



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 203 OF 2018**

**ALFRED KENGA KAZUNGU.....PLAINTIFF**

**VERSUS**

**1. NELSON NYALE LUGANJE**

**2. MORIS NYANJE.....DEFENDANTS**

**JUDGMENT**

**Background**

1. By his Complaint dated 5<sup>th</sup> September 2018 as filed herein on 26<sup>th</sup> October 2018, Alfred Kenga Kazungu (the Plaintiff) prays for Judgment against the two Defendants jointly and severally for: -

***a) Vacant possession of the eight acres of land within Title No. Chembe/Kibabamshe/1 and their eviction therefrom;***

***b) An order of permanent injunction against the Defendants restraining the Defendants by themselves, their servants and/or agents and any person claiming through them from entering onto the suit property and carrying on any activity thereon or selling or charging the suit property or in dealing with the suit property in any manner whatsoever;***

***c) A mandatory order compelling the Defendants to release to the Plaintiff the Title Deed Plan for the suit property and for an order to the Land Registrar, Kilifi Land Registry to withdraw the caution registered against the Title to the suit property on 11<sup>th</sup> February 1993 as entry No.4;***

***d) Costs of this suit and interests 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 position that he is the Administrator of the Estate of the late Kazungu Mangale Kombe who is the registered proprietor of the said Title No. Chembe/Kibabamshe/1 containing by measurement 8.0 Ha. The Plaintiff avers that he has been residing on the suit property together with his family members ever since he was born and that they have developed the same by building their houses and planting permanent crops and trees thereon.

3. It is the Plaintiff's case that sometime back, the 1<sup>st</sup> Defendant went to the suit property and started claiming some eight acres thereof on the purport that he had been sold the same by the late Kazungu Mangale Kombe. The Plaintiff further avers that the 1<sup>st</sup> Defendant also claimed to be in possession of the original Title Deed for the suit property. The Plaintiff asserts that neither himself nor other members of his family were aware of the alleged sale and or the fact that the 1<sup>st</sup> Defendant held the original title to the suit property.

4. The Plaintiff further avers that unbeknown to himself, the 1<sup>st</sup> Defendant had on 11<sup>th</sup> February 1993 registered a caution against the Title to the suit property claiming purchaser's interest thereon. Subsequently the 1<sup>st</sup> Defendant purported to sell to the 2<sup>nd</sup> Defendant the said eight acres of land and the 2<sup>nd</sup> Defendant proceeded to trespass onto the suit property on the strength of the said transaction and continues his trespass thereon to-date.

5. But in their Joint Statement of Defence dated and filed herein on 10<sup>th</sup> April 2019, the Defendants deny the averments contained in the Complaint and assert that the suit premises were duly purchased from the Plaintiff's father the late Mangale Kombe vide a Sale Agreement dated

22<sup>nd</sup> March 1989.

6. The Defendants state that all building and any developments on the suit property were brought about by themselves and that they have in addition planted mango and coconut trees as well as rearing cows and goats in the premises.

7. The Defendants further assert that their occupation of the suit premises has been notorious and open and the Plaintiffs are only feigning ignorance in order to vitiate the acts of their father. It is further the Defendants' case that they placed the caution on the suit property when the Plaintiff's father attempted to sell the land to a third party.

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

8. At the trial herein, the Plaintiff called a total of four witnesses in support of his case.

9. PW1- Alfred Kenga Kazungu is the Plaintiff himself and a resident of Chembe Kibabamshe. He told the Court that the land was allocated to his late father Kazungu Kombe when he was six years old in 1991. His father later passed away in 1998.

10. PW1 testified that he was unaware of any sale of the land by his father to the 1<sup>st</sup> Defendant in the year 1989. He told the Court his father was an illiterate man and that he never told his family about the sale of the land. PW1 further testified that they were aware the Defendants use the land and that when they lodged a complaint at the Chief's Office, the Defendants never turned up. He further told the Court he did not have the original title and that he thought the 1<sup>st</sup> Defendant keeps it.

11. On cross- examination, PW1 told the Court they never attended the National Land Commission (NLC) hearing as they were never summoned to attend the same. He further told the Court the 1<sup>st</sup> Defendant only cultivates the land but does not reside therein. PW1 further testified that he did not know how a caution was placed on the suitland.

12. PW2- Anderson Kazungu Mwanyale is a younger brother to the Plaintiff. PW2 testified that the suit property belongs to his deceased father and that the Defendant had built a house thereon some three years ago. He told the Court in 1989, he was seven years old and that his father never sold the land to the Defendants.

13. On cross- examination, PW2 conceded that there are coconut trees on the land and that the 1<sup>st</sup> Defendant rears goats thereon. He testified that when the 1<sup>st</sup> Defendant started constructing houses on the land, they reported the matter to the area chief. PW2 further conceded that he was aware the 1<sup>st</sup> Defendant had buried a relative on the land. He also conceded that he was aware the dispute went before the National Land Commission and that his mother had testified before the Commission.

14. PW3- Jackson Kazungu Mwanyale Kombe is also a brother to the Plaintiff. He testified that the suit property belonged to their late father and that they were unaware he had sold the land to the 1<sup>st</sup> Defendant. He told the Court the 1<sup>st</sup> Defendant went to the land after their father passed away. He dismissed a Sale Agreement allegedly executed between his father and the 1<sup>st</sup> Defendant telling the Court his father could not have signed the same as he did not know how to read and write.

15. On cross- examination, PW3 conceded that they had been to the National Land Commission where the 1<sup>st</sup> Defendant produced the Sale Agreement. He further conceded that the National Land Commission determined the dispute in favour of the 1<sup>st</sup> Defendant.

16. PW4- Kadzo Kazungu is the mother of the Plaintiff and the widow of the late Kazungu Mwangale Kombe. She told the Court she was aware that her late husband did not sell any portion of the suit property to the 1<sup>st</sup> Defendant. She further told the Court that her husband would have informed her if he wanted to sell the same.

17. PW4 further testified that she resides on the property with her family and that none of them was aware of the alleged sale. PW4 further told the Court that her husband and herself never attended any Land Control Board meeting to apply for consent to sub-divide the suit property and to sell eight acres to the 1<sup>st</sup> Defendant. She was therefore unaware of the alleged sale until the 1<sup>st</sup> Defendant trespassed onto the property claiming he had bought the same.

18. PW4 further told the Court that her late husband was illiterate and she was therefore surprised to see that he had signed an Agreement for Sale with the 1<sup>st</sup> Defendant. She further told the Court she did not see her husband give the original title deed for the suit property to the 1<sup>st</sup> Defendant.

19. On cross- examination, PW4 told the Court that she did not know the 1<sup>st</sup> Defendant. While conceding that she has been seeing the 1<sup>st</sup> Defendant on the land, she told the Court she did not know why he was on the land. She further told the Court she was aware the 1<sup>st</sup> Defendant built a house on the land a year ago but she had not been to his home. She was however aware the 1<sup>st</sup> Defendant has cattle and goats on the land.

20. PW4 further conceded that she had attended a session at the National Land Commission. She however told the Court that even before she could testify, she was told the case was over. She did not know who won the case before the National Land Commission.

### **The Defence Case**

21. On their part, the two Defendants called one witness who testified in support of their case.

22. DW1- Nelson Nyale Lughanje is the 1<sup>st</sup> Defendant and a resident of Chembe/Kibabamshe. DW1 testified that he bought the then Plot No.1 in 1989 from the Plaintiff's father and that they both executed a Sale Agreement to the effect on 22<sup>nd</sup> March 1989. He further told the Court that immediately upon the sale, the Plaintiff's father called an Agricultural Officer who demarcated his portion from the seller's and he thereafter embarked on cultivation of his portion.

23. DW1 told the Court that sometimes in 1993, he became aware that the Plaintiff's father wanted to sell the same piece of land to someone else. DW1 then proceeded to place a caution on the land. He told the Court that he has since planted coconuts, mango and cashew nut trees on the land. He also told the Court he has since built a permanent house thereon in which he resides to-date.

24. DW1 further testified that at some point in time, he was summoned by the National Land Commission where the Plaintiffs had gone claiming their father only sold one acre of land to DW1. He told the Court he explained himself to the Commission and that the area Assistant Chief corroborated his position. The National Land Commission then gave a verdict in favour of DW1 on 17<sup>th</sup> July 2017.

25. DW1 further told the Court that he started utilizing the suit property during the lifetime of the Plaintiff's father and that no one had ever tried to stop him from doing so.

26. On cross-examination, DW1 told the Court it is the seller who approached him in 1989 with the intention of selling the land. He went to the land where he found that the seller was staying on a portion thereof. The seller was at the time accompanied by his first wife who has since died. While conceding that PW4 was also the seller's wife, DW1 told the Court PW4 did not accompany the seller at that time and that he did not see the Plaintiff or any of the seller's children.

27. DW1 further testified that even though the seller did not know how to read, he could write his name. The Sale Agreement was read to the seller by the Advocate who prepared the same in both Kiswahili and Giriama before he executed the same. DW1 told the Court the entire land was 16 acres and that he was sold eight acres thereof which portion was demarcated by an Agricultural Officer who had been called by the seller.

28. DW1 told the Court they neither called a Surveyor nor sought the Land Control Board Consent for the transaction as there was an embargo placed by the Government on all land in the area. The embargo was later removed.

29. DW1 further told the Court that the 2<sup>nd</sup> Defendant was his younger brother. He denied selling any portion of the land to his brother whom he told the Court resides in Mombasa and not on the suit property. DW1 conceded that he built a permanent house on the land three years ago and that he had placed an embargo thereon when he heard that the seller wanted to sell it again.

#### **Analysis and Determination.**

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

31. The Plaintiff herein brings this suit as the Administrator of the Estate of the late Kazungu Mangale Kombe. According to the Plaintiff, the deceased was at all times the registered proprietor of the parcel of land known as Chembe/Kibabamshe/1 containing by measurement approximately 8.0 Ha. It is the Plaintiff's case that together with his family, they have been residing on the suit property since his childhood and that they have developed the same by building their houses and planting permanent crops and trees thereon.

32. Without specifying the date, the Plaintiff asserts that sometime back the 1<sup>st</sup> Defendant went to the suit property and started claiming ownership of some eight acres thereof on the purport that he had been sold the same by the late Kazungu Mangale Kombe. The Plaintiff told the Court that thereafter, the 1<sup>st</sup> Defendant purported to sell the land to the 2<sup>nd</sup> Defendant who has since trespassed onto the suit property and remains thereon.

33. It was the Plaintiff's case that neither himself nor any member of the deceased's family are aware of the alleged sale of the eight acres to the 1<sup>st</sup> Defendant and that hence the Defendants have no right or interest over the suit property. Accordingly, the Plaintiff urged this Court to grant orders evicting the Defendants from the suit property and to compel them to release the original Title Deed thereof to enable the removal of a caution lodged thereon by the 1<sup>st</sup> Defendant on 11<sup>th</sup> February 1993.

34. While the Plaintiff claimed that the 1<sup>st</sup> Defendant had sold the disputed portion measuring eight acres to the 2<sup>nd</sup> Defendant, there was nothing much of substance placed before me as evidence of any sale or transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. In his testimony before the Court, the Plaintiff testified that he knew the 2<sup>nd</sup> Defendant and that he (the 2<sup>nd</sup> Defendant) claimed to have bought the suit property from the 1<sup>st</sup> Defendant.

35. As it turned out, it was unclear to me why the said 2<sup>nd</sup> Defendant had been enjoined in these proceedings for even the Plaintiff himself told the Court that only the 1<sup>st</sup> Defendant cultivates the land. His two brothers Anderson Kazungu Mangale (PW2) and Jackson Kazungu Mangale (PW3) told the Court they neither knew nor had seen the 2<sup>nd</sup> Defendant. The Plaintiff's mother Kadzo Kazungu indeed made no reference whatsoever to the 2<sup>nd</sup> Defendant.

36. From the 1<sup>st</sup> Defendant's testimony it did emerge that the 2<sup>nd</sup> Defendant was his younger brother. As it were, the 1<sup>st</sup> Defendant denied selling the disputed portion of land to his brother. He also denied that his brother resided on the suit property and in the absence of any contrary evidence from the Plaintiff, it was clear to me that the 2<sup>nd</sup> Defendant had been erroneously enjoined in these proceedings.

37. As regards the 1<sup>st</sup> Defendant, he does not deny being on the disputed portion of the suit property. It is however his case that he is there by right having purchased the same from the Plaintiff's father way back in the year 1989. In support of that position, the 1<sup>st</sup> Defendant produced a copy of a Sale Agreement dated 22<sup>nd</sup> March 1989 between himself and the said Kazungu Mangale Kombe. The said Agreement reads in the relevant portion as follows:

***“Whereas the Vendor is possessed of or otherwise entitled to all that piece of parcel of land known as Chembe/Kibabamshe/1 containing by measurement sixteen (16) acres or thereabouts and whereas the Purchaser has agreed with the Vendor for the sale to him of Eight (8) acres of the said parcel of land at an agreed price of Kshs 40,000/- paid to the Vendor by the Purchaser (receipt whereof the Vendor doth hereby acknowledge) the Vendor as beneficial owner agrees to transfer and convey unto the Purchaser his right title and interest in the above described portion.***

***In witness whereof the parties herein have subscribed their respective signatures the day and year first above written.”***

38. The Plaintiff has attacked that Agreement stating that his father was an illiterate man who could not read and write and that he could not therefore have executed the Agreement as shown. On the other hand, the Defendant testified that while the Plaintiff's father was indeed illiterate, he was capable of writing his name and that that is what he did in execution of the Sale Agreement after the same was explained to him in both Kiswahili and Giriama languages by Mr. Lughanje Advocate who prepared the Agreement.

39. The Plaintiff's father is shown to have indeed inscribed his name “Kazungu” on the Sale Agreement dated 22<sup>nd</sup> March 1989. Messrs Kupalia & Lughanje Advocates who are shown to have prepared the Agreement were not called to testify before me and this Court did not find any reason to doubt that the Plaintiff's father had indeed signed the Agreement.

40. In my view, under Section 109 of the Evidence Act, it was incumbent upon the Plaintiff as the one alleging that his father was illiterate and incapable of writing his name to prove that fact. The Plaintiff did not bring any evidence to demonstrate that his father was that illiterate and that the signature on the Sale Agreement was a forgery.

41. Besides, it was clear to me that on 11<sup>th</sup> February 1993, some five (5) years before his father would pass away, the 1<sup>st</sup> Defendant was able to lodge a Caution on the suit property claiming an interest thereon as the purchaser of the land. There was no evidence whatsoever that the Plaintiff's father ever sought the removal of the Caution during his lifetime. It was also curious that the Plaintiff and or any member of his family made no attempts to have the Caution lifted until some 25 years later in the year 2018 when they filed this suit.

42. From the Plaintiff's own testimony and that of his witnesses, they were unable to pin point the exact time when the 1<sup>st</sup> Defendant allegedly trespassed upon their land and started claiming the eight acres portion. When their father passed away almost ten years after the 1<sup>st</sup> Defendant is said to have purchased the land, they did not bury him on the disputed portion but on the remaining portion of the suit property which they still occupy to-date.

43. This Court also found it curious that while the Plaintiff wants this Court to compel the Defendants to produce the original title to the suit property, they are unable to explain how the same came to be in the possession of the Defendants. This Court did find the 1<sup>st</sup> Defendant's explanation as to the whereabouts of the title rather candid. According to the 1<sup>st</sup> Defendant the said title was surrendered by the Plaintiff's father to the sale transaction Advocates for purposes of the processing of the sub-division of the title. That again can only lead to the conclusion that the Plaintiff's father had sold the disputed portion of the land to the 1<sup>st</sup> Defendant.

44. That being the case, this suit was clearly time-barred by dint of Section 7 of the Limitation of Actions Act. It was clearly evident to me that the 1<sup>st</sup> Defendant has been in actual possession of the disputed suit portion of the property ever since he bought the same in 1989.

45. In the premises I did not find any iota of merit in the Plaintiff's claim herein. His suit is dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.**

**J.O. OLOLA**

**JUDGE**