



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 80 OF 2017**

**KACHE KATANA BAYA.....PLAINTIFF**

**VERSUS**

**SHUKRAN CHAKO KAMBI.....DEFENDANT**

**JUDGMENT**

1. By a Complaint dated 4<sup>th</sup> April 2017 and filed herein on 7<sup>th</sup> April 2017, Kache Katana Baya (the Plaintiff) prays for an order of a permanent injunction to issue restraining Shukran Charo Kambi (the Defendant) from selling, subdividing, trespassing, building structures or staying on a parcel of land described as an unregistered Portion of land in Sabaki Katsangani Area.

2. It is the Plaintiff's case that at all material times she was in control of the suit premises until the time the Defendant and his family invaded the same and built illegal structures thereon. Despite numerous demands made, the Defendant has refused to vacate the land.

3. As per the Affidavit of Service of one Morris Mwavuo Ngonyo, the Defendant was served with copies of the Summons and Pleadings filed herein on 14<sup>th</sup> April 2017 at his homestead in Sabaki area. He did not however enter appearance and/or file a defence to the Plaintiff's claim. He was also served with a hearing notice on 2<sup>nd</sup> February 2018 but failed to turn up in Court on the day slated for hearing. Accordingly, this matter proceeded by way of formal proof.

4. Testifying in support of her case, the Plaintiff told the Court that she is a farmer and a resident of Sabaki. She accused the Defendant of invading and taking her parcel of land measuring about ten acres situated in Sabaki-Katsangani.

5. The Plaintiff told the Court that the Defendant entered the land and started selling Portions thereon to third parties. She also built structures on other Portions of the land. The Plaintiff reported the matter to the elders who advised her to report the same to the Area Chief. The Chief could also not solve the same.

6. The Plaintiff further told the Court that she had lived on the land which does not have a title deed for a long period of time and that she gave birth to her ten children while residing thereon. She asked the Court to help her get back her land as the Defendant had been unresponsive.

7. I have considered the pleadings herein, the Plaintiff's testimony and the evidence placed before me. I have equally perused and considered the submissions filed herein by Mr. Obaga, Learned Counsel for the Plaintiff.

8. The Plaintiff craves an order of injunction to issue restraining the Defendant from dealing in any manner whatsoever with the Plaintiff's Parcel of land. The Plaintiff submits that at all material times, she was the owner or beneficiary of the land described simply as an unregistered portion of land in Sabaki Katsangani Area.

9. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya provides that:-

***“Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

10. The above provision deals with what is generally referred to in law as the burden of proof. That principle of law is amplified by the learned authors of the leading reference text book in law - *The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at Paragraph 13 and 14* as follows:-

*“13.” The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.”*

*14. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a Claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegations is an essential of his case. There may therefore be separate burdens in a case with separate issues.*

*(Emphasis added).*

11. In the matter before me, it was alleged that the Plaintiff was at all material times in control of the suit premises until the time when the Defendant invaded the same. From paragraphs 4 and 5 of the Plaintiff, it is evident that the Plaintiff was not claiming interest on the suit property as the owner but as one who was in ‘control’ thereof. This Court was not told what form of control the Plaintiff exercised over the suit land.

12. Granted that this was an undefended suit, I think it was incumbent upon the Plaintiff to provide evidence of ownership and/or the said control over the suit property that entitled her to bring this suit against the Defendant. Indeed, while the Defendant was said to have invaded the property, the date of the alleged invasion and the nature thereof was neither given in the pleadings, filed herein nor in the Plaintiff’s oral testimony given in Court.

13. The suit property was itself described as an unregistered Portion of land at Sabaki Katsangani Area. Even if this Court was minded to grant any orders herein the imprecise description of the property given herein was completely unhelpful and open to both challenge and abuse.

14. In the circumstances of this case, I was not satisfied that the Plaintiff had discharged the legal and evidential burden as required in law. The natural consequence of that failure is that this suit even as it was undefended, cannot succeed. The same is dismissed with no order as to costs.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**