



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 352 OF 2016**

**COSMUS MWANGUDZA.....PLAINTIFF**

**VERSUS**

**DAVIS MASHA SIRYA.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By his Complaint dated 20<sup>th</sup> December 2016 as amended on 30<sup>th</sup> October 2018, Cosmus Mwangudza (the Plaintiff) prays for Judgment against the Defendant as follows:-

***a) A declaration that the suit property being Portion No. M3A/985 Muyeye, Malindi belongs to himself and (a) permanent injunction restraining the Defendant, his agents or servants from trespassing upon the suit property, vacant possession of the suit property and demolition of all the illegal structures built by the Defendant.***

***b) Costs of the suit and interest.***

2. Those prayers arise from the Plaintiff's contention that at all times material, he was the owner of the said piece of land having purchased the same from one Kai Chirauni in the year 2003. Upon purchase, the Plaintiff started construction of a house thereon but before he could finish, the Defendant trespassed upon the property, demolished the Plaintiff's unfinished house and a toilet and went ahead to put up his own structures thereon.

3. The Plaintiff avers that as a result of the Defendant's said actions, he has now been deprived of the use and quiet enjoyment of his property and hence the suit herein.

4. But in a Statement of Defence dated and filed herein on 1<sup>st</sup> March 2017, Davis Masha Sirya (the Defendant) denies that the Plaintiff owns the land as stated. On the contrary, the Defendant asserts that he is the beneficial owner of the property being parcel No. MYY/BTL/A/039 formerly known as M3/M3A Phase 1 Malindi having purchased the same from one Justus Juma Ngonyo on 2<sup>nd</sup> November 2012.

5. The Defendant avers that the said Justus Juma Ngonyo from whom he bought the land had bought it from previous owner one Emmanuel Menza Thuva who had in turn purchased the land from Mrs Kai Chirauni aka Madam Sidi.

6. The Defendant therefore denies that he has encroached upon the Plaintiff's land. He asserts that he entered the suit property in the year 2012 and immediately started construction and he has since lived thereon together with his family and tenants.

7. The Defendant further asserts that this present suit is defective, vexatious and filed in utter abuse of the Court process as the Plaintiff had previously filed ***ECL Case No. 136 of 2013*** against the said Emmanuel Menza and Justus Charo which suit was later on withdrawn.

**The Plaintiff's Case**

8. At the trial herein the Plaintiff called two witnesses in support of his case.

9. PW1-Cosmas Mwangudza Mwachakwe is the Plaintiff. He testified that he purchased the suit property from Kai Chirauni who passed away in 2003, just after they did a Sale Agreement dated 20<sup>th</sup> March 2003. He told the Court that he bought the Plot for Kshs 140,000/-.

10. PW1 told the Court that later on, Kai's wife Sidi Kai sold the land to a third party one Emmanuel. When the land was sold to him, PW1 built a house and a toilet thereon. But after he finished construction in 2007, the third party served him with a demand letter through the Area Chief. The Chief told the said Emmanuel to pay PW1 if he wanted to take the land but Emmanuel could not pay.

11. PW1 told the Court that later on the said third party and the Defendant demolished his house and the Defendant built his own house on the land.

12. On cross-examination, he confirmed that it is Kai Karauni's wife who sold the land for a second time to Emmanuel. By the time the Chief told Emmanuel to refund him his money, the Defendant was not yet on the scene. PW1 told the Court he did not know if the Defendant came to know that he was the owner of the land. They demolished his bed-sitter house and the Defendant now resides on the land.

13. PW2-Anderson Furaha Kenga is a Committee Member of a Self-Help Group in the area known as Kilio Cha Umoja Mwanashungi. He told the Court that he was elected a Member in 2008 and that their task was to register members and their plot Numbers.

14. PW2 told the Court that according to their records, Plot No. 985 belonged to the Plaintiff as he was the one on the ground when they were doing the registration.

### **The Defence Case**

15. The Defendant equally called two witnesses who testified in support of his case.

16. DW1-Jacinta Nyeku Kaingu is the Defendant's wife. She told the Court that her husband who works abroad in Italy brought the subject property on 2<sup>nd</sup> November 2012 from one Justus Juma Ngonyo. Since then, they have been living on the land.

17. DW1 told the Court that Justus showed them a Sale Agreement dated 16<sup>th</sup> December 2011 indicating he had bought the land from Emmanuel Menza who had also bought it from Mrs Kai Chirauni (aka Madam Sidi).

18. On cross-examination, DW1 told the Court that the Plot was empty when they bought the same. They have since built an eight roomed house with two toilets on the land.

19. DW2-Justus Juma Ngonyo is a resident of Muyeye. He testified that he is the one who had sold the subject land to the Defendant vide a Sale Agreement dated 16<sup>th</sup> December 2011. DW2 had earlier bought the land from Emmanuel Menza. He told the Court he had fenced the land before he sold it to the Defendant. He was also the one who was contracted to build the Defendant's house on the land.

20. On cross-examination, DW2 told the Court he had lived in the area since 2004 and that his house is about 200 metres from the Defendant's land. He further told the Court that before he bought the land, it was being used as a play ground by children from a nearby private school run by Emmanuel Menza.

21. DW2 further told the Court he did not know if Sidi Kai's husband had sold the land to the Plaintiff. He only got to know about the present dispute some two years ago long after he had sold the land to the Defendant.

### **Analysis and Determination**

22. I have perused and considered the pleadings filed herein by the parties, the oral testimony of the witnesses and the evidence adduced at the trial. I have also looked at the submissions filed herein by the Learned Advocates for the parties.

23. The Plaintiff craves a declaration that he is the rightful owner of a piece of land he describes as Portion No. M3A/985 Muyeye in Malindi. In addition, he prays for a permanent order of injunction restraining the Defendant, his agents or servants from trespassing upon the said property as well as an order for the Defendant to give up vacant possession of the land.

24. It was the Plaintiff's case that he bought the said piece of land from one Kai Chirauni way back in 2003 and that upon purchase he commenced construction of a house and toilet which he was however unable to finish due to financial constraints. The Plaintiff asserts in his pleadings that sometime after the death of the said Kai Chirauni, the Defendant herein moved into the land, demolished his unfinished house and commenced construction of his own house thereon.

25. The Defendant does not deny that he took over the land. It is however his case that he lawfully moved into the parcel of land which he described as MYY/BTL/A/039 (formerly M3/M3A Phase 2) Malindi, upon purchase thereof from its previous owner one Justus Juma Ngonyo. The Defendant denies that he demolished any structures belonging to the Plaintiff and avers that the land was empty as at the time he bought the same.

26. From the material placed before me, it was apparent that the property in dispute is an unsurveyed and unregistered parcel of land situated in the Muyeye area of Malindi. In support of his case, the Plaintiff produced a Sale Agreement executed between himself and the said Vendor Kai Chirauni dated 20<sup>th</sup> March 2003. The said Agreement describes the parcel of land as Plot No. 985 M3 Area Muyeye Milano B and gives its measurements as 22 metres by 22 metres.

27. On the other hand the Defendant produced a Sale Agreement dated 2<sup>nd</sup> November 2012 between himself and Justus Juma Ngonyo which describes the parcel of land as Plot No. M3M3A near Loto Junior School Malindi measuring 89ft by 65ft.

28. While it was difficult to tell if the description given by the two sides referred to the same parcel of land, the parties themselves were in agreement that they were both referring to the same parcel of land. From the evidence of PW2-Anderson Furaha Kenga, it was clear that the area residents were all squatters on the land and that they had come together under the umbrella of an organization known as Kilio Cha Umoja Mwanashungi Self Help Group for purposes of acquiring the title deeds for the plots they occupied.

29. According to the Plaintiff, he had bought the parcel of land for Kshs 140,000/- from Kai Chirauni in 2003. While he told the Court that he had constructed a house thereon half-way, it would appear that he did not live near the area or had not been thereon for a period of time. I say so because when he testified before this Court, he had neither the evidence of any construction on the plot nor any clear information as to when or by whom it was demolished.

30. Indeed testifying before this Court, the Plaintiff deflected blame not to the Defendant but to one Emmanuel whom he accused of "purchasing" the land for a second time from the wife of Kai Chirauni who had earlier on sold the land to himself. It is the said Emmanuel whom the Plaintiff in his testimony before Court, accused of taking over the land and demolishing his property.

31. That Emmanuel was indeed a person of interest for both sides of the dispute. According to the Defendant, he had purchased the land as an empty plot from Justus Juma Ngonyo (DW2) for the sum of Kshs 350,000/=. Justus himself testified herein and told the Court he had purchased the land from Emmanuel Menza for a sum of Kshs 200,000/-.

32. According to DW2, the said Emmanuel had been using the land for sometime as a playground for children who were in a private school run by Emmanuel nearby. DW2 further told the Court that Emmanuel had told him that he had bought the land from Kai Chirauni's wife Sidi.

33. As it turned out, the Plaintiff herein was very much aware that Emmanuel had bought the land from Sidi. In his written Statement filed herein on 5<sup>th</sup> November 2018, the Plaintiff's witness Anderson Furaha Kenga (PW2) avers as follows:-

***"5. That the Plaintiff was also registered by us and he appears in our register and owns Plot No. M3A/985 measuring 66 ft square. At the time of registration, the Plaintiff was already there. He had built a permanent house which was at Lenten stage.***

***6. That there was also a pit latrine on the plot built with blocks.***

***7. That the Plaintiff's plot shared a common boundary with Emmanuel Menza Thuva. Mr. Menza had built a house on his plot and running a nursery school.***

***8. That after sometime, Cosmos came to the Committee and complained that his Plot had been grabbed and a house built. His structure had been demolished. As Committee, we went to the property. We saw a lady who informed us that she was the wife of the Defendant. She informed us that they had bought the plot from Justus Juma Ngonyo.***

***9. The Committee was surprised as Justus was not the owner of the plot. We had registered the Plot in Cosmos' names and he was the owner according to our records and we had not transferred it to anyone else and after registration the Plot into the Plaintiff's name who was in possession thereof, no one came to complain. We summoned Justus and during the hearing of the dispute, Justus said that he was sold the plot by Emmanuel Menza Thuva.***

***10. The Committee ruled that Menza had no authority to sell the plot as it belonged to the Plaintiff. He was therefore to refund the money. That as today, the Plot is the property of the Plaintiff and the Defendant has no right over the same."***

34. The Plaintiff confirmed this position during his testimony before the Court stating that Emmanuel was nevertheless unable to refund him the money. He also confirmed during cross-examination that he had filed ***Malindi ELC Case No. 136 of 2013*** against the said Emmanuel Menza but he was advised that that was the wrong party.

35. As it were, this Court does not think that was good advise. While the Plaintiff accuses the Defendant of demolishing his house and taking over his land, he was aware as he confirmed during cross-examination herein that the house was demolished long before the Defendant came into the scene.

36. The land in question was unsurveyed and unregistered and in its empty state, the Plaintiff needed to demonstrate that he had gone an extra mile to show to the whole world that he was the owner thereof. Otherwise in the circumstances prevailing herein, it was clear to me that his remedy lies elsewhere as the Defendant was a bona fide purchaser for value without any notice of any defect that may have been on the Vendor's title.

37. In his absence the Defendant purchased the land for value and was able to put up a permanent building in which he resides with his family without any resistance from the Plaintiff.

38. In the premises, I was not persuaded that the Plaintiff has brought out a case and proved to the required standard against the Defendant.

39. This suit is accordingly dismissed with costs to the Defendant.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

JUDGE