



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 32 OF 2019**

**(Consolidated with Malindi ELC No. 62 of 2019)**

**DAVID KIMANI GICHARU..... PLAINTIFF**

**-VERSUS-**

**ALI MOHAMED ALI MOTHAS..... 1<sup>ST</sup> DEFENDANT**

**NASSOR MOHAMED ALI MOTHAS.....2<sup>ND</sup> DEFENDANT**

**YUSUF MOHAMED ALI MOTHAS.....3<sup>RD</sup> DEFENDANT**

**HABIB MOHAMED ALI MOTHAS.....4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**MOHAMED ALI MOTHAS .....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Complaint dated 20<sup>th</sup> May, 2019 as amended on 3<sup>rd</sup> June, 2019, David Kimani Gicharu (*hereinafter the Plaintiff*) commenced these proceedings against Ali Mohamed Ali Motha (*the 1<sup>st</sup> Defendant*) Nassor Mohamed Ali Motha (*the 2<sup>nd</sup> Defendant*), Yusuf Mohamed Ali Motha (*3<sup>rd</sup> Defendant*), Habib Mohamed Ali Motha (*the 4<sup>th</sup> Defendant*) and the Chief Land Registrar (*the 5<sup>th</sup> Defendant*) as well as Mohamed Ali Motha (*the 6<sup>th</sup> Defendant*) praying for:

(a) A permanent injunction (to) be issued restraining the Defendant either by themselves, their agents or servants or otherwise howsoever from interfering with the Plaintiff's quiet and peaceful possession and occupation of the suit property known as Land Reference No. 356/III/MN, H. of Mtwapa Creek, Mombasa;

(b) A permanent injunction (to issue) against the Defendants prohibiting (them) whether by themselves, their agents or servants from entering upon, remaining upon, transferring, occupying, leasing, charging assigning or interfering with the Plaintiff's quiet possession of the suit property known as Land Reference No. 356/III/MN, H. of Mtwapa creek, Mombasa;

(c) A permanent injunction (to issue) against the Defendants (restraining them) either by themselves, their agents (or) employees from interfering with the works of the Plaintiff and attacking the servants and agents of the Plaintiff on the suit property;

(d) A declaration that the Plaintiff is entitled to ownership and occupation of the suit property known as Land Reference No. 356/III/MN to the exclusion of the Defendants herein;

(dd) A declaration that the title by the 6<sup>th</sup> Defendant being LR No. 419/III/MN is a nullity and does not entitle any of the defendants to ownership of the suit property.

(e) Damages for trespass against the Defendants; and

*(f) Costs of the suit.*

2. Those prayers arise from the Plaintiff's position that at all times material to this suit, he has been the lawfully registered proprietor of the suit property having been issued with a letter of allotment thereto on 24<sup>th</sup> July, 1998 and having complied with all conditions set out therein by the Government. The Plaintiff avers that following the allocation, he took vacant possession and has remained thereon to-date with members of his family.

3. It is the Plaintiffs case that on or about 16<sup>th</sup> May 2019, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants wrongfully entered the suit property, harassed and intimidated the Plaintiff and his employees and carted away some construction material therefrom. The Plaintiff asserts that the said acts of the 1<sup>st</sup> to 4<sup>th</sup> Defendants were illegal and unlawful as the Defendants have no proprietary interest or right over the suit property. He is now apprehensive that unless the said acts are stopped by this court he shall be deprived of the use and enjoyment of the suit property.

4. But in their joint Statement of Defence dated 10<sup>th</sup> September, 2020 and filed herein on 14<sup>th</sup> September 2021, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> Defendants deny the contents of the Plaintiff and aver that they are strangers to the suit property described therein as they reside in the property known as LR No. 419/III/MN located within Kilifi county. They aver further that they have never resided on or trespassed on the property described as LR No. 356/III/MN Kilifi and invite the Plaintiff to strict proof.

5. The Defendants aver that the property known as LR No. 419/III/MN was sold to the 6<sup>th</sup> Defendant in the year 1977 by the then registered owners – Thomas Clement Martin and Joan Martin and that they have ever since resided thereon as a family. They assert that if at all any new property has been registered as LR No. 356/III/MN in place of LR No. 419/III/MN belonging to the 6<sup>th</sup> Defendant, the said registration could only have been procured by fraud.

6. On its part, the 5<sup>th</sup> Defendant is not opposed to the orders sought by the Plaintiff. In its Statement of Defence dated 10<sup>th</sup> June, 2019 and filed herein on 17<sup>th</sup> June, 2019, the 5<sup>th</sup> Defendant avers that the Plaintiff is the registered proprietor of the suit property being LR No. MN/III/356 which was allocated to him before he was issued with a certificate of title on 16<sup>th</sup> April, 2019.

7. In that respect, the 5<sup>th</sup> Defendant avers that the property described as LR No. 419/III/MN does not exist in their records and they therefore deny any liability for the existence of the title said to be in the 6<sup>th</sup> Defendant's name.

8. As it turned out, shortly after being served with the summons, the 6<sup>th</sup> Defendant herein on 31<sup>st</sup> July, 2019 instituted Malindi ELC Case No. 62 of 2019 against the Plaintiff (*as the 1<sup>st</sup> Defendant*), the 5<sup>th</sup> Defendant herein (*as the 2<sup>nd</sup> Defendant*) and the Director of Survey (*as the 3<sup>rd</sup> Defendant*) praying for the following:

*(a) A permanent injunction restraining the 1<sup>st</sup> Defendant, either by himself, his agents, assigns, representatives or otherwise howsoever from interfering in any way with all that parcel of land describes as LR No. 419/III located in Kiruitu Area of Kilifi County;*

*(b) A declaration that the 1<sup>st</sup> Defendant has no legal or other right over all that parcel of land described as LR No. 419/III that is located in Kiruitu Area of Kilifi county;*

*(c) Damages for trespass against the 1<sup>st</sup> Defendant; and*

*(d) Costs of the suit against the 1<sup>st</sup> Defendant.*

9. In support of those prayers the 6<sup>th</sup> Defendant makes the same averments as contained in their joint Statement of Defence with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the effect that he acquired the said property in the year 1977 from the said Thomas Clement Martin and Joan Martin and that they have been residing thereon ever since..

10. The 6<sup>th</sup> Defendant further avers that on purchasing the said property, the two vendors executed an irrevocable Power of Attorney dated 12<sup>th</sup> July, 1977 in his favour thereby granting him full power over the suit property. The vendors also released to him the original title and the Deed Plan for the Property and he has since been responsible for settling all the relevant outgoings, utility bills and other statutory payments.

11. In response to the 6<sup>th</sup> Defendant's suit, the Plaintiff filed a Statement of Defence and Counterclaim dated 14<sup>th</sup> August, 2019 reiterating the contents of his Plaintiff dated 20<sup>th</sup> May, 2019 as filed in Malindi ELC No. 32 of 2019 and seeking similar prayers in the counterclaim.

12. Similarly in their Statement of Defence to the 6<sup>th</sup> Defendant's suit, the 5<sup>th</sup> Defendant and the Director of Survey jointly assert the position taken earlier by the 5<sup>th</sup> Defendant to the effect that the property claimed by the 6<sup>th</sup> Defendant does not exist in their records and that what they have is the property claimed by the Plaintiff herein.

13. Subsequently and by a consent order recorded in the said Malindi ELC Case No. 62 of 2019 on 4<sup>th</sup> February, 2020, the parties agreed that the said ELC 62 of 2019 be consolidated with Malindi ELC 32 of 2019 and that ELC 32 OF 2019 would be the lead file.

**THE PLAINTIFF'S CASE**

14. At the trial herein, the Plaintiff called a single witness in support of his case.

15. PW1 – David Kimani Gicharu is the Plaintiff himself. He told the court that vide a letter dated 14<sup>th</sup> February, 1996, he had applied to the President of the Republic of Kenya through the office of the Commissioner of Lands for allocation of the property known as LR No. MN/III/356 – Kilifi. On 24<sup>th</sup> July, 1998 he received a letter of allotment from the Commissioner of Lands indicating that the Government had offered to him the property.

16. PW1 testified that the letter required him to accept the offer and to make an additional payment of Kshs.341,510 within 30 days. By a letter dated 24<sup>th</sup> August, 1998, PW1 communicated his acceptance of the offer and forwarded a banker's cheque for the sum of Kshs.341,510/- to the Commissioner of Lands as required. He was subsequently issued with a fee receipt No. 185236 for the sum of Kshs.341,510/- on 25<sup>th</sup> August, 1998.

17. PW1 told the court he took vacant possession of the land upon communicating his acceptance to the offer and he had thereafter occupied the same quietly, peacefully and uninterrupted for a period of 20 years. The documents of title were however not issued immediately to PW1 as sometimes the file would disappear from the Land Registry and could not be traced. PW1 finally executed a lease in respect of the property on 15<sup>th</sup> April, 2019. The lease was registered on 16<sup>th</sup> April, 2019 and a certificate of title dated the same day was then issued to PW1 in his name.

18. However on 15<sup>th</sup> May, 2019, PW1 testified that the 6<sup>th</sup> Defendant and his sons the 1<sup>st</sup> to 4<sup>th</sup> Defendants wrongfully trespassed the property and sought to evict him therefrom. PW1 told the court that on that date he had hired workers to undertake some construction works on the property. The workers had to leave the premises on account of the threats from the Defendants. He told the court he was thereafter compelled to come to court to protect his interests.

### **THE DEFENCE CASE**

19. As it turned out, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants did not attend court when the matter came up for hearing and they did not therefore testify in support of their case. The 5<sup>th</sup> Defendant however called one witness in support of its position.

20. DW1 – Edwin Wafula is a Principal Land Registrar. He told the court that his office has in its custody records in respect of LR No. 356/III/MN but does not have any records in relation to the property known as LR. No. 419/III/MN claimed by the 6<sup>th</sup> Defendant. Those records show that LR No. 356/III/MN belongs to the Plaintiff herein.

21. DW1 Further told the court that the records in their custody show that the suit property LR No. 356/III/MN was allocated to the Plaintiff. Having complied with the conditions set out in the letter of allotment, the Plaintiff was eventually issued with a lease and a Certificate of Title dated 16<sup>th</sup> April, 2019.

### **ANALYSIS AND DETERMINATION**

22. I have carefully considered the pleadings filed herein by the parties, the sole testimony of the Plaintiff as well as the evidence adduced at the trial. I have equally perused and considered the submissions and authorities placed before me by Mr. Rapando, Learned Counsel for the Plaintiff.

23. Before this court for consideration are two consolidated suits being Malindi ELC Case No. 32 of 2019; David Kimani Gicharu -vs- Mohamed Ali Motha and 5 Others and Malindi ELC Case No 62 of 2019; Mohamed Ali Motha –vs- David Kimani Gicharu. Upon consolidation, it was agreed that ELC case No. 32 of 2019 filed earlier be the lead file. Both the Plaintiff in the consolidated suit – David Kimani Gicharu, and the 6<sup>th</sup> Defendant – Mohamed Ali Motha lay claim to the same parcel of land but which they both describe differently.

24. The Plaintiff's case is outlined in the Plaint dated 20<sup>th</sup> May, 2019 as amended on 3<sup>rd</sup> June, 2019 as well as in the Defence and Counterclaim dated 14<sup>th</sup> August, 2019. The Plaintiff's prayer is for judgment to be entered against the six (6) Defendants jointly and severally and that a permanent injunction be issued restraining the Defendants from interfering with his quiet and peaceful possession as well as occupation of the suit property which he describes as LR No. 356/III/MN, H of Mtwapa.

25. In addition to the orders of injunction, the Plaintiff craves a declaration that he is entitled to ownership and occupation of the said LR NO. 356/III/MN to the exclusion of the Defendants herein and a further declaration that the title held by the 6<sup>th</sup> Defendant referred at as LR No. 419/III/MN is a nullity that does not entitle any of the Defendants to ownership of the suit property.

26. It is the Plaintiff's case that at all times material to this suit, he has been the lawful and registered proprietor of the suit property having been issued with a Letter of Allotment therefore by the Government on 24<sup>th</sup> July, 1998 and subsequently, having complied with all the conditions set out in the Letter of Allotment.

27. The Plaintiff told the court that upon allocation of the land to himself, he took immediate vacant possession and has remained in occupation thereof with members of his family to-date. It is the Plaintiff's case that despite such long possession and occupation of the suit property, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants together with their agents did wrongly invade the land on 16<sup>th</sup> May, 2019 whereupon they proceeded to harass and intimidate the Plaintiff and his employees who were working thereon.

28. On the purport that the suit property belonged to them, the said Defendants carted away some construction materials that the Plaintiff had brought on the suit property as a result whereof the Plaintiff states that he has suffered loss and damage. The Plaintiff told the court that the

Defendants conduct was illegal and unlawful as they did not have any proprietary interest or right over the suit land.

29. On the other hand, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendant's case is outlined in the Plaintiff dated 30<sup>th</sup> July, 2019 as filed by the 6<sup>th</sup> Defendant on 31<sup>st</sup> July, 2019 as well as in their joint statement of Defence filed herein dated 10<sup>th</sup> September, 2020. The Defendants deny the Plaintiff's accusation and aver that none of them have at any time whatsoever trespassed upon the property described by the Plaintiff as LR No. 356/111/MN situated in Kilifi.

30. To the contrary, the Defendants aver that at all times material, they have always been residents of a parcel of land known as LR No. 419/III/MN that is located in Kuruitu area of Kilifi. It is the Defendants' case that the subject land was sold to the 6<sup>th</sup> Defendant way back in the year 1977 by the then registered owners – Thomas Clement Martin and Joan Martin and that they have ever since remained in exclusive possession and occupation thereof as a family.

31. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants contend that the suit property is in fact known by the reference LR No. 419/III/MN and that the reference LR NO. 356/III/MN given by the Plaintiff is suspicious and fraudulent as the said LR No. 419/III/MN has never been available for allotment as suggested by the Plaintiff. They assert that if indeed a new property has been registered as LR No. 356/III/MN in place of the 6<sup>th</sup> Defendant's LR No. 419/III/MN, such registration could only have been procured fraudulently with the collusion of officials from the 5<sup>th</sup> Defendant and other Government functionaries such as the Director of Survey.

32. From the material placed before me, the 1<sup>st</sup> to 4<sup>th</sup> Defendants herein derive their claim to the suit property to the ownership of the said LR No. 419/III/MN by the 6<sup>th</sup> Defendant who is their father. While the said Defendants did not testify herein a perusal of their pleadings as filed herein reveal that they trace their claim to the acquisition of the land from a purchase said to have been made by the 6<sup>th</sup> Defendant from the then original owners in 1977.

33. It was however curious that while the 6<sup>th</sup> Defendant asserts proprietary rights over the property described as LR No. 419/III/MN, he neither exhibited a Sale Agreement nor a certificate of title issued to him or registered in his name. All that the 6<sup>th</sup> Defendant exhibited is a Power of Attorney issued to him by the vendors on 12<sup>th</sup> July, 1977.

34. That Power of Attorney does not seem to appear on official Government records and there was no evidence that the land was ever transferred to the 6<sup>th</sup> Defendant. I say so because the Chief Registrar of Lands (*the 5<sup>th</sup> Defendant*) and the Director of Surveys are the custodians of all land records in this country. At the trial herein, the 5<sup>th</sup> Defendant testified through its Principal Land Registrar Edwin Wafula (DW1) who produced some 18 documents that were in their custody.

35. The crux of the 5<sup>th</sup> Defendant's evidence before this court was that the property known as LR No. 356/III/MN was lawfully allocated to the Plaintiff – David Kimani Gicharu, by a Letter of Allotment dated 24<sup>th</sup> July, 1998. The 5<sup>th</sup> Defendant testified that the Plaintiff did comply with the conditions contained in the Letter of Allotment and that subsequently a Deed Plan No. 43107 dated 14<sup>th</sup> February, 2019 in favour of the Plaintiff was duly approved and issued by the Director of Surveys.

36. The 5<sup>th</sup> Defendant further told the court that from their records, a lease dated 11<sup>th</sup> April, 2019 was issued to the Plaintiff who executed the same and that a Certificate of Title was consequently issued for the suit property in the name of the Plaintiff on 16<sup>th</sup> April, 2019. Even more telling, the 5<sup>th</sup> Defendant testified that they do not have in their records any property going by the reference LR No. 419/III/MN that is purportedly owned by the 6<sup>th</sup> Defendant.

37. As it were, **Section 24(a) of the Land Registration Act, 2012** envisages that the Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging to or appurtenant thereto.

38. **Secton 25(1)** of the said **Act** on the other hand provides that:-

**“The right of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interest and claims whatsoever ...”**

39. It is further provided under **Section 26(1) of the Land Registration Act, 2012** as follows:

**“The certificate of title issued by Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title or that proprietor shall not be subject to challenge except –**

**(a) On the grounds of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

40. While the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants have termed the Plaintiff's title as suspicious and fraudulent in their pleadings, the Plaintiff has produced documents herein showing the application that was made for the allocation of the suit property vide his letter dated 14<sup>th</sup> February, 1996 to the President of the Republic of Kenya. He has also produced evidence that the application was approved and that he was

issued with a letter of allotment dated 24<sup>th</sup> July, 1998.

41. The Plaintiff has also produced evidence that he accepted the offer vide a letter dated 24<sup>th</sup> August, 1998 wherein he enclosed the requisite fees being Kshs.341,510/- for the stand premium and other fees required for the allocation. In addition he has produced Receipt No. 185236 issued by the Department of Lands on 25<sup>th</sup> August, 1998 as evidence that the payment was received by the Government.

42. The evidence of the Plaintiff is corroborated by that of the 5<sup>th</sup> Defendant who as the custodian of all land records denied knowledge of the existence of the parcel of land purportedly owned by the 6<sup>th</sup> Defendant.

43. I think it is a settled proposition that where there is a contention as to the validity of a title document, the person claiming interest thereon must adduce evidence to show that its acquisition was lawful. As was stated in **Daudi Kiptugen -vs- Commissioner of Lands and 4 Others (2015) eKLR**.

**“The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a lease or certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

44. That the Chief Registrar of Lands and the Director of Surveys have confirmed that LR No. 419/III/MN has never existed is conclusive evidence that the document held by the 6<sup>th</sup> Defendant is indeed a nullity. Indeed, the 6<sup>th</sup> Defendant does not hold a certificate of title issued or registered in his name and therefore he cannot have a valid claim over the property be it the one he refers to as LR No. 419/III/MN or the suit property herein.

45. In the premises, I am satisfied that the Plaintiff has proved his case to the required standard and that there is no merit in the claim by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants.

46. Accordingly I make the following orders:

*(i) The 6<sup>th</sup> Defendant’s suit in Malindi ELC Case No. 62 of 2019 is hereby dismissed with costs;*

*(ii) The Plaintiffs prayers as per the Amended Plaint dated 3<sup>rd</sup> June, 2019 in ELC Case No. 32 of 2019 together with the Defence and counterclaim dated 14<sup>th</sup> August, 2019 as filed in ELC case No. 62 of 2019 are hereby allowed with costs.*

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS PLATFORM THIS 2ND DAY OF DECEMBER, 2021.**

In the presence of:

Mr. Rapando for the Plaintiffs

Mr. Ogunde holding brief for Habib for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 6<sup>th</sup> Defendants

No appearance for the Attorney General for the 5<sup>th</sup> Defendant

Court assistant - Wario

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**J. O. Olola**

**JUDGE**