



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 32 OF 2014**

**CONSOLIDATED WITH ELC MISC CIVIL SUIT NO. 20 OF 2016(O.S)**

1. LUCAS M. MUNGA
2. LAWRENCE MTENZI MUNGA
3. MUKOMU MUNGA
4. JANJI MUNGA
5. THOYA GAMBO
6. JANJI ABDALLA
7. DECHE GAMBO
8. MUTENZI SANGA
9. MBURA MWELE GEORGE
10. THOMAS NGUZO MWELE
11. THOMAS GONA.....PLAINTIFFS

**VERSUS**

1. LAWRENCE NYAMAWI
2. NYAMAWI MWAKUNI
3. RAYMOND KAI MWANGOLO
4. MWANDOGA PEKESHE
5. NYAMAWI MWAMUYE CHIMWAGA
6. MWACHIRO LEWA.....DEFENDANTS

**JUDGMENT**

**Background**

1. By a Complaint dated 18<sup>th</sup> February 2014 as filed herein on 26<sup>th</sup> February 2014, the eleven Plaintiffs pray for Judgment against the six Defendants jointly for: -

**a) An order for the rectification of the Register relating to the Title Numbers Chonyi/Mwakaraya/325 and Kilifi/Chilulu/213 by cancelling the registration of the Defendants as the proprietors of the said Titles and instead registering the Plaintiffs as the proprietors;**

**b) Costs of this suit.**

**c) Interest thereon at Court rates; and**

**d) Any other relief that this Honourable Court may deem just to grant.**

2. It is the Plaintiff's case that at all times material to this suit, they have been residing on the said parcels of land having settled thereon and built their homes many years before the land was registered and have been using the same openly and continuously without interruption from any quarter.

3. The Plaintiffs contend that during the demarcation and adjudication of claims to the suit properties in the year 1972 and 1986, the Defendants without any colour of right were fraudulently allocated the property thereby denying the Plaintiffs their rights thereto.

4. The Plaintiffs maintain that when the Defendants were allocated the properties as aforesaid, they duly objected but their objection was not heard and determined in the manner provided under the Land Adjudication Act, Cap 284 of the Laws of Kenya. The Plaintiffs assert that the Defendants were subsequently wrongfully and illegally issued with title deeds on 15<sup>th</sup> February 1995.

5. The Plaintiffs aver that their efforts to resolve the matter through a Council of Elders in 1982 failed to succeed on the ground of jurisdiction but they eventually filed a boundary complaint at the Lands Office the same year which dispute was later on in 1986 resolved in their favour. That resolution was later confirmed by the Court in **Award No. 14 of 1996** wherein the Defendants were granted 30 days to appeal but they never did and hence the orders sought herein.

6. But in their Amended Statement of Defence and Counterclaim dated and filed herein on 10<sup>th</sup> September 2014, the six Defendants jointly deny that the Plaintiff have been residing on the suit properties as alleged or at all. They aver that if indeed the Plaintiffs have been residing on the land as claimed, then they did so without the consent or authority of the Defendants who are the rightful owners of the land.

7. In particular, the Defendants aver that they are the rightful owners of the suit properties having inherited the same from their fathers who are the registered owners of the same. It is their case that they have always peacefully resided in, developed and carried out farming activities on the land. They assert that they hold legitimate title deeds and deny that the Plaintiffs raised any objection during the allocation, adjudication and or registration thereof.

8. While admitting that the Plaintiffs lodged a boundary dispute against them, the Defendants aver that the said dispute was lodged at the Land Disputes Tribunal which had no jurisdiction to deal with the matter as the Plaintiffs instead of giving evidence of a boundary dispute argued a claim of ownership of the properties. The Defendants therefore contend that the resulting award was null and void as the tribunal had no jurisdiction to deal with the matters of ownership.

9. By way of their Counterclaim, the Defendants accuse the Plaintiffs of encroaching upon their properties and embarking on a process of forcefully take possession thereof. Accordingly, they pray for Judgment to be entered against the Plaintiffs jointly and severally for: -

**a) A declaration that the Defendants are the rightful and lawful owners of all that parcel of land known as Kilifi/Chilulu/215 and Chonyi/Mwarakaya/325;**

**b) A declaration that the Defendants have the right to continue occupying and owning the suit properties;**

**c) A declaration that the consequential Judgment in Kaloleni RM Land Award No. 14 of 1996; Lucas M. Munga & Others –vs- Mwakuni Mwakititi & 3 Others dated 8<sup>th</sup> October 1996 is null and void;**

**d) A permanent injunction restraining the Plaintiffs or their agents, servants, workers from encroaching upon and/or remaining on or taking possession of or continuing fencing off, the Defendants referenced land known as Kilifi Chilulu/325; and**

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

10. By way of **Miscellaneous Civil Suit No. 20 of 2016 (OS)**, the Plaintiffs also sought extension of the period of execution of the Decree issued on 3<sup>rd</sup> December 2001 in the said **Kaloleni Magistrates Court Land Award Case No. 14 of 1996**. The Defendants opposed the extension vide a Replying Affidavit sworn by the 1<sup>st</sup> Defendant on 7<sup>th</sup> June 2016.

11. On 7<sup>th</sup> September 2016 the said Originating Summons was consolidated with this suit by the consent of the parties with this suit as the lead file.

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

12. The Plaintiffs called one witness who testified on their behalf at the trial.

13. PW1-Lucas Mwamgandi Munga is the 1<sup>st</sup> Plaintiff and a resident of Jibane, Kaloleni. Relying on his Statement dated 9<sup>th</sup> October 2017 as filed herein on 6<sup>th</sup> April 2018, PW1 testified that the suit properties were first inhabited by their forefather Bezungu Runya. One Bongo Mwadzayo, a grandfather to the Defendants then went to seek refuge on the land from Mzee Rangome Shume. He was later followed by his family members.
14. PW1 told the Court that during the registration of the land, the said Bongo Mwadzayo and his family fraudulently presented themselves as the owners of the land. They then hurriedly and clandestinely brought in Surveyors to the land without consulting the Plaintiffs who were the resident owners. When the Plaintiffs went to the settlement office to stop what was going on, the Settlement Officer refused to listen to them. They then went to the District officer (D.O) Kaloleni who in turn directed them to the Land Registry at Kilifi.
15. PW1 testified that at the Land Registry, they were given a document referring them to the Kaloleni Law Courts. When they arrived at the Kaloleni Court, they were given yet another document to present at the Mombasa Law Courts. At Mombasa, the Judge told them that the matter was supposed to be handled by the elders under the Chairmanship of the D.O
16. PW1 further testified that when they went back to the D.O, he requested each side to present two elders. Those elders were then given some blank papers to sign before the papers were taken to the Mombasa Court. At the Court, they were told the parties did not come to any written conclusion so the matter should be heard in the High Court.
17. PW1 told the Court they then consulted a lawyer who advised them to go back to the Lands Office Kilifi. At that office, they paid some amount and were given receipts which they took to the D.O Kaloleni. The D.O then set up a tribunal which heard the case and later prepared a report which was presented to the Kaloleni Court. The verdict was in favour of the Plaintiffs and the Defendants were given time to appeal but did not do so.
18. The Plaintiffs were later granted an eviction order against the Defendants but the Defendants did not move.
19. On cross-examination, PW1 told the Court that Plot No. 213 Chilulu is registered in the names of five people. All of them are however now dead and only their children are on the land. Similarly Plot No. 325 Mwarakaya was registered in the names of three people all of whom have since died. PW1 told the Court he was initially living on Plot 213 where he was born but had since moved to 325 because it was the same parcel of land. He moved to 325 in 1975 by which time it had been registered in the names of the Defendants.
20. PW1 testified that he was now 73 years old and that land adjudication was done in the area in 1972. He was then already an adult and his father had passed on in 1955. He was present with three of his uncles when the adjudication was done one early morning. He told the Court the adjudication officers refused to listen to their representations.

#### **The Defence Case**

21. On their part, the Defence called a total of six witnesses at the trial.
22. DW1-Lawrence Nyamawi Mwajanji is the 1<sup>st</sup> Defendant and a farmer at Manyani in Kaloleni. He told the Court that he resides in Plot No. 325 Mwarakaya which is registered in the names of Elisha Mwajanji Shibanda, Paulo Nyamawi and Mwamuye Mwang'ombe.
23. DW1 testified that all the families were there when the land adjudication was done in the area. The 1<sup>st</sup> Plaintiff's family was given Plot No. 939. DW1 told the Court that none of his family members attended the Tribunal proceedings in 1996 as all the registered owners of the land were dead by then.
24. On cross-examination, DW1 told the Court he was unaware of any Court decision confirming that the land belonged to the Plaintiffs.
25. DW2- Raymond Kaye Mwangolo is the 3<sup>rd</sup> Defendant and a resident of Manyani where he does farming. He reiterated the averments made by the 1<sup>st</sup> Defendant in his statement and testimony before the Court.
26. On cross-examination, DW2 denied the Plaintiff's statement that they are the ones who welcomed them (the Defendants) to the suit property.
27. DW3- Mwandonga Pekeshe is the 4<sup>th</sup> Defendant and a resident of Manyani. He similarly reiterated the averments made by the DW1 and DW2. He told the Court he resides on Plot No. 213.
28. DW4- Keya Kabunda is a neighbor of the disputants. He told the Court he resides in Plot No. 472. He further told the Court he attended the cases before the elders as a witness.
29. DW5- Wellington Kai Mwakumbi is a brother to the 3<sup>rd</sup> Defendant whom he told the Court is now deceased. He gave the history of the land and told the Court the Plaintiffs had in 1982 filed a land dispute before the Panel of Elders. Those elders told the Court in that they had no jurisdiction to hear a dispute concerning ownership of registered land and told them to go file a case in the High Court. That decision registered as ***Mombasa RM's Award Case No. 32 of 1985*** was later ignored by the Plaintiffs who filed another case before another elder's tribunal. The Defendants did not participate in the second case.
30. DW1- Mashaka Mwangome is also a neighbor of the Defendants and reiterated the position taken by the Defendants in respect of the ownership of the land.

## **Analysis and Determination**

31. I have carefully perused and considered the pleadings filed by both sides of the dispute, the oral testimonies of their witnesses and the evidence adduced at the trial herein. I have also perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

32. The eleven Plaintiffs before me are in effect challenging the registration of the parcels of land known as Kilifi/Chilulu/213 and Chonyi/Mwarakaya/325. From the material placed before me, these parcels of land were registered in the names of various relatives of the six Defendants herein. The parcels of land known as Kilifi/Chilulu/213 measuring 18.1 Ha was registered in the names of five people namely Mwakoni Mwakiti, Mwangolo Ngala, Mwachiro Lewa, Mwamuye Chimwaga and Pekeshe Kambi on 5<sup>th</sup> July 1977.

33. On the other hand, the parcel of land known as Chonyi/Mwarakaya/325 measuring 2.0 Ha was registered on 14<sup>th</sup> February 1983 in the names of some three people listed therein as Mwajanji Chibanza Mwamuye, Paul Nyamawi and Mwamuye Mwabonje Mwamuye.

34. It was not in dispute that all the registered proprietors were all deceased at the time of institution of this suit. The Plaintiffs contend that during the demarcation and adjudication of the two properties in 1972, the deceased relatives of the Defendants herein fraudulently caused themselves to be allocated the said properties and that the Land Adjudication and Settlement Officers declined to hear and determine their Objections as provided under the Land Adjudication Act, Cap 284 of the Laws of Kenya.

35. The Plaintiffs told the Court that as a result of the fraud and subsequent refusal to hear and consider their objection, the Defendants were wrongfully and illegally issued with the title deeds for the two properties on or about 15<sup>th</sup> February 1995.

36. At paragraph 28 of their Complaint, the Plaintiffs have listed the particulars of fraud and/or misrepresentation on the part of the Defendants as follows: -

***1) Fraudulently misrepresenting themselves to the Demarcation Officer and Adjudication Officer at the time of demarcation and adjudication of the interests or claims to the suit property that they were the rightful beneficial owners of the suit property while knowing or having reason to believe that they did not own the suit property.***

***2) Knowing or having reason to believe that the Plaintiffs have been in rightful physical possession of the suit property from time immemorial yet proceeding to misrepresent themselves to the Demarcation Officer and Adjudication Officer at the time of demarcation and Adjudication of the interest and claims to the suit property that they were the ones in rightful physical possession of the suit property.***

***3) Obtaining registration of the suit property in their names while knowing or having reason to believe that they had no registrable interest or claims to the suit property; and***

***4) Obtaining registration of the suit property in their own names while knowing or having reason to believe that the suit property belongs to the Plaintiff.***

37. At the trial herein it did emerge that Lucas Mwanganda Munga, the 1<sup>st</sup> Plaintiff herein was present and attended the adjudication exercise when it was conducted in 1972. Testifying herein as PW1, the 1<sup>st</sup> Plaintiff told the Court that he was born in 1945 and was therefore already an adult at the time of the exercise which he attended with three of his uncles. His own father had already passed away in 1955.

38. According to PW1, the exercise began as early as 6.00 a.m. and he recalls that he did with his uncles present their position in regard to the ownership of the two parcels but the Settlement Officer refused to listen or document the same. It was his case that while the Defendants' forefathers were allocated as the owners of the suit properties, his own family was only registered under another Parcel of land being Kilifi/Chilulu/393.

39. As it were, the Plaintiffs did not place before me any evidence of their contention that it is their forefathers that had welcomed the Defendants to the suit properties prior to the adjudication exercise. It is also apparent that no such evidence was placed before the adjudication officers and hence the reason both parties were allocated the land they were occupying prior to the commencement of the exercise.

40. From the testimonies of the witnesses who testified before me, it was clear that by the time the land adjudication was done in the area, both parties to the dispute had been on the land for a relatively long period of time. While the 1<sup>st</sup> Plaintiff told the Court the land was first occupied by his great grandfather Bezungu Runya who then welcomed the Defendants relatives, it was clear that if indeed that happened it must have been some very long time back. The 1<sup>st</sup> Plaintiff himself put it as at the year 1945, the same year he was born and it was clear that whatever he told the Court were not from his own recollection of events but what he was told by others.

41. In this respect, it was interesting to note that other than the 1<sup>st</sup> Plaintiff, no other witness was called by the Plaintiffs to corroborate the claim that it is his forefathers who had welcomed the Defendants forefathers to the land. The Defendants on their part called their neighbours DW5 and DW6 who told the Court they were present during the exercise and that it was the Defendants forefathers who had occupied the land prior to the adjudication thereof.

42. As it were, the registration of the Defendants relatives as proprietors of the suit properties was done pursuant to an adjudication exercise conducted in the area. That being the case, any objection to the ascertainment of interests on the land ought to have been made in accordance with the mechanism set out under Parts III and IV of the Land Adjudication Act, Cap 284 of the Laws of Kenya. Sections 19, 20, 21, 22, 26,

27 and 29 of that Act provide an elaborate mechanism complete with timelines within which such disputes can be dealt with.

43. At the trial herein, it emerged that the Plaintiffs did not commence any objection proceedings until some ten years later when they lodged a Land Dispute Case before a Panel of Elders at the Kaloleni District Officer's Office being **Case No. LND/KAL/16 of 1982; Lucas Mwangandi & Others –vs- Mwakuni Mwakiti & 3 Others**. The Panel of Elders however rightfully observed in that case that they had no jurisdiction to deal with the complaint on registered land and urged the Plaintiff to refer the matter to the High Court at Mombasa. The decision of the Panel of Elders was subsequently adopted as an order of the Court in **Mombasa SRMCC Land Award No. 32 of 1985**.

44. Rather than proceed to the High Court as advised, the Plaintiffs found their way back to the Kaloleni District Officer's office some ten years later whereat they again now purported to have a boundary dispute lodged against the relatives of the Defendants. In this second round, reflected as **Kaloleni Land Award Case No. 14 of 1996**, the Plaintiffs were awarded the land.

45. It is not clear from the record if the Panel sitting **as Kaloleni Land Award Case No. 14 of 1996** were made aware of the proceedings of the previous tribunal and the fact that its decision had been adopted as an award of the Court in the said **Mombasa SRMCC No. 32 of 1985**. What is clear is that the parcels in dispute had in 1977 and 1983 been registered in the names of the Defendants' now deceased relatives and that to the Plaintiffs' knowledge, the title deeds had been issued therefore in February 1995.

46. The jurisdiction of the now defunct Land Disputes Tribunals was conferred by Section 3(1) of the now repealed Land Disputes Tribunal Act, No. 18 of 1990 as follows:

***“Subject to this Act, all cases of a civil nature involving a dispute as to: -***

***a) The division of, or the determination of boundaries to land including land held in common.***

***b) A claim to occupy or work land, or***

***c) Trespass to land, shall be heard by a Tribunal established under Section 4(of the Act).***

47. A perusal of the proceedings in the said **Land Award Case No.14 of 1996** as placed before me clearly shows that the Plaintiffs accused the Defendants herein of registering their “Shamba” shown therein as the two suit properties herein, in their names. That dispute did not relate to division or determination of boundaries to land and it was not about a claim to occupy or work land or that of trespass as set out under Section 3 (1) of the Land Disputes Tribunal Act as set out above.

48. Indeed, at page 8 of the proceedings, the Tribunal after the hearing purported to award the suit properties to the Plaintiff. That is what gave rise to the decree that the Plaintiffs sought to execute in the Originating Summons being **Miscellaneous Civil Suit No. 20 of 2016** in which they sought to cancel the said titles as issued and to have themselves registered as the owners of the two properties. Unfortunately for the Plaintiffs, they took the wrong path when they disregarded the advise given to them by the first Panel of Elders. The Land Disputes Tribunal had no jurisdiction to entertain the dispute and it clearly acted ultra vires its mandate when it proceeded to award the suit properties to the Plaintiffs.

49. In the premises, I had no difficulty in arriving upon the conclusion that the Plaintiffs suit before me has no merit. The Defendants' forefathers were lawfully adjudicated as the rightful owners of the land more than 40 years ago and I think the 1<sup>st</sup> Plaintiff in particular has pestered them long enough for these two properties. There is no evidence that the land ever belonged to the Plaintiffs and it is high time they left the Defendants to enjoy quiet and peaceful possession thereof.

50. Accordingly, and for the reasons given hereinabove, I find that the Plaintiffs case lacks merit and I hereby dismiss the same. Judgment is instead entered for the Defendants as prayed in the Counterclaim.

51. The Defendants shall have both the costs of the Plaintiffs suit and of the Counterclaim.

**Dated, signed and delivered at Malindi this 2<sup>nd</sup> day of October, 2020.**

**J.O. OLOLA**

**JUDGE**