolve the disputes.

### **Analysis and Determination**

41. I have perused and considered the pleadings filed by both parties, the testimonies of their witnesses and the evidence adduced at the trial. I have also considered the submissions and authorities placed before me by the Learned Advocates for the parties.
42. The subject matter of the dispute herein is a hitherto unsurveyed plot of land situated within Ngao Location in Tana Delta within Tana River County. None of the parties were clear either in their pleadings and or testimonies before the Court as to the exact measurement of the parcel of land. In their pleadings herein, the Plaintiffs simply describe the suit property as un-surveyed plot known as Elisha Maghere Family Plot.
43. The said Elisha Maghere Dullu who is said to have passed away in 1972 was the father of the Plaintiffs herein. It was the Plaintiffs case that prior to his death, Elisha was the sole occupant of the suit property and that his children continued to reside on the land together with their mother long after he had passed away. In that respect, the 1<sup>st</sup> Plaintiff Yerine Maghere (PW1) who is the 4<sup>th</sup>-born daughter of Elisha told the Court that they continued living on the land until sometime in 1982 when her brother Bonaya (the 2<sup>nd</sup> Plaintiff) acquired another plot

and moved to stay thereon with their mother. Thereafter the 1<sup>st</sup> Plaintiffs other brothers got employment elsewhere and the 1<sup>st</sup> Plaintiff herself upon being married, moved away from the land.

44. The Plaintiffs told the Court that when they moved away, they left behind their brother and Elisha's 1<sup>st</sup>-born son one Nehemiah Maghere. When the siblings returned home after sometime, they found a small shop built on the suit property. Upon enquiry from their brother Nehemiah, he explained to them that he had temporarily lent that portion of land to the Defendant to build the shop to sustain himself as he had just lost a job in Lamu where he used to work and was homeless. In the knowledge that the Defendant was their distant relative, the Plaintiffs left the Defendant to continue using the land.

45. As it turned out, Nehemiah passed away in 2011 and according to the Plaintiffs, it was then that the Defendant started asserting a claim on the land and even commenced construction of permanent houses thereon. The Plaintiffs told the Court that since then, their efforts to resolve the dispute through the Ngao Village Elders and the Provincial Administration had failed to bear fruits and hence the institution of this suit.

46. On his part, Samuel Hamena Mtetemo (the Defendant) does not deny that the suit property was occupied by Elisha and or his family in the years gone by. Neither does he deny that he has since moved onto the land and erected houses thereon. It is however his case that he occupies the land as of right as the same was allocated to him by a Committee of the Ngao Village Elders which is responsible for and deals with land allocation in the area.

47. The Defendant told the Court that following that allocation, he had occupied the suit property since 1991 and asserted that the present complaint was only brought out of malice after the marriage of the 1<sup>st</sup> Plaintiff's daughter to his (the Defendant's), son collapsed.

48. Both sides to the dispute agreed that there were no individual titles to the parcels of land comprising what is known as Ngao Village within Tana River County. Instead the whole village is registered under one title which is kept by an apex Committee elected by the community through their traditions and customs known as the Gasa Council of Elders.

49. As it turned out, the suit property is but an undefined portion of a parcel of land registered as Tana Delta/Ngao 'A'/439 measuring approximately 11-12 Ha and registered as aforesaid simply in the name 'Ngao Village'. That title issued on 28<sup>th</sup> May 2013 was produced before me by Yona Kongwe Galgalo (DW2) who is the current Chair of the Supreme Council of Elders referred to locally as the Gasa Council of Elders.

50. DW2 told the Court that all the land in Ngao Village as registered belonged to the Community and the Gasa Council of Elders had the authority to allocate the unoccupied or underdeveloped plots of land to the members of the Ngao Village Community. While confirming that indeed the land was previously occupied by the Plaintiffs' father Elisha, DW2 testified that their tradition was that it was the elders who allocated the land. Where one's house collapsed and it was not re-built within six months, the elders were free to allocate it to someone else.

51. In this respect, DW2 told the Court that following Elisha's death, his eldest son Nehemiah occupied the land but did not build any new structures thereon. When the Defendant came back home from Lamu and applied for land to build, the Gasa Committee consulted and since Nehemiah had no objection, the land was given to the Defendant.

52. DW2's position was indeed corroborated by the Ngao Sub-Location Assistant Chief Joshua James Kitumbili (DW3). According to the Assistant Chief, Ngao Sub-Location is managed by the Community and Village Elders. When one wants to build, he is given the land to build by the Village Committee and after six months if one fails to develop the land, it is given by the same Committee to some other applicant.

53. Arising from the foregoing, it was evident to me that the suitland in dispute was part and parcel of the Community land registered in the name of Ngao Village. Communal tenure as it were involves a group of individuals or communities having joint exclusive rights to use and manage a parcel of land. Under Section 2 of the Community Land Act No. 27 of 2016 as read together with Article 63(1) of the Constitution, people are considered to belong to a community where they share a common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space, ecological space or ethnicity.

54. From the material placed before me, it was evident that the disputants herein are all members of the Pokomo ethnic community resident in Ngao Village. Given that they share the attributes defined under Section 2 of the Community Land Act aforesaid and Article 63 (1) of the Constitution, all of them were entitled to a claim of interest in land held by the community as a group. It was also self-evident to me that the Community to which the disputants belong has its chosen leaders under the Gasa Council of Elders whose role included the allocation of land to individual applicants.

55. Section 15 of the Community Land Act clearly envisages a community such as the one resident in Ngao village to appoint or constitute a community land Management Committee whose roles shall be, inter alia, to:

***a) Have responsibility over the running of the day to day functions of the community;***

***b) Manage and administer registered community land on behalf of the community;***

***c) Co-ordinate the development of community land use plans in collaboration with the relevant authorities; and***

***d) Prescribe rules and regulations, to be ratified by the community assembly, to govern the operations of the Community.***

56. In this respect, I am in agreement with the submissions of Mr. Gekanana, Learned Counsel for the Defendant that the Ngao Village Gasa Council of Elders are one such committee envisaged under Section 15 of the Community Land Act and that it was possessed with authority to deal with the Ngao Village Community land matters on a day to day basis and according to the set rules and guidelines.

57. From the material placed before me, it was evident that for one to be allocated land, he was required to apply and pay a sum of Kshs 500/- to the elders. In this regard, the Defendant produced a receipt dated 20<sup>th</sup> August 2012 showing payment of Kshs 500/- to the Council of Elders. He also produced a letter dated 23<sup>rd</sup> August 2012 from the Area Assistant Chief confirming that the Ngao Village Committee was the custodian of the suit property.

58. In the premises, I was persuaded that the Plaintiffs have neither possessory nor occupational right or interest over the suit property and that the Ngao Village Gasa Committee is the custodian of the whole parcel of land known as Tana Delta/Ngao 'A'/439 within which the disputed plot of land falls. The Plaintiffs did not prove any individual ownership of the subject land and I did not hear them to challenge the legality of the Ngao Village Gasa Committee in the administration and management of the land comprised in the title registered under Ngao Village.

59. Accordingly, the Plaintiffs' case must fail. The same is hereby dismissed with costs to the Defendant.

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

**J.O. OLOLA**

**JUDGE**