



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 29 OF 2015**

**STELLA KIUMBI MCHARO**

**{Suing in her capacity as personal**

**representative of the estate of EVANS**

**KAFUSI MCHARO (Deceased)}.....PLAINTIFF**

**VERSUS**

**JOSEPH RUA.....1<sup>ST</sup> DEFENDANT**

**PETRO CHARO KAZINGO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

*(Suit by plaintiff seeking orders to have the defendants permanently restrained from the disputed land and for damages; plaintiff representing the estate of the registered deceased owner of the land; evidence showing that defendants alongside others invaded the land of the deceased; judgment given for the plaintiff)*

1. This suit was commenced through a plaint filed on 24 February 2015 against two persons, Joseph Rua and one Chengo. In the plaint, the plaintiff has pleaded that the land parcel Subdivision No. 1095 (Original No. 547/7) Section III Mainland North is registered in the name of Evans Kafusi Mcharo (deceased). The plaintiff is the personal representative of the estate of the deceased. It is pleaded that sometimes in December 2014, the defendants wrongfully entered the suit land and took possession of it. It is pleaded that the defendants are also selling portions of the land to third parties. In the suit, the plaintiff has asked for orders of permanent injunction to restrain the defendants, their servants, or agents from the land or from dealing with it. She has also sought damages and costs.

2. The defendants filed a joint statement of defence. They pleaded that they have been living and cultivating on the Plot No. 337/III/MN which they averred is Government land. It was pleaded that the plaintiff is suing squatters residing and cultivating a different plot.

3. In the course of the proceedings, the 1<sup>st</sup> defendant died and his suit abated. The only remaining defendant is therefore the 2<sup>nd</sup> defendant.

4. The plaintiff had a witness statement which she adopted. She inter alia stated that it was in December 2014 when the defendants, and others she could not identify, wrongfully entered the suit land and took possession. She reported the incident at Mtwapa Police Station and an officer went to the ground and observed that the defendants and others had put up sticks to serve as beacons. She also reported to the Mtwapa District Officer who ordered the trespassers to move out but they did not heed. She stated that this was the third time that the defendants and other trespassers had invaded her land. The first time was when her husband was still alive and police officers evicted them. The second time, she and her husband fenced off the land with wooden posts and barbed wire. It is for the third invasion that she has sought relief. In court, she added that when she was informed of the invasion, she went to the land and found very many people who were armed with machetes. They were subdividing the land amongst themselves. She stated that some have now built permanent structures. Cross-examined, she testified that there are more than 100 people on the land. She has not however sued them because she does not know them. She stated that it is not the defendants who have built on the land but it is other persons. She did not know what relation they have with the defendants. She however believed that the defendants were the leaders of these invaders. She elaborated that they bought the land in 1998 when it was a forest and there was nobody in it. They cleared it and built a two roomed house which was occupied by a caretaker.

5. PW-2 was Frank Mcharo Kafusi, a son of the plaintiff. He affirmed that in December 2014, their land was invaded. He visited the land and found people constructing houses and clearing bushes. There is now a group on the land.

6. The 2<sup>nd</sup> defendant, Petro Chengo Kazingo, testified that he was born on the land and has lived on it peacefully. He claimed that his forefathers were cultivating on the land. He wondered why it was only him who has been sued yet there are over 900 people on the land. He was cross-examined on his statement which stated that he and his family moved into the suit land in the year 2004 but he denied that he is the one who made the statement.

7. With the above evidence, the defendant closed his case.

8. I invited counsel to file submissions and I have taken note of the submissions filed by counsel for both plaintiff and the now sole existing defendant. Counsel for the defendant inter alia submitted that the prayers are untenable for not seeking an order of eviction or vacant possession. Counsel also submitted that the developments on the land have been made by third parties who are not parties to the suit. She also raised issue that the 2<sup>nd</sup> defendant is not properly identified since only one of his names was mentioned in the pleadings. For the plaintiff, counsel was of the view that the plaintiff has proved her case and deserves the prayers sought.

9. I have considered all the above.

10. This is a suit claiming trespass. Only two people were sued although from the evidence tendered, it appears as if there are many other persons who are in possession of the land. They are not parties to this suit. I can only make orders for or against the persons who are in the suit. In this instance, and since the 1<sup>st</sup> defendant died, I can only make orders for or against the 2<sup>nd</sup> defendant. Although counsel for the 2<sup>nd</sup> defendant raised issue that the 2<sup>nd</sup> defendant is not properly identified, because he was only identified by one name "Chengo," I see nothing here because it is not the law that a person must be identified by his full names so as to be sued. In any event, we now know that his full name is Petro Chengo Kazingo. I will identify him in this judgment by his full name.

11. Having assessed the evidence, I am not in doubt that the 2<sup>nd</sup> defendant is among the persons who invaded the plaintiff's land. He was positively identified by the plaintiff. His claim that he was born on the suit land is not believable at all especially given the fact that in his statement he stated that he and his family moved into the land in the year 2004.

12. In the defence, the defendants pleaded that this was Government land. No evidence of such was availed. The plaintiff has indeed adduced sufficient evidence about the ownership of the land. She availed a title which showed that the suit land is registered in the name of her deceased husband. She is administrator of his estate. It is the estate which has full rights over the land and not the 2<sup>nd</sup> defendant. I therefore do not hesitate to issue the order of permanent injunction to restrain the 2<sup>nd</sup> defendant from the suit land as sought in the plaint. The 2<sup>nd</sup> defendant will also pay damages of Kshs. 250,000/= for trespass, the same to attract interest from the date of judgment. The 2<sup>nd</sup> defendant will in addition pay the costs of this suit.

13. Before I close, I need to emphasise that I have only made orders against the 2<sup>nd</sup> defendant. I have not made any orders against other persons who may be in possession of the land. It would have been more useful to the plaintiff if she had sued all the persons in possession, or if she didn't know them, advertise to have the suit against all persons in possession of the land. She will need to live with the fact that this judgment only binds the 2<sup>nd</sup> defendant.

14. Judgment accordingly.

**DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF NOVEMBER 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**