



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 94 OF 2017**

**DANIEL GOYA.....PLAINTIFF**

**VERSUS**

**KAZUNGU KARISA**

**SAFARI KARISA**

**KATANA KARISA**

**SIDI CHUI CHAI.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By his Plaint dated and filed herein on 25<sup>th</sup> April 2017, Daniel Goya (hereafter “the Plaintiff”) prays for:-

- a) Eviction of the Defendants and vacant possession of the suit premises;***
- b) Costs of the suit; and***
- c) Any other or further relief as the Honourable Court may deem fit to grant.***

2. Those prayers are anchored in the Plaintiff’s averments that he is the legal owner of the suit premises described as an unsurveyed parcel of land measuring around three acres in Mwashungi Milano. It is the Plaintiff’s case that he inherited the said parcel of land from his grandfather and that he has peacefully lived on the same until the year 2005 when the four Defendants invaded the same and started issuing threats to repossess the same.

3. It is the Plaintiff’s case that as a result of the Defendants illegal activities, he has been denied peaceful occupation of the suit premises and hence the suit herein.

4. However in a Statement of Defence dated 8<sup>th</sup> June 2017 and filed herein on 13<sup>th</sup> June 2017, Kazungu Karisa, Safari Karisa, Katana Karisa and Sidi Chui Chai (the Defendants) jointly deny the Plaintiff’s claim and assert that the Plaintiff has never owned the subject parcel of land.

5. It is the Defendant’s case that the Plaintiff was destitute and was hence only given a small portion of the suit property to cultivate and fend for himself. It is further the Defendants case that the dispute herein was amicably settled in the presence of the Plaintiff and they urge the Court to dismiss the same with costs.

**The Plaintiff’s Case**

6. At the trial herein, the Plaintiff called three witnesses who testified in support of his case.

7. Testifying as PW1, the Plaintiff told the Court that he had inherited the suit property from his grandfather who had in the process shown him where to build and raise his family. He told the Court that sometime before 2005, he had a dispute with the Defendants over the parcel of land in which he had lived since the year 2000.

8. PW1 testified that all attempts to resolve the dispute, including the last meeting held on 3<sup>rd</sup> April 2016 failed. He told the Court that the Defendants had turned violent and were invading his property without any justification. PW1 reported the invasions to the Police but nothing much had been done. He told the Court that he has built semi-permanent structures in the piece of land where he lives with his family and urged the Court to grant the orders sought in the Plaintiff.

9. PW2- Mary Kadzo Charo is a step mother of the Plaintiff having been married to a brother to the Plaintiff's father. It was her testimony that the land initially belonged to Kaingu Mwabaya who died and left the land to the Plaintiff's father Gona Mwabaya. The suit property was allocated to the Plaintiff by his father.

10. PW2 testified that the dispute started when the Plaintiff's father Goya Mwabaya died. As one of the Plaintiff's aunts, they divided the land into six pieces and all had been peacefully living therein until the time the Defendants invaded the land. Sometime in 2017, the Defendants carried out further sub-divisions of the land and left the Plaintiff out. The family tried to resolve the dispute without success.

11. PW3- David Katana Mazurui is a Village Elder at Mwanashungi. He told the Court that at some point in time, the Chief Kijiwetanga Location referred the dispute herein to him for a resolution. PW3 called the family elders and after lengthy talks, it was resolved that the suit premises belonged to Kaingu Mwabaya who had given it to the Plaintiff.

12. PW3 told the Court that the said Kaingu Mwabaya only sired daughters and in the absence of a son to inherit his property, he had called his grandchild the Plaintiff herein and gave him the suit property. PW3 further told the Court that he had tried his best to resolve the dispute but the Defendants have been defiant and continue to illegally occupy the suit premises. They have since become violent with the sole mission to occupy the land and be declared as being in adverse possession thereof.

### **The Defence Case**

13. On their part, the Defendants called a total of four witnesses who testified in support of their case.

14. DW1- Abdalla Omar Mwakoyi told the Court that he is a Village Elder at Kadongoleni, Muyeye area. He recalled that this dispute has been there for long. Following the complaints lodged by the Plaintiff, DW1 and other committee members went to the land in the company of a surveyor.

15. DW1 further told the Court that they then called a meeting of all the concerned family members. At that meeting, it was revealed that the land belonged to Karisa Mwabaya but his brother, Kaingu Mwabaya had asked for a piece of the land to cultivate some years back.

16. DW1 told the Court that the Plaintiff acknowledged at the meeting that the land belonged to Karisa Mwabaya but stated that he needed a place to stay. As the families were related, it was agreed that the Plaintiff be given a small portion to live in with his family.

17. DW2 Rachael Dama Karisa is the daughter of Karisa Mwabaya and an aunty of the Plaintiff. She told the Court that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are her brothers while the 4<sup>th</sup> Defendant is her mother. According to DW2, the Plaintiff requested her family for a piece of land to use for cultivation. At that time DW2's father had passed away but her brothers allowed the Plaintiff to cultivate the land. It was DW2's case that the Plaintiff is claiming something that does not belong to him.

18. DW3-Sidi Karisa Mwabaya is the 4<sup>th</sup> Defendant and the mother of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. She told the Court that the suit property belonged to her husband Karisa Mwabaya. Almost 40 years ago, however, her Husband's brother one Kaingu Mwabaya came to her home while feeling unwell. They welcomed him and his wife and gave them a piece of land to till. The said Kaingu died a few months later and his wife left with the children for a place called Bate.

19. DW3 told the Court that sometime in 2002, the Plaintiff approached them and requested for a piece of land to cultivate. He was given a piece but he later started claiming the land. It was then that DW3's children decided to share out the land. She told the Court that out of pity, they have still given the Plaintiff a piece of land for his use.

20. DW4- Kaingu Mwabaya is the last born in the family of Kaingu Mwabaya. She told the Court that they used to till the land around the time she was born in 1952. When her father died in 1963 however, they left with their mother and went to live in a place called Bate. She told the Court that even though the Plaintiff had no land in the area, they have given him a piece of their land on humanitarian grounds.

### **Analysis and Determination**

21. I have perused and considered the pleadings filed herein by both the Plaintiff and the Defendants. I have equally considered the oral testimonies of all the witnesses who testified, the evidence placed before me and the submissions filed by the Learned Advocates for the parties.

22. The Plaintiff herein craves orders of eviction and vacant possession of the suit premises from the Defendants. It is the Plaintiff's case that he inherited the suit premises described as an unregistered portion of land measuring "around three acres in Mwashungi Milano area" of Malindi. He accuses the four Defendants of invading the said premises sometime in the year 2005 and thereafter threatening to evict him therefrom.

23. At the trial herein, it became evident that the Plaintiff and the four Defendants are related by blood. It was the Plaintiff's case that the land in question initially belonged to his grandfather one Kaingu Mwabaya who gifted the same to him prior to his death.

24. From the material placed before me, the said Kaingu Mwabaya was a brother to one Karisa Mwabaya who was the father of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the husband of the 4<sup>th</sup> Defendant herein. On their part, the Defendants deny that the Plaintiff inherited the suit property as he asserts. Instead it is their case that the suit property belonged to them as the beneficiaries of the late Karisa Mwabaya's estate and that they only offered the Plaintiff a portion thereof to cultivate for purposes of fending for himself.

25. Given the description of the suit property herein, it would appear to me that the disputed property is unsurveyed and unregistered. The Plaintiff traces his ownership thereof to inheritance from his grandfather the said Kaingu Mwabaya. The fact of that inheritance is contested as the Defendants also trace their claim on the land to a brother to the Plaintiff's father.

26. In my mind, as a beneficial owner to the land by virtue of inheritance, the Plaintiff would not have any legal title to the land capable of enforcement as sought herein prior to the transfer of the land to his name. While he claims to have lived on a portion of the disputed property since the year 2000, it was not clear to me when his grandfather died or when he bequeathed the same to the Plaintiff. While he asserts boldly at paragraph 3 of the Plaint that he inherited the land, it is evident that no letter of administration were taken prior to the institution of this suit.

27. Indeed while the claim was that the land belonged to the said grandfather, nothing was placed before me to demonstrate how the said grandfather acquired the land. As it were, there was evidence that the land in dispute was being shared by both parties. An initial complaint made by the Plaintiff to the area Village Elders was as per the evidence of DW1 dismissed by the elders and I think it was incumbent upon the Plaintiff in the circumstances of this case to delve deeper and demonstrate how his father came to own the land.

28. In the circumstances of this case and having determined that the Plaintiff has not produced anything to entitle him to inherit the land he claims by virtue of inheritance, I am not satisfied that the Plaintiff's case has merit. The same is dismissed with costs to the Defendants.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of July, 2019.**

**J.O. OLOLA**

**JUDGE**