



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 41 OF 2015(OS)

**IN THE MATTER OF: AN APPLICATION UNDER ORDER 37 RULE 3 OF THE CIVIL PROCEDURE RULES BY AMRI KHAMIS AND OMAR KHAMIS IN RESPECT OF TITLE NUMBER KILIFI/ROKA 750 (PLOT NO. 364 A CHUMANI TEZO/ROKA)**

AMRI KHAMIS.....1<sup>ST</sup> APPLICANT

OMARI KHAMIS.....2<sup>ND</sup> APPLICANT

VERSUS

SLYVESTER CHIBO MWAROME (SUED AS THE ADMINISTRATOR

OF THE ESTATE OF MASHA DENA KIDESWE.....RESPONDENTS

JUDGMENT

1. By an Originating Summons dated 18<sup>th</sup> December 2014 but filed herein on 17<sup>th</sup> March 2015, Amri Khamis and Omar Khamis (the Applicants) pray for orders: -

**3. That it be declared that the property known as Title Number Kilifi/Roka/750 (formerly known as Plot No. 364 A Chumani Tezo/Roka, registered in the name of Sylvester Chibo Mwarome belongs to the Applicants.**

**4. That the Respondent in his capacity as the Administrator of the Estate of the late Masha Dena Kideshwe do execute transfer of Title Number Kilifi/Tezo/750 (formerly known as Plot No. 364 A Chumani Tezo/Roka) in favour of the Applicants;**

Alternatively

**5. The Deputy Registrar of the Honourable Court to execute the transfer of Title Number Kilifi/Roka 750 (formerly known as Plot No. 364 A Chumani Tezo/Roka in favour of the Applicants; and**

**6. That the Respondent be ordered to pay the costs of this application.**

2. The Originating Summons which is supported by an affidavit sworn by the 1<sup>st</sup> Applicant –Amri Khamis is premised on the grounds: -

**a. That vide a Sale Agreement made on 27<sup>th</sup> June 1983, the Applicants purchased Plot No. 364 A Chumani/Tezo Roka from the Vendor Masha Dena Kideshwe;**

**b. That immediately thereafter the Vendor was taken ill and requested the Applicants to pay the outstanding payments in order for him to get medication and the Applicants went ahead and completed the payments but the Vendor passed away leaving behind his wife Kache Masha Dena who confirmed living on the suit property;**

**c. That vide Malindi High Court Succession Cause No. 21 of 2003, the Respondent describing himself as an adopted son of the Vendor petitioned and was granted Letters of Administration in respect of the estate of the deceased on 25<sup>th</sup> May 2007 thereby becoming the beneficiary of the suit property;**

**d. That the Applicants were not aware of the Succession proceedings and only came to learn about the same when they conducted a search in respect of the property;**

**e. That although the parcel of land is situated within Chumani Area, Kilifi Succession Cause No. 21 of 2013 was filed on the strength of a letter from the Assistant Chief Roka Sub-Location yet the deceased was not a resident of Roka Sub-Location.**

3. Sylvester Chibo Mwarume sued herein as the Administrator of the Estate of Masha Dena Kideshwe (the Respondent) neither entered appearance nor filed any response to the Originating Summons. This matter accordingly proceeded by way of formal proof.

4. Testifying in support of their case, Amri Khamis (PW1) told the Court that on 27<sup>th</sup> June 1983, together with his brothers Omar Khamis (the 2<sup>nd</sup> Applicant) and Mohamed Dzombo Kirunga (now deceased) they did execute a sale agreement with one Masha Dena Kideshwe who was the registered proprietor of the suit property then known as Plot No. 364 A Chumani Tezo/Roka.

5. PW1 testified that immediately after purchasing the land, the Vendor was taken ill and he requested the purchasers to make the outstanding payments to enable him get medication. The brothers agreed to complete the payments before registration of the transfer to their name but the Vendor consequently passed away before the transfer leaving behind his Widow Kache Masha Dena on the land.

6. PW1 further told the Court that although it was a term of the agreement of sale that they would immediately take possession of the suit property, they were unable to do so after the Vendor passed away leaving his elderly and childless wife on the land. The parcel of land was later registered as Title No. Kilifi/Roka/750.

7. PW1 told the Court that subsequently following an application made in *Malindi High Court Succession Cause No. 21 of 2003*, the Respondent herein describing himself as an adopted son of the late Masha Dena Kideshwe was issued with a Grant of Letters of Administration for his estate on 25<sup>th</sup> May 2007. As a result, the Respondent became a beneficiary of the suit property. PW1 further told the Court they were unaware of the Succession Cause and only learnt of the same on 19<sup>th</sup> September 2007 when they conducted a search in respect of the suit property.

8. PW1 testified that it subsequently came to their knowledge that another *Succession Cause No. 21 of 2013* was instituted by one Sulubu Charo Dena purporting that he together with others were the sons of the deceased. The said Sulubu Charo Dena also filed *Succession Cause No. 40 of 2012* seeking a similar grant.

9. PW1 told the Court the suit property is now registered in the name of the Respondent and they have now been compelled to register a caution on the title forbidding any dealings therewith. PW1 told the Court the Respondent went ahead to destroy his house on the suitland even after a Court order was issued restraining the Respondent from doing so.

10. I have perused and considered the pleadings filed by the Applicants herein acting in person, the sole testimony of the 1<sup>st</sup> Applicant as well as the evidence adduced at the trial herein.

11. The Applicants have urged this Court to declare that Title No. Kilifi/Roka/750 (formerly Plot No. 364 A Chumani Tezo/Roka) and presently registered in the name of the Respondent belongs to themselves. They also urge this Court to direct the Respondent to execute a transfer of the said title to the Applicants in his capacity as the Administrator of the Estate of the late Masha Dena Kideshwe.

12. In the alternative, the Applicants have asked the Court to direct the Deputy Registrar of this Court to execute the transfer from the name of the Respondent to the Applicants.

13. Those prayers are borne of the Applicants contention that on or about 27<sup>th</sup> June 1983, they did purchase the suit property from one Masha Dena Kideshwe who was then the registered proprietor thereof. The Applicants told the Court that shortly after the purchase the Vendor fell ill and he urged the purchasers to pay the balance of the purchase price even though the process of transfer was yet to be done, to enable the Vendor to acquire medication.

14. The Applicants told the Court that they did comply with the Vendor's request but as fate would have it, the Vendor passed away leaving behind his widow, Kache Masha Dena who was elderly and childless, still occupying the land. It was the Applicant's case that even though the Sale Agreement provided for immediate possession of the land, they were unable to do so given the age of the Vendor's wife.

15. The Applicants further told the Court that they later came to learn of *Malindi High Court Succession Cause No. 21 of 2003* which matter was filed by the Respondent herein purporting to be an adopted son of the Vendor. The Respondent was later issued with a Grant of Letters of Administration as a result whereof he came to be registered as the proprietor of the suit property measuring some 14.5 Ha.

16. In support of their case, the Applicants produced a Sale Agreement dated 27<sup>th</sup> June 1983 between themselves and the said Masha Dena Kideshwe. A perusal of the said agreement reveals that the parcel of land described therein as Plot No. 364 A Chumani Tezo/Roka measuring 12.4 acres was sold to the two Applicants together with their brother Mohamed Dzombo Kirunga at a consideration of KShs 20,000/-. At the point of execution of the Agreement, the purchasers paid the sum of KShs 5,000/- while Clause 4 thereof required the balance of KShs 15,000/- to be paid in two instalments- KShs 10,000/- on or before 20<sup>th</sup> May 1984 and KShs 5,000/- on 10<sup>th</sup> May 1984.

17. Clauses 5 and 6 of the Sale Agreement then provided as follows in respect of the transfer and possession: -

**“5. That the transfer in respect of the Title hereof shall be executed by both parties on receipt of the final instalment of the**

purchase (price).

**6. That the Vendor shall notwithstanding, continue to live on the said parcel of land and to enjoy the proceeds of sale of the fruits of the cash (crops) trees presently standing on the said parcel of land until his demise and thereafter the purchaser shall take vacant possession whereupon all developments thereon including plants, buildings etc will be transferred to (the purchaser) with the property.”**

18. The Applicants were not very clear as to when the apparently expected demise of the Vendor occurred. It was however evident that the Vendor did not live long after the execution of the Agreement. From a copy of the Grant of Letters of Administration issued to one Sulubu Charo Dena vide Kilifi Principal Magistrates Court *Succession Cause No. 21 of 2013*, the said Vendor passed away on 13<sup>th</sup> August 1983 at Roka. However according to the Grant of Letters of Administration issued to the Respondent in *Malindi High Court Succession Cause No. 21 of 2003*, the Vendor passed away at Chumani on 13<sup>th</sup> November 1983.

19. Regardless of the correct date that the Vendor is said to have died in the same year of the sale appears to corroborate the Applicants' position that the Vendor fell ill immediately after the sale transaction and hence required them to remit the balance of the purchase price earlier than was indicated in the Agreement to enable the Vendor to procure medication.

20. And while the Applicants were expected to take immediate possession of the land immediately after the demise of the Vendor, they told the Court they were unable to do so as the Vendor left behind a widow-one Kache Masha Dena whom the Applicants described to be elderly and childless. The old lady was however apparently still alive as at the time this dispute came to Court and continued residing on the suit land. That much can be discerned from a letter dated 12<sup>th</sup> November 2014 from Roka Location Chief Julius P. Ziro addressed to the District Criminal Investigations Officer (DCIO) Kilifi following a complaint made by the Applicants over interference with the suit property.

21. As it turned out, the Respondent herein had on 27<sup>th</sup> November 2003 proceeded to the Malindi High Court vide the said *Succession Cause No. 21 of 2003* and was subsequently on 26<sup>th</sup> July 2005 issued with a Grant of Letters of Administration Intestate of the estate of the Vendor. A copy of the application produced by the Applicants reveals that the Respondent presented the application in his capacity as an “adopted son of the deceased.”

22. That fact in my view equally fortifies the Applicants' contention that they took pity on the Vendor's widow on account of her being elderly and childless and hence the reason they left her to continue occupying the suitland. Despite being served with the suit papers, the Respondent neither entered appearance nor filed a response to the Applicant's claim. In the premises the Applicant's claim is unchallenged and uncontroverted. Having produced the sale agreement and given a proper account why they did not take full possession of the suitland, I had no reason to doubt that the Applicants are the rightful owners of the suitland.

23. From their application dated 13<sup>th</sup> April 2016 seeking orders of injunction against the Respondent, it was evident that the Applicants had also at some point in time erected a permanent building on the suit premises. They accused the Respondent of demolishing the same on account of his registration as the proprietor of the suitland.

24. The Applicants have explained that the Vendor was childless and that they were unaware of how and when the Respondent became the deceased's adopted son and/or when he filed the application for grant of Letters of Administration.

25. In the premises I am satisfied that the Applicants have proved their case on a balance of probabilities. Accordingly, I allow the Originating Summons in terms of Prayers 3 and 4 thereof.

26. The Respondent has 45 days from today to execute the documents of transfer of the suit property to the Applicants failure to which the Deputy Registrar of this Court shall do so as sought in the alternative at Prayer No. 5 of the Summons.

27. The Applicants shall have the costs of this suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF JULY, 2021**

**J.O. OLOLA**

**JUDGE**