



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 75 OF 2014**

**KAZUNGU MASHA BIRYA.....PLAINTIFF**

**VERSUS**

**1. STEPHEN BEN NGUMBAO KATANA**

**2. KARISA KATANA IHA**

**3. ROBERT TISHO THOYA**

**4. LAND REGISTRAR, KILIFI.....DEFENDANTS**

**JUDGMENT**

**Background**

1. By a Plaint dated 16<sup>th</sup> April 2014 as amended on 8<sup>th</sup> October 2014, Kazungu Biry Masha (the Plaintiff) prays for Judgment against the four (4) Defendants for: -

*a) A permanent injunction (restraining) the Defendants, their servants, agents, employees and/or anybody acting through them from selling, leasing, cultivating, transferring, letting and or subletting or in any other manner dealing with property on Title Number Kilifi/Mtondia/169;*

*b) An order directing the 4<sup>th</sup> Defendant Land Registrar Kilifi to cancel the title deed issued to the Defendants and register the same to the Plaintiff's deceased father and/or the Plaintiff and his brothers;*

*c) Costs and interest at Court rates; and*

*d) Any other relief that (the) Court deems fit to grant.*

2. Those prayers arise from the Plaintiff's contention that at all times material, he was the Administrator of the Estate of the late Kahindi Masha Mumba who was the owner of Plot No. Kilifi/Mtondia/170 which number was later amended by the 4<sup>th</sup> Defendant to become Kilifi/Mtondia/169. It is the Plaintiff's case that the Defendants who are the descendants of a sister to his mother have fraudulently manipulated and altered the records of the land ownership for purposes of disinherit his family.

3. But in their joint Statement of Defence dated 7<sup>th</sup> July 2014 Stephen Ben Ngumbao Katana, Karisa Katana Iha and Robert Tisho Thoya (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) deny having any interest whatsoever in Plot No. Kilifi/Mtondia/170. It is instead their case that they are together with their now deceased brother Mwakamsha Katana, the registered owners of Plot No. Kilifi/Mtondia/169.

4. In the alternative, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that sometime in 1974 the Plaintiff's deceased father sold to the 1<sup>st</sup> Defendant his cashew nuts and mango trees which were located on the deceased's Plot No. Kilifi/Mtondia/170. The Defendants asserts that the practice at the time was that upon the purchase and acquisition of such trees, the purchaser would acquire ownership rights to the said land.

5. The Defendants further assert that accordingly and subsequent to the purchase of the trees, the 1<sup>st</sup> Defendant moved into the suit property in 1975, built his house and settled thereon with his family. Sometime in 1996, they were issued with a title deed for the parcel of land registered as Plot No. Kilifi/Mtondia/170 but after a ground verification exercise carried out in the area in 2007, it was established that the

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were in occupation of Plot No. 169 instead of 170.

6. The Defendants assert that acting on the recommendations in the report of the District Land and Settlement Officer, Kilifi, the title deed issued to them on 18<sup>th</sup> October 1996 was cancelled and they were issued with a new one for Plot No. Kilifi/Mtondia/169 on 17<sup>th</sup> April 2007.

7. By way of their Counterclaim, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that they are the registered owners of the said parcel of land and accuse the Plaintiff whom they state has been occupying part of the land with their permission of threatening to dispose of the same to third parties. The Defendants accordingly urge this Court to dismiss the Plaintiff's suit with costs and to instead enter Judgment in their favour for: -

***i) A permanent injunction to restrain the Plaintiff and or his family and or servants and or authorized agents from selling and leasing and alienating or interfering with their right to quite possession of Plot No. Kilifi/Mtondia/169 in any manner whatsoever;***

***ii) The Plaintiff to be ordered to hand over vacant possession of the part of Plot No. Kilifi/Mtondia/169 which the Plaintiff and or his family and or sevants and agents do occupy. Alternatively, the Plaintiff and or his family, servants or authorized agents be evicted from Plot No. Kilifi/Mtondia/169 at their own costs;***

***iii) Costs of the Counterclaim; and***

***iv) Any other relief this Honourable Court may deem fit to grant.***

8. The Land Registrar Kilifi (the 4<sup>th</sup> Defendant) similarly denied the Plaintiff's claim. In a Statement of Defence dated 26<sup>th</sup> March 2015 and filed herein on 22<sup>nd</sup> April 2015, the 4<sup>th</sup> Defendant avers that it is not privy to the particulars of ownership of the suit property as stated by the Plaintiff.

9. In the alternative, the 4<sup>th</sup> Defendant asserts that upon perusal of the documents in their record, it was clear that the property known as Kilifi/Mtondia/169 was initially Plot No. 170 and was first registered in the name of the Settlement Fund Trustees (SFT) on 8<sup>th</sup> September 1980. The Fund transferred the property to Kahindi Masha Mumba on 18<sup>th</sup> October 1996 before being transferred on the same day to the Defendants who were then issued with a Title Deed.

10. The 4<sup>th</sup> Defendant further asserts that on 17<sup>th</sup> April 2007, there was an amendment as a result of ground positioning and parcel No. 170 was changed to No. 169 after the registered owners surrendered the same for correction.

### **The Plaintiff's Case**

11. The Plaintiff called a total of five (5) witnesses at the trial herein which commenced before the Honourable Justice Angote on 6<sup>th</sup> September 2016.

12. PW1- Kazungu Biry Masha is the Plaintiff and a resident of Mukoroshoni in Kilifi. He told the Court that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are his maternal cousins, as their grandmother and PW1's grandmother were sisters. PW1 told the Court that the said Defendants stay on his father's land. The land was initially registered in the name of PW1's father Kahindi Masha Mumba as Plot No. 170.

13. PW1 testified that his father died on 21<sup>st</sup> October 1996 and that he was later on issued with Letters of Administration. He further testified that the Defendant's grandmother had come to stay with PW1's grandmother and that he was unaware how the Defendants transferred the property to their name. He told the Court the transfer dated 19<sup>th</sup> August 1996 shows that his father transferred the land to the Defendants for a consideration of Kshs 70,000/-.

14. PW1 told the Court that neither his mother nor himself were aware of the transfer. He told the Court that his father was ill and that he died on 21<sup>st</sup> October 1996, a few days after he is said to have thumb-printed the transfer on 7<sup>th</sup> October 1996. PW1 testified that a letter dated 19<sup>th</sup> December 1995 from the Settlement Funds Trustee shows that the land was discharged to his father and that the letter was collected by one Mwakamshe Katana on 15<sup>th</sup> January 1996. Mwakamshe Katana was a brother to the 1<sup>st</sup>- 3<sup>rd</sup> Defendants and worked at the Land Registry in Kilifi at the time before he later died in 2013.

15. PW1 told the Court that the land belonged to his father and that his father never sold the land to anyone.

16. PW2- Kesi Chea Gunga is a village elder and neighbor to the Plaintiffs. He testified that the suit property belonged to the Plaintiff's father the late Kahindi Masha. He told the Court the deceased was allocated the land measuring 13 acres and that he lived on the property with his family. PW2 told the Court the Defendants were distant relatives who came to the land after it had been demarcated. Their grandmother Kadzo Mahombo had been given a portion of the land at the end to construct a house.

17. PW2 testified that no one in their community had heard of the alleged sale of the land to the Defendants and that the land was irregularly registered in the name of the Defendants.

18. On cross-examination, PW2 produced his original identify card and told the Court he was 70 years old. He further told the Court his own parcel of land is Plot No. 149. He told the Court that he was unaware how the Defendants acquired the land from the Plaintiff's father.

19. PW3- Kaingu Ngala is also a neighbor of the Plaintiff. He told the Court he grew up knowing the suitland belonged to the Plaintiff's father. He had assisted him to plant coconut trees on the land. He told the Court the Defendants were cousins to the Plaintiff and that they had come to the land in the 1980s after their grandmother came to assist her sick sister who was the Plaintiff's grandmother. The Defendants originally came from Ganze and their father never lived on the land. PW3 told the Court he had never heard that the Plaintiff's father sold the land to the Defendants.

20. PW4- Peter Njeru is a Land Surveyor based at the Kilifi Land Adjudication and Settlement Office. He told the Court he had documents from his office in regard to the suit property. He was however stood down and did not complete his testimony following an objection to the documents he sought to refer to.

21. PW5- Athman Timbe Juma is a Land Registrar based at Kilifi. He produced the parcel file for the suit property. From their records, he told the Court Plot No. 170 was previously registered in the name of Nyamawi Karisa before it was cancelled on 17<sup>th</sup> February 2007. Its Green Card shows the land was 13 acres.

22. In respect of Plot 169, PW5 told the Court the Green Card initially showed it was Plot No. 170 but that was altered following a letter from the District Land Adjudication Office dated 17<sup>th</sup> April 2007 which stated that the ground visit established it was on a different parcel. That letter advised that there be an amendment to correct the Title Deeds in respect of the two parcels. From the record, Plot 169 was previously in the name of Kahindi Masha Mumba while 170 was in the name of Nyamawi Karisa.

23. PW5 further told the Court that their records show that by a letter dated 19<sup>th</sup> December 1996, a number of titles and transfers were sent to the District Land Adjudication and Settlement Office, Kilifi from the Director's Office in Nairobi. Title No. 170 was among them and the records show that it was collected by one Mwakamushe Mtana from the Lands Department on 15<sup>th</sup> January 1996. PW5 told the Court he knew the said Mwakamushe Mtana as a Clerical officer in the Registration Section of their Department.

24. PW5 further testified that their records reflected that Kahindi Mumba had transferred the title to the Defendants yet no title had been issued to the said Kahindi. According to him, that was irregular. There was also nothing to show the parties in respect of the two plots met and agreed to swap titles.

25. On cross-examination however, PW5 conceded that the original transfer was franked, an indication that stamp duty had been paid for the transfer.

### **The Defence Case**

26. On their part the Defendants called a total of three (3) witnesses in support of their case.

27. DW1- Stephen Ben Ngumbao Katana is the 1<sup>st</sup> Defendant herein, a retired teacher and a resident of Mwazang'ombe, Kilifi. He told the Court that he is one of the registered owners of the suit property together with his deceased brother Mwakamsha Katana as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

28. DW1 testified that the Plaintiff's father Kahindi Masha Mumba was allotted Plot Number Kilifi/Mtondia/170 sometimes in 1968. However, sometime in 1974, the Plaintiff's father decided to move to Ziwa la Ng'ombe in Mombasa together with his family. Before he did so, he sold to DW1 his 16 Cashew nut trees, two coconut trees and one mango tree which were on the said Plot No. 170.

29. DW1 told the Court that prior to that, he had given the Plaintiff's father at his request money to pay the annual levies required by the Government for the said Plot. He further told the Court that the practice prevalent around Kilifi at that time was that in a land purchase transaction, a purchaser would buy the vendor's trees and in turn the purchaser would acquire ownership rights to the land.

30. DW1 testified that the transaction was reduced into writing and was witnessed by the local settlement committee and the then Chief of Tezo/Roka Location one Benjamin Shaha. He however told the Court he was not able to trace the agreement.

31. DW1 told the Court that after acquiring the land, he continued paying all relevant charges regarding the same in the name of the Plaintiff's father as he awaited registration. In 1975, he moved into the Plot No. 170, put up a small house and settled his family therein including his grandmother Hawe Kadzo Mahombo. Sometimes after 1987, the Plaintiff's father brought back his family and requested to be accommodated for some time as he wanted to make arrangements to move to his rural village in Ganze.

32. DW1 testified that he showed the Plaintiff's father a place to build a house for his family and that he stayed on the land until 1996 when he died. DW1 told the Court he allowed the deceased to be buried on the land as he was his relative. Before his death, the deceased had on 27<sup>th</sup> June 1996 obtained consent of the Bahari Land Control Board to transfer Plot No. 170 to DW1 and his brothers. Later that year, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were issued with a Title Deed jointly with their brother Mwakamsha Katana who has since died.

33. DW1 further told the Court that following an exercise to determine the ground status and or location of Plot Nos 169, 170, 171 and 172 in Mtondia Settlement Scheme in 2007, it was established that the property occupied by the Defendants on the ground was Plot No. 169 and not No. 170. The title deed issued to them on 18<sup>th</sup> October 1996 was then cancelled and they were issued with a new one for Parcel No. 169 on 17<sup>th</sup> April 2007.

34. On cross-examination, DW1 told the Court that the suitland was given to Kahindi Masha in 1968 but when he was unable to pay, the land was registered in his (DW1's) name by the Land Settlement Office in 1974. He told the Court that he completed the payments due to the

Government in 1996 and that the receipts used to come in the name of Kahindi Masha.

35. DW1 conceded that he had only bought the trees on the land and had paid Kshs 600/- to Kahindi. DW1 further conceded that it is his brother Oscar Mwakamsha Katana who picked the Discharge of Charge which came out in the name of the Plaintiff's father in January 1996 as he used to work at the Kilifi District Land Registry. He could not remember if the Plaintiff's father had gone to the Land Control Board. Neither could he remember the name of the Advocate who did the transfer.

36. DW2- Janet Katana Stephen Ngumbao is a retired social worker and the wife of DW1. She told the Court they have lived on the disputed parcel of land since 1975. She told the Court the Plaintiff's grandmother and the Mother to her husband were sisters. The suit property was initially allocated to the Plaintiff's father but he was unable to pay. DW2 told the Court that when their family got this information from the Area Assistant Chief, it was decided that they get someone to take over the land and to pay for it.

37. DW2 testified that thereafter, the Land Settlement Committee sat and allocated the land to her husband. By then in 1975, the Plaintiff had not been born. DW2 further told the Court the Plaintiff's father left in 1974 for Ziwa la Ng'ombe but the Plaintiff's mother fell ill and they came back. When she died, the Plaintiff's mother was buried on a parcel of land across the road from where DW1 and DW2 stay. The Plaintiff has remained on the land since.

38. On cross-examination, DW2 told the Court the Plaintiff's grandmother was on the land when they (the Defendants) got there. When DW2 was married in 1969, she found the Plaintiff's grandmother on the land. She had already built on the land. The Plaintiff's father was also already on the land but later in 1974 he sold the trees to DW1 and they left for Ziwa La Ng'ombe. DW2 told the Court they then settled on the land in 1975.

39. DW2 further testified that the Plaintiff's father later came back with his family and occupied a small portion of the land. She told the Court they did not buy the land and that they were allocated the same by the Settlement Scheme. Not all the brothers were however registered on the land and she did not know how her husband's other brothers came to be registered as the owners of the land.

40. DW3- Simeon Karisa Kenga was the Assistant Chief of Ngerenya Sub-Location Tezo/Roka Location between 1970 and 1992. He told the Court that Mwezang'ombe area where the suit property is situated fell within his area of jurisdiction.

41. DW3 testified that sometimes in 1972/73, he visited the suit land because Kahindi Mumba Masha who had been allocated the land defaulted in making payments to the Lands Office Kilifi and officers from the said lands Office were going around offering the land to other allottees. On the advise of DW3, DW1 agreed with the allottee that he would make the payments so that the parcel of land was not allotted to someone else.

42. DW3 told the Court the Plaintiff's father and DW1 later went to see him to inform him that they had reached an agreement that the ownership of the land would vest on DW1. That agreement was reduced into writing before the then Chief Tezo/Roka Location.

43. On cross-examination, DW3 conceded that he and DW2's father are married from the same home. He however told the Court he got involved in the dispute not as a relative but as the area Chief. He told the Court he was a Committee member of the Settlement Scheme before he became the Chief.

### **Analysis and Determination**

44. I have carefully perused and considered the pleadings filed herein, the oral testimonies of the witnesses who testified and all the evidence adduced at the trial herein. I have also taken time to peruse and consider the written submissions and authorities placed before me by the Learned Advocates –Mr. Nyachiro for the Plaintiff and Mr. Lewa for the Defendants. The Honourable the Attorney General neither called a witness nor did they file any submissions herein.

45. The Plaintiff herein craves an order of a permanent injunction to issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who are his cousins from selling, leasing, cultivating, transferring, letting or in any manner whatsoever dealing with all that property measuring 13 acres and more particularly known as Parcel No. Kilifi/Mtondia/169. In addition, the Plaintiff craves an order directing the Land Registrar Kilifi (the 4<sup>th</sup> Defendant) to cancel the title deed issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and to instead register the same in the name of the Plaintiff's father, the late Kahindi Masha Mumba and or in the name of the Plaintiff and his brothers.

46. It is the Plaintiff's case that the said parcel of land was formerly known as Kilifi/Mtondia/170 and that the same was allotted to his father Kahindi Masha Mumba many years ago before his demise on 21<sup>st</sup> October 1996. The Plaintiff accuses the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and their late brother one Mwakamsha Katana of fraudulently manipulating and altering the records held by the 4<sup>th</sup> Defendant in regard to the suit property for purposes of disinherit the Plaintiff of the same and or changing the ownership thereof to reflect that the property belongs to the Defendants.

47. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants do not deny that they are presently, together with their brother Mwakamsha Katana (now deceased) the registered proprietors of the suit property. Contrary to the Plaintiff's accusations of fraud however, the Defendants told the Court that they acquired the property lawfully from the Plaintiff's father the late Kahindi Masha Mumba in 1974.

48. While they admit that the original Plot No. Kilifi/Mtondia/170 was allotted to the Plaintiff's father in the year 1968, they told the Court that sometimes in 1974 before the Plaintiff was born, his father decided to move to Ziwa la Ng'ombe in Mombasa with his family and that before he did so, he sold to Stephen Ben Ngumbao Katana (the 1<sup>st</sup> Defendant) his 16 cashew nut trees, two coconut trees and one mango tree that were on the suit property.

49. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further told the Court that at that time, the practice prevalent in Kilifi area was that in a land purchase transaction, a purchaser would buy the Vendor's trees in the parcel of land being sold and in turn he would acquire ownership rights over the said land. Thus having purchased the trees as aforesaid, the 1<sup>st</sup> Defendant moved into the suit property a year later in 1975, put up a house and bought more trees from other neighbours thereabouts.

50. It was the evidence of the 1<sup>st</sup> Defendant that having so acquired the suit property, he continued paying all relevant charges regarding the same in the name of the Plaintiff's father as he waited for the process of registration to be finalized and the property to be transferred to his name and or those of his nominees.

51. The 1<sup>st</sup> Defendant told the Court that sometime in 1987 however, the Plaintiff's father returned to the land following the death of the Plaintiff's grandmother with whom he had also moved away, and requested to be accommodated for sometime as he planned to relocate back to his ancestral village in Ganze. As fate would have it, the Plaintiff's father would remain on the land for another nine years until his death on 21<sup>st</sup> October 1996.

52. It was the Defendant's testimony that a few months before his death, the Plaintiff's father transferred the suit property and on 18<sup>th</sup> October 1996, some three days before the death of the Plaintiff's father, they were issued with a title deed in their name jointly with their brother Mwakamusha Katana who himself passed away later on in the year 2013.

53. While the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Counsel submitted vigorously that Land Parcel No. Kilifi/Mtondia/170 was separate and distinct from Land Parcel No. Kilifi/Mtondia/169, I did not find any difficulty in arriving at the conclusion that the two referred to one and the same thing. At paragraph 6(C) of their own pleading herein those very Defendants explain the mutation of the title from No. 170 to 169 as follows:-

***“L) That after an exercise to determine the ground status and or location of Plot Nos 169, 170, 171 and 172 in Mtondia Settlement Scheme vis a vis the records at the Registry was conducted sometimes in 2007, it was established that on the ground, the 1<sup>st</sup> -3<sup>rd</sup> Defendants were in occupation of Plot No. 169 instead of 170. Acting on the recommendation of the report of the District Land and Settlement Officer, Kilifi, the title deed issued on the 18<sup>th</sup> day of October 1996 was cancelled and instead the 1<sup>st</sup>- 3<sup>rd</sup> Defendants and Mwakamusha Katana (deceased) were issued with one for Plot Number Kilifi/Mtondia/169 on 17<sup>th</sup> day of April 2007.”***

54. That position was indeed confirmed by the Kilifi Land Registrar Athman Timbe Juma (PW5) who testified herein that from their records, Plot No. 169 was initially Plot No. 170 in the original Green Card and that the same was altered following a letter from the District Land Adjudication Office dated 17<sup>th</sup> April 2007 which stated that the ground visit established that it was on a different parcel. According to PW5, that letter advised that there be an amendment to correct the title deeds in respect of the two parcels.

55. There was therefore no doubt in my mind that the parcel of land presently registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants together with their deceased brother Mwakamusha Katana as Kilifi/Mtondia/169 is the very same Kilifi/Mtondia/170 that was allocated to the Plaintiff's father in 1968.

56. In her testimony during cross-examination, Janet Katana Stephen Ngumbao(DW2) told the Court that the Plaintiff's grandmother was already on the land when the Defendants arrived on the land. DW2 who is the 1<sup>st</sup> Defendant's wife testified that when she was married in 1969, it was the Plaintiff's grandmother who was on the disputed parcel of land and had built her home thereon.

57. From the evidence and material placed before me, the Defendants appeared to trace their acquisition of the property from the Plaintiff's father on two fronts. On the first front, the Defendants asserted that although the Plaintiff's father was the original allottee of the suit property, he was a poor man who was unable to pay the fees and charges required by the Settlement Fund Trustees (SFT) that was in charge of the allotments of the parcels of land in that region.

58. In this respect, the Defendants asserted through the 1<sup>st</sup> Defendant and the former Assistant Chief Ngerenya Sub-Location Simeon Karisa Kenga (DW3) that as a defaulter, the Plaintiff's father was on the verge of losing the land since the Settlement Funds Trustees had issued notices to defaulters and were about to repossess the land when the family met and agreed to have the land re-allocated to the 1<sup>st</sup> Defendant, who was then a teacher and considered to have the capacity to pay.

59. The second and related position taken by the Defendants was that the Plaintiff's late father decided sometime in 1974 to sell his cashew nut and coconut trees to the 1<sup>st</sup> Defendant to relocate to Mombasa. In this regard, it was the Defendants' evidence that the 1<sup>st</sup> Defendant then purchased the trees on the suit property from the Plaintiff's father at a consideration of Kshs 600/-. According to the Defendants, at that time, the practice then prevalent in Kilifi was that when one bought such trees, he would in turn acquire ownership rights to the said land. Accordingly, and on the basis of that purchase, the 1<sup>st</sup> Defendant and his wife DW2 moved into the suit property in 1975 and occupied the same as their home.

60. As it were however, not much was placed before me by way of evidence to support any of those positions. While the Assistant Chief (DW3) was a former member of the Settlement Committee, nothing was produced to demonstrate that the Plaintiff's father had been in default of loan repayments and or that the Settlement Funds Trustee had sent any demand to repossess the land from the Plaintiff's father.

61. Indeed, while the Defendants testified that the original allottee defaulted and that the Settlement Committee allowed the 1<sup>st</sup> Defendant to pay the loan and to be allocated the land, nothing was placed before me to show any communication in writing of this position either to the Plaintiff's father as the defaulter or the 1<sup>st</sup> Defendant as the new allottee. The 1<sup>st</sup> Defendant had no letter from the Settlement Funds Trustee

in his name. Nor did he produce any payments receipts issued to himself even in the name of

62. the Plaintiff's father to demonstrate that he took over the loan as alleged.

63. The same goes for the proposition that the 1<sup>st</sup> Defendant paid for the cashew nut and coconut trees that were on the land before the Plaintiff's father is said to have moved to Mombasa in 1974. While the 1<sup>st</sup> Defendant told the Court there was an agreement in writing evidencing the same, the said agreement was neither produced nor did any witness thereto come forth and profess as to its existence.

64. As it turned out, when the loan was paid and the Settlement Funds Trustee discharged the title many years later in 1996 that Discharge was in the name of the Plaintiff's father. That Discharge of Charge was collected by the Defendants brother Oscar Mwakamusha Katana who worked at the Lands Registry at Kilifi on 15<sup>th</sup> January 1996 and there is zero evidence that he was authorized to do so by the Plaintiff's father and or that the same was brought to the knowledge of the Plaintiff's father up and until the time he passed away some nine months later.

65. Indeed how the title deed came out in the names of the three Defendants together with their brother who picked the Discharge of Charge is even more mysterious. As PW5 told the Court, while the records at the Land Registry reflected that the Plaintiff's father had transferred the title to the Defendants, there was a major irregularity as no title deed had ever been issued to the Plaintiff's father at the time. Indeed, while the 1<sup>st</sup> Defendant purported to have been the one who purchased the land, he had no explanation how the title came out to be in the names of the four brothers. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not testify herein and therefore also never offered any explanation how they came to acquire the title in their names.

66. The same applied to the proposition that it was the practice in Kilifi those days that when one purchased your trees, he would in turn come to own your piece of land. There was no independent evidence placed before me to show that this was the practice and custom by which land was sold and/or disposed of. Neither was there any evidence that the Defendants had purchased any trees from the Plaintiff's father.

67. Section 3(3) of the Law of Contract Act stipulates that any disposition of land or any transaction involving land must be reduced in writing and must be signed by both parties thereto in the presence of independent witnesses. There was no evidence that this requirement was adhered to prior to the transfer of the suit property in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

68. In the premises, I did not find an iota of evidence to back the Defendants' defence and Counterclaim. This Court was however satisfied on a balance of probabilities that the suit property belonged to the Plaintiff's father and that there was merit in the Plaintiff's suit.

69. Accordingly, the Counterclaim is dismissed and I hereby enter Judgment for the Plaintiff as follows: -

***a) An order is hereby given directing the 4<sup>th</sup> Defendant Land Registrar Kilifi to cancel the title deed issued to the Defendants and register the same in the name of the Plaintiff's deceased father.***

***b) An order of eviction is hereby issued requiring the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to vacate the suit property Kilifi/Mtondia/169 within 90 days from today.***

***c) An order of permanent injunction is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their servants, agents, employees or anybody acting through them from selling, leasing, cultivating, transferring, letting and or subletting or in any other manner dealing with the property known as Kilifi/Mtondia/169.***

***d) The Plaintiff shall have both the costs of this suit and of the Counterclaim.***

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of October, 2020.**

**J.O. OLOLA**

**JUDGE**