



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 175 OF 2017**

**STANLEY HENRY KAHINDI.....PLAINTIFF**

**VERSUS**

**BOZO NDENGE MUMBO.....1<sup>ST</sup> DEFENDANT**

**DICKSON MUMBO NDENGE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Complaint dated 4<sup>th</sup> August 2017 as amended on 14<sup>th</sup> September 2017 Stanley Henry Kahindi prays for Judgment against the two Defendants-Bozo Ndenge Mumbo and Dickson Mumbo Ndenge, jointly and severally for:-

**a) A permanent injunction restraining the Defendants either by themselves, legal representatives or any person claiming interest through them (from) interfering in any way with the Plaintiff's use and enjoyment of Title No. Chembe/Kibabamshe/165 within Kilifi County;**

**b) An order for the rectification of the register relating to Title No. Chembe/Kibabamshe/165 by cancelling the registration of the Defendants' father one Simba Mumbo as the proprietor of the said title and instead registering the Plaintiff as the proprietor thereof and lifting of caveats and restrictions placed by the Defendants;**

**c) Damages for wrongful entry by the Defendants on to the Plaintiff's said parcel of land and obstruction of profitable developments thereon; and**

**d) Costs and interest of this suit.**

2. It is the Plaintiff's case that in or about the year 1983 his father bought the said parcel of land from the Defendants' father who is now deceased at a consideration of Kshs 21,000/-. On or about 30<sup>th</sup> May 1983, the Defendants' said father executed transfer documents and vacated the suit property leaving the Plaintiff's family in possession.

3. The Plaintiff avers however that his father passed away on 13<sup>th</sup> December 1983 before registering the transfer documents and due to financial constraints, the Plaintiff was equally unable to transfer the land. In the year 2003 the Defendants trespassed into the property and proceeded to occupy the same.

4. The Plaintiff further asserts that following the trespass, he instituted a case at the Malindi Land Disputes Tribunal and on 29<sup>th</sup> April 2011, the Tribunal rendered a decision in his favour which decision was adopted by the Chief Magistrates Court at Malindi on 17<sup>th</sup> May 2011.

5. The Plaintiff avers that despite the said Judgment and decree being served upon the Defendants, they have since refused and/or neglected to vacate the suit property thereby compelling the Plaintiff to file this suit.

6. While the two Defendants entered appearance through Messrs Michira Messah & Company Advocates, they neither filed a defence nor participated in any way in these proceedings. This matter accordingly proceeded by way of formal proof.

7. Giving his testimony before the Court, the Plaintiff told the Court that his late father Justin Kambi Kibada bought the parcel of land known as Chembe/Kibabamshe/165 from the Defendants' father Simba Mumbo in May 1983 at a consideration of Kshs 21,000/-. After the sale transaction, the Defendants' father executed the transfer forms which were then deposited with Morris Kupalia Advocate who handled the transaction.

8. The Plaintiff told the Court that consequently, his father and the entire family took over the land and started occupying and cultivating the same. His father however passed away on 13<sup>th</sup> December 1983 before he could lodge the documents at the lands registry and the Plaintiff was himself unable to do so due to financial constraints. The family however continued in possession of the land without interruption for another 20 years.

9. The Plaintiff testified that sometime in the year 2000, the Defendants trespassed into the property and demanded that the Plaintiff and his family vacate the land on the allegation that their father had only leased the land to the Plaintiff's father. The Plaintiff reported the dispute to the Provincial Administration and they were then referred to the Malindi Land Disputes Tribunal.

10. The Plaintiff further told the Court that the Tribunal heard the dispute and rendered Judgment in his favour on 29<sup>th</sup> April 2011. The decision was later adopted by the Chief Magistrates Court on 17<sup>th</sup> May 2011 in the presence of the Defendants and himself. The Defendants have however to-date refused to vacate the same.

11. I have perused and considered the pleadings filed herein by the Plaintiff. I have also considered the Plaintiff's oral testimony and the evidence placed before me.

12. From the material placed before me, it is apparent that the dispute between the Plaintiff and the Defendants has been on-going for sometime. According to the Plaintiff, his father Justin Kambi Kibada purchased the suit property from one Simba Mumbo who happens to be the father of the two Defendants herein way back in 1983 at a consideration of Kshs 21,000/-.

13. The sale transaction was apparently conducted before Morris Kupalia Advocate with whom the duly executed transfer documents were lodged after the Sale Agreement. The Plaintiff's father was to lodge the same documents with the Land Registry but as fate would have it, he passed away some seven months later on 13<sup>th</sup> December 1983 before the transfer was done.

14. According to the Plaintiff, by that time, the Defendants family had vacated the land and they would continue living on the same land cultivating the same for an uninterrupted period of 20 years. During that period, the Plaintiff was unable to complete the transfer of the land for what he told the Court were financial constraints.

15. As it turned out, sometime around the year 2000 the two Defendants came back, occupied the land and asked the Plaintiff and his family to leave. The Plaintiff told the Court that the Defendants insisted that their father had only leased but did not sell the land to the Plaintiff's father. By then the Defendants' father had also passed away.

16. The Plaintiff reported the actions of the Defendants to the Area Assistant Chief who in turn referred them to the area District Officer (DO). The DO after hearing both parties then referred the dispute to the Malindi District Land Tribunal. From the material placed before me, the Tribunal assumed the jurisdiction over the matter and proceeded to hear a number of witnesses from both sides of the dispute. By a decision rendered on 29<sup>th</sup> April 2011, the Tribunal entered Judgment for the Plaintiff and ordered as follows:-

***i) That the Objectors Bozo Ndenge Mumbo and Dickson Ndenge (the Defendants herein) do hereby surrender the parcel of land Chembe/Kibabamshe No. 165 to the Claimant Stanley K. Kahindi (the Plaintiff herein) from the date of this Judgment;***

***ii) That the Objectors...and their families to vacate the (suit property) in six months from the date of this Judgment;***

***iii) That the Objectors...are hereby ordered to suffer compensation of Kshs 60,000/- in respect of this suit and inclusive costs of the witnesses;***

***iv) That the Objectors...are hereby ordered to suffer compensation of Kshs 40,000/- for the loss of land use and cash crop trees for six years; and***

***v) That the Objectors...their families, relatives and their agents are hereby restrained from interfering, trespassing the Claimants peaceful occupation, possession and any other development of the suitland.***

17. As was the requirement under the now repealed Land Disputes Tribunal's Act, the proceedings of the Tribunal were subsequently adopted in ***Malindi Chief Magistrates Court Land Dispute Case No. 1 of 2011; Stanley H. Kahindi –vs- Bozo Ndenge Mumbo & Dickson Mumbo Ndenge on 17<sup>th</sup> May 2011.***

18. Despite the said decision, the Plaintiff told the Court that the Defendants have remained put and have refused to comply therewith. As it were the Defendants neither filed a Statement of Defence nor did they participate in these proceedings. The Plaintiff's testimony and evidence therefore remained unchallenged.

19. While I did not think the Tribunal had any jurisdiction to make the orders they made over a registered parcel of land, this Court could not close its eyes to the fact that the disputants herein went to the Tribunal in good faith having been referred thereto by the area District Officer to seek for a resolution of their dispute.

20. From the proceedings as captured by the Tribunal, it was the Defendants' case that they were present during the alleged sale transaction and that all their father had done was to lease the land to the Plaintiff's father at a consideration of Kshs 21,000/-. It was the Defendants case that it took them about 24 years to repay back the money and that when they went back to the Plaintiff to repay the money, the Plaintiff rejected the repayment on account that it had taken too long.

21. Those proceedings further reveal that the Defendants accepted during cross-examination that after the so called lease, their father moved away to stay in Mtondia and that the lease was not time-bound.

22. Like the Malindi Land Disputes Tribunal before me, I did not think that the Defendants' case made any sense. From the documents produced herein, their father had clearly executed the land transfer forms in favour of the Plaintiff's father. There was no evidence of a lease and having vacated the land some 24 years earlier in respect of the transaction which one of them witnessed, it was not open to them to return and re-take the land in the manner they have purported to do herein.

23. Their actions clearly amounted to wrongful trespass. In his testimony before this Court, the Plaintiff testified that the Defendants continue to occupy part of the suit property and that their actions continue to interfere with his lawful use and occupation thereof. I am therefore in agreement with the Plaintiff that he is entitled to damages for the trespass and obstruction by the Defendants. In my view the sum of Kshs 1,500,000/- will be adequate compensation in this respect.

24. Accordingly Judgment is hereby entered for the Plaintiff as prayed in the Plaint with damages for wrongful entry assessed at Kshs 1,500,000/-.

25. The Plaintiff shall also have the costs of this suit.

**Dated, signed and delivered at Malindi this 17<sup>th</sup> day of June, 2020.**

**J.O. OLOLA**

**JUDGE**