



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 1 OF 2013**

**KHADIJA MOHAMED.....PLAINTIFF**

**VERSUS**

**AMINA THUBE**

**MOHAMED ABDULREHAMEN.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint previously filed before the Chief Magistrates Court Malindi on 24<sup>th</sup> January 2012 (being Malindi CMCC No. 12 of 2012) as amended in the present case on 28<sup>th</sup> November 2013, Khadija Mohamed (hereafter the Plaintiff) prays for:-

*a) A declaration that the titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect to Plot Nos. 1734/281 and 1734/282 that lawfully belong to the Plaintiff herein was irregularly issued and/or is null and void;*

*b) A declaration that the Plaintiff is the lawful owner of all that parcel of land referenced Portion No. 1734/528 and 1734/459 Maisha Mapya Scheme and that the Defendants' acts are unlawfully;*

*c) A declaration that the Plaintiff has the right to continue owning the suit property;*

*d) A permanent injunction restraining the Defendants or their agents, servants, workers from encroaching upon and/or remaining on, or taking possession of or continuing fencing off the Plaintiffs referenced land 1734/528 and 1734/459 Maisha Mapya Scheme;*

*e) That the Defendants by themselves, agents and/or servants be compelled by an order of mandatory injunction to pull down and/or uproot an illegal fence being put up by their agents, servants or assigns over the Plaintiff's land referenced Portion No. 1734/528 and 1734/459 Maisha Mapya Scheme;*

*f) A mandatory injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup> Defendants to issue to the Plaintiff all the deed plans of all that parcel(s) of land(sic) that have been paid for in full;*

*g) Costs and interest of this suit.*

2. Those prayers are premised on the Plaintiff's contention that at all times material she was the owner of the said parcels of land having occupied, cultivated and utilised the same from the time she was born. Sometime in or about 23<sup>rd</sup> January 2012 however, the Defendants pulled down the Plaintiff's fence and began constructing their own perimeter wall over the two parcels of land.

3. It is the Plaintiff's case that it is only after the Defendants' said actions that she came to learn that the Defendants had illegally obtained title over the suit property. It is her case that she is entitled to the suit premises by virtue of her prolonged stay over the same and having purchased the same from Maisha Mapya Scheme like all other squatters who were previously on the land.

4. On their part, the two Defendants Amina Thube (initially sued as Asha Mohamed) and Mohamed Abdulrehman filed their Defence and Counterclaim on 29<sup>th</sup> May 2012 in which they generally denied the Plaintiff's contentions. It is their case that they purchased the suit properties from the beneficiaries of the Estate of the late Hussein Erwin Berner.

5. As a result the Defendants sought the following orders in their Counterclaim:-

*a) A declaration that the Defendants are the only lawfully registered owners of Plot No. 10719/459 and 528;*

*b) An order compelling the Registrar of Titles to expunge the names of the Plaintiff from the Register and maintain the Defendants as the only registered owners;*

*c) Without prejudice to the above prayers, the Court to order the Plaintiff to execute the cross –transfer that the Defendants take the vacant plots and the Plaintiff to continue to have ownership of the Plots (on) which they currently reside;*

*d) Costs of this suit;*

*e) Any other relief that this Court deems fit to grant.*

#### **THE PLAINTIFF’S CASE**

6. At the trial herein which trial commenced before the Honourable Justice Angote , the Plaintiff called six witnesses who testified as herein below:-

7. PW1-Mohammed Hassan Kheri alias Madevu told the Court that he was a village elder at Majengo Mapya and he knew the Plaintiff’s mother, one Zamzam who was one of the original squatters in the area and had resided in the suit land since 1991. He told the Court that the land previously belonged to one Abu Muhidhar who later sold the same to Maisha Mapya Self-Help Group.

8. PW1 further testified that the said Zamzam was among the first squatters to buy her portion of the land-some ten plots after the Group bought the land. She resided on the land with her family until her demise. Zamzam left two children that is Khadija Mohamed (the Plaintiff) and one Nasoro Ali both of whom reside on the land.

9. PW2-Nasoro Ali Maita told the Court that the Plaintiff is his elder step sister. When he was young, PW2’s mother Zamzam bought ten plots from Maisha Mapya Self-Help Group. Their mother died in 1994 and left the property to PW2 and the Plaintiff.

10. PW2 further told the Court that after the death of Zamzam, the officials of Maisha Mapya Self-Help Group gave them five Deed Plans. The Group undertook to issue them later with five more Deed Plans for the rest of their Plots. They are yet to get the same. It was his further testimony that they have lived on the suit land from their childhood and have cultivated the same and reared livestock thereon. They are strangers to claims of ownership by the Defendants as they have never sold their land to anyone.

11. PW3-Khadija Mohamed (the Plaintiff) told the Court that the suit land is their mother’s home. Her name was Zamzam Binti Ali. PW3 was born in 1960 as the family lived on the land. Her mother died in 1994 shortly after paying for the Plots to Maisha Mapya Self-Help Group. That Group was established after the original owners of the land allowed the squatters to own the land after selling it to the Group.

12. PW3 testified that her mother had more than one acre. When she died, the land was yet to be sub-divided. They divided them into eleven Plots, three of which PW3 has since sold to third parties. PW3 first saw the Defendants when they brought people to the land and started digging thereon. They were claiming the land was their own.

13. PW3 recalled that there was another dispute in regard to the suit properties with one Hussein Abubakar. That was in 2004. The said Hussein was stopped by the DO from constructing on the disputed land. PW3 never had any agreement either with Hussein or his father one Erwin Berner.

14. PW4- Samuel Charo Mraba on his part told the Court that he was called upon sometime back to help Maisha Mapya with some work. The squatters wanted to be issued with their Plots. PW4 knew the Plaintiff and her mother. They were squatters and he sub-divided their land. The Scheme PW4 prepared was later approved. The Plaintiffs family had neighteen Plots but they were allocated eleven Plots by the Officials of the Group.

15. PW5-Antony Ongamo Oundo told the Court that he was the Plaintiff’s neighbour. When they formed Maisha Mapya Group, they agreed that each squatter was to be allocated the Portion in which they were residing upon payment of the agreed purchase price to the Self-Help Group. A survey was then carried out.

16. PW5 testified that after the survey, the Plaintiff’s mother was allocated ten Plots and she made some payments. She later died leaving behind the Plaintiff and PW2 as beneficiaries of her estate. It is these two who own the suit land as they have always resided thereon.

17. PW6-Irungu Mwangi also told the Court that the Plaintiff is his neighbour. They had lived on the land since she was young. The Plaintiff is the daughter of Zamzam who was one of the original squatters of Maisha Mapya. PW6 does not know the Defendants and he is not aware that the land was sold to anyone.

#### **THE DEFENCE CASE**

18. The Defence called four witnesses in support of their case.

19. DW1-Amina Abdi Duba (1<sup>st</sup> Defendant) testified that she bought the Plots in dispute from one Virginia who was the Administrator of the Estate of Hussein. Virginia initially sold to her two Plots Nos. 10719/545 and 10719/569 which Plots are not in dispute. DW1 fenced the two Plots and later resold them to one Sheikh Ali.

20. DW1 told the Court that the 2<sup>nd</sup> Defendant is her husband. When in 2011 they went to fence the plots in dispute which according to her were three in number, the Plaintiff and her brother attacked them claiming the Plots were their own. These were Plot Nos. 458, 459 and 528. At that point in time, DW1 discovered that the Plots she was fencing and the titles she had were different. When she had purchased, she was shown the Plots she had gone to fence. She called a Surveyor one Mr. Chiula who proceeded to the scene and confirmed that the Plots in the title and those on the ground were not matching.

21. DW1 then contacted officials of Maisha Mapya Self Help Group. The officials showed her the sub-division Plan and confirmed that while there was some confusion, all the Plots she had bought belonged to the late Hussein. The Plots had been ten in total. Five had been allocated by the Group to the Plaintiff while the other five were allocated to Hussein.

22. DW1 further told the Court that the Deed Plan she was given were for Plots 454, 455 and 529. The Plaintiff was already in occupation of those Plots. The Plaintiff was summoned to the Chief's office but she never attended. The DO then took DW1 to the DC who in turn summoned the Plaintiff again. The Plaintiff again never turned up and the DC referred DW1 back to Maisha Mapya.

23. DW1 subsequently met the officials of Maisha Mapya with a Surveyor known as Mr. Kiguru. While at the site, they were attacked and they sought help from the police. When the OCPD came and asked the Plaintiff for her documents, she had none. The Maisha Mapya Officials then did an Affidavit and sent documents to the Director of Survey asking him to provide the duplicates Deed Plans 458, 459 and 528 whose originals were initially with the Plaintiff.

24. DW1 told the Court that as the matter was pending in Court, the Plaintiff sold Plot No. 458 to one Mr. Shah.

25. DW2- Joseph Karisa Katsoma is the current Chair of Maisha Mapya Group. He told the Court that they started the Group in 1990 with a view to ensure everyone gets a title for their land. DW2 told the Court that the Plaintiff lived with her mother Zamzam on the land. The mother who is now deceased was a member of their Group.

26. DW2 told the Court that the Plaintiff inherited ten Plots from her mother. DW2 came to know the 1<sup>st</sup> Defendant (DW1) at a time when they had the dispute about those Plots. In 2004, DW2 met one Hussein Erwin Berner who came during one of the Committee Sittings and claimed five of the ten Plots that were in the Plaintiff's name. The said Hussein told the Committee he was the son of Zamzam's husband and that their father had given them their Portions of land and he produced a letter from JK Mwarandu Advocates showing how the Plots had been sub-divided.

27. DW2 further told the Court that when the Committee learnt of the dispute, they referred the matter to the Area Chief. He was however unable to resolve the matter and he referred them to the DO. The DO summoned the Committee and urged them to sub-divide the land as per an Agreement dated 14<sup>th</sup> May 1996 which Hussein had shown them indicating that the Plaintiff had agreed on the sub-divisions with Hussein's father one Erwin Berner.

28. DW2 testified that thereafter, their Committee transferred five Plots to the Plaintiff and five Plots to Hussein. The said Hussein later died in 2006 and DW2 came to learn of a dispute between the Plaintiff and Hussein's wife when the wife reported to the Committee about the same. Thereafter, the 1<sup>st</sup> Defendant went to the Committee asking for a Deed Plan after the Plaintiff stopped her from fencing the Plots which she said she had bought from Hussein's wife. It turned out that the Plaintiff had built on the Portion that ought to have been Hussein's.

29. DW2 told the Court that the Group then advised that the 1<sup>st</sup> Defendant should take the Plots that were still vacant and which initially belonged to the Plaintiff. The Plaintiff however refused and the Group advised them to go to the Police. The Group Committee members were later summoned to the Police Station where the Plaintiff claimed that her original papers of ownership were lost. The Committee then prepared an Affidavit seeking to have new Deed Plans. When they got the same, they transferred the same to the 1<sup>st</sup> Defendant.

30. DW3-Rajab Mbaruku Mangu was a Committee Member of Maisha Mapya Group since 2002. He told the Court that the Plaintiff was a fellow Committee member of the Group. She had ten Plots which she had inherited from her mother. Later, one Hussein went to the Group with a letter claiming half of the Plaintiff's land. The Group tried to resolve the matter with the help of the Provincial Administration.

31. DW3 further testified that after the dispute went to the DO's office, it was decided that the Plots be divided and each party be given half share. A transfer was subsequently done in the name of Hussein. Later after Hussein died, a dispute arose between the Plaintiff and the 1<sup>st</sup> Defendant after the 1<sup>st</sup> Defendant bought two of the Plots. It turned out that the Plaintiff had developed the Plots which the Group had transferred to Hussein.

32. DW4-Joseph Karisa Mwarandu is an Advocate of the High Court. He was the Legal Advisor to Maisha Mapya Group when the Squatters were buying the land. He did the Sale Agreement between the original land owner and the Squatters. He is also the one who registered the transfer from the owner to the Group.

33. DW4 told the Court that at one point in time, the Plaintiff went to his office with Committee members of the Group and told her that her mother who had died had been a squatter for a long time. She requested DW4 to assist her obtain some money from a Swiss national who

had been known to her mother. The lawyers for the Swiss national then told DW4 that he was willing to assist on condition that they would share the land so bought equally with the Swiss national.

34. DW4 told the Court that he thereafter prepared an Agreement which was executed on 14<sup>th</sup> May 1996 between the Plaintiff and one Erwin Berner. The Plaintiff signed the document before DW4 after which DW4 sent the document to Erwin's Lawyers to obtain his signature. Money was then paid to Maisha Mapya Group through DW4's account.

35. DW4 further told the Court that the last page of the Agreement shows a Schedule of the Plots which were supposed to be transferred to the two parties. Later on at some point, there was a dispute between the Plaintiff and the heir of Erwin Berner, one Hussein. DW4 was then summoned to the DO's office to explain what had transpired. DW4 honoured the summons and explained how the parcels were acquired.

### **ANALYSIS AND DETERMINATION**

36. I have carefully considered the pleadings filed herein, the testimony of the witnesses and the evidence adduced by both parties. I have also considered the submissions and the authorities relied upon by the Learned Advocates for the parties.

37. According to the Plaintiff, her mother the late Zamzam Ali Maitha (Zamzam) was one of the original squatters in an area that later came to be known as Maisha Mapya Scheme within Malindi. At the time the land was owned by one Abu Muhdhar. According to the Plaintiff, she was born on the disputed parcel of land in 1960 and they have lived there ever since.

38. Sometimes in the early 1990s, the Squatters organised themselves into an association calling themselves Maisha Mapya Self Help Group with the sole aim of acquiring the land and getting title deeds for their respective Portions. At the time of her death in 1994, the late Zamzam had made some payments as was required of members of the Group and after survey of the land she was allocated ten Plots each measuring (50 x 100) ft among them the suit Plots Nos. 1734/459 and 1734/528.

39. The Plaintiff asserted that she thereafter paid for the preparation of the Deed Plans for all the plots to Maisha Mapya and in the meantime she occupied, cultivated and utilised the land. However, sometime in or about 23<sup>rd</sup> January 2012, the Defendants pulled down her fence perimeter and began constructing their own perimeter wall thereon. It is her case that the Defendants had no colour of right to trespass upon her land and urges this Court to kick them out of her property.

40. The Defendants however deny that they are trespassers as contended by the Plaintiff. In particular, the 1<sup>st</sup> Defendant asserts that she purchased five different Plots in 2011 from two beneficiaries of the Estate of one Hussein Abubakar Berner, who according to the Defendants was the one originally allocated the disputed parcels by Maisha Mapya Self-Help Group.

41. According to the 1<sup>st</sup> Defendant, she purchased among other Plots Nos. 10719/454, 455 and 529. At the time of purchase, these Plots were fenced with pillars and she was given original indentures and Deed Plans thereof. She then decided to take a surveyor to pick the beacons to enable her fence the land. However when they went to the area in the company of her husband (the 2<sup>nd</sup> Defendant) they were accosted by the Plaintiffs who objected to the fencing of the land.

42. It was the Defendants' case that they then reported the matter to Malindi Police Station. On consulting with their Surveyor, they realized that of the three Plots sold to the 1<sup>st</sup> Defendant, the Plaintiff had already constructed some buildings on two of them while the Plaintiff also held Deed Plans for other empty Plots nearby. When the Plaintiff was asked about the Deed Plans, she told the Police in the presence of Maisha Mapya Officials that she had lost the original Deed Plans.

43. The Maisha Mapya officials then prepared an Affidavit which was presented to the Director of Surveys and fresh Deed Plans were issued for the Plots originally allocated to the Plaintiff. The Plots were then transferred to the 1<sup>st</sup> Defendant and hence prompting this suit.

44. From the material placed before me, there was no denying that the Plaintiff's mother, the late Zamzam was one of the original squatters in the area that is now referred to as Maisha Mapya. It was not denied that prior to her death, she had made certain payments towards the acquisition of the Plots she lived on. Indeed according to some of the receipts produced by the Plaintiff in evidence herein she had paid at least Kshs 64,000/- to Maisha Mapya for what is described in the receipt as "Buying a Plot".

45. There is also evidence that after Zamzam's death, her daughter, the Plaintiff herein made various payments for various Portions of the land. She produced in evidence four separate Agreements indicating that Maisha Mapya had sold to her Plot Nos. 1734/260, 361, 281 and 282. In addition, she produced two indentures for Portion No. 133/3 dated 3<sup>rd</sup> March 2003 and Portion No. 138/3 dated 16<sup>th</sup> November 2001.

46. It would however appear that contrary to the Plaintiff's assertions that she was in occupation and possession of the disputed Plots until the Defendants invaded the same in January 2012, she had had to contend with another dispute in regard thereto sometime in the year 2004. At the time, the Plaintiff was apparently a serving member of Maisha Mapya Self-Help Group Management Committee when one Hussein Abubakar Erwin Berner (Hussein) laid a claim to five of the ten Plots that the Plaintiff had by then caused to be transferred to her name.

47. In her testimony before this Court, the Plaintiff admitted during cross-examination that she knew one Erwin Berner. She told the Court that the said Berner was a Whiteman who used to come to their house as a family friend. The Plaintiff however denied that she entered into any Agreement with the said Erwin Berner to share the ten Plots on a 50/50 basis. In addition, she denied receiving any money from the said Whiteman.

48. While admitting that she knew Erwin Berner's son by the name Hussein, she denied that Hussein was her brother or a relative. She

however admitted that the Area Chief summoned her in relation to an Agreement dated 14<sup>th</sup> May 1996 and ordered her to give Hussein five Plots. The Plaintiff refused and had the matter escalated to the area District Officer (DO). Apparently according to the Plaintiff, she had also reported Hussein to the DO sometime in 2003 when Hussein had erected pillars on the property.

49. As it turned out, it was the said Hussein who caused the registration of five of the ten Plots originally in the Plaintiff's name to be cancelled. According to both DW2 and DW3 who were then the Chair and Committee Member respectively of Maisha Mapya, Hussein complained to them that the registration of the Plaintiff names against the ten Plots was contrary to an Agreement that the Plaintiff had had with Hussein's father on 14<sup>th</sup> May 1996. That Agreement which the Plaintiff denied executing lists the ten Plots claimed herein by the Plaintiff and proceeds to state that the same were to be shared equally between the Plaintiff and Hussein's father Erwin Berner.

50. Upon considering the said Agreements, officials of Maisha Mapya as well as the Provincial Administration to whom the matter was reported agreed and directed that the Plots be divided as per the Said Agreement.

51. According to the Defendants the Officials of Maisha Mapya were forced to execute an affidavit for the issuance of fresh Deed Plans after the Plaintiff alleged that the originals in her possession were missing. Subsequently, new plans were prepared and the five Plots were registered in Hussein's name in February 2005. The Defendants produced in evidence the Indenture's through which Maisha Mapya transferred the Plots to Hussein.

52. While the Plaintiff accuses the officials of Maisha Mapya of siding with Hussein due to corruption, no evidence of fraud or such corruption was placed before me. I have myself considered the Agreement and the testimony of DW4 Joseph Karisa Mwarandu Advocate who prepared the same. In his testimony, DW4 explained how the Plaintiff approached him to secure the funds for the purchase of the Plots from Hussein's father who was then in Switzerland.

53. According to DW4, he managed to secure the sum of Kshs 433,000/- which sum he transferred to the Plaintiff's and Maisha Mapya's account but only after an Agreement was prepared on instructions of Hussein's father giving him a 50% share in the Plots that were being paid for.

54. I have carefully considered the circumstances therein in light of the Plaintiff's contention that she did not execute the Agreement. I was unable to find what would have motivated DW4 way back in 1998 to prepare such an Agreement, forge the Plaintiff's signature and proceed to register the same many years down the line.

55. Indeed when the dispute first arose in 2005, Mr. Mwarandu Advocate was summoned to the DO's office and he explained the same circumstances that led to the preparation of the Agreement. As it were, it is apparent that no follow up was made to the claim of forgery and the Plaintiff never moved to annul the titles in Hussein's name.

56. It is further evident that the Plaintiff only resuscitated the dispute herein long after Hussein passed away on 3<sup>rd</sup> May 2005. Following Hussein's death, his wife Virginia Katunge John was on 12<sup>th</sup> July 2007 issued with a Certificate of Confirmation of Grant for his Estate. That Certificate lists his properties to include, among others, Plot No. 10719/469, 545, 454, 495 and 529 Kisumu Ndogo.

57. The 1<sup>st</sup> Defendant bought the properties in contention from Hussein's wife the said Virginia and his mother one Charagh Mohamed in the year 2011. At the time of the sale, the Plaintiff had neither objected to the transfer nor placed a restriction on the titles. As innocent purchasers for value without notice of any encumbrances, the Defendants are entitled to protection of the property that they had lawfully acquired. They are however ready to accommodate the Plaintiff and take the alternative Plots that have been left vacant.

58. In the circumstances of this case, I did not find any merit in the Plaintiff's case. I did however find merit in the Defence case and I hereby enter Judgment for the Defendants and make orders as follows:-

***i) The Plaintiff's suit is hereby dismissed.***

***ii) The Plaintiff is hereby ordered to execute the cross transfer that the Defendants do take the vacant Plots among the original ten Plots the subject matter herein within thirty days from today. In default, the Deputy Registrar of this Court to forthwith execute the same.***

***iii) The Defendants shall have the costs of the suit and the Counterclaim.***

**Dated, signed and delivered at Malindi this 29th day of May, 2019.**

**J.O. OLOLA**

**JUDGE**