



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO.142 OF 2014**

**JOHN H. MRAMBA** (Suing as the Administrator of the Estate of **PAUL GEORGE KENGA....PLAINTIFF**

**VERSUS**

**KOMBO CHINANDO & 22 OTHERS).....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. This suit was initially filed as *Mombasa HCCC No. 279 of 2013*. By his Plaint dated and filed in Mombasa on 28<sup>th</sup> November 2013, John H. Mramba suing as the Administrator of the Estate of the late Paul George Kenga(the Plaintiff) sought the following orders against the 23 Defendants herein:-

- a) Vacant possession of the suit premises on Plot No. Kilifi/Roka/529;*
- b) Demolition of illegal structures standing on the suit premises;*
- c) Mesne profits from 1<sup>st</sup> January 2006 until delivery of vacant possession and interest thereon; and*
- d) Costs of (and) incidental to the suit.*

2. Those prayers are premised on the Plaintiff's contention that at all times material, he was the registered owner of the property known as Kilifi/Roka/529 and the landlord of the Defendants who own business premises on a portion of the land. It is the Plaintiffs case that on or about 27<sup>th</sup> January 2006, he issued notices to the Defendants terminating their tenancy and giving them six months to vacate the said property.

3. By a letter dated 25<sup>th</sup> April 2006 however, the Defendants responded to the Plaintiff's notice declining to vacate the land on the basis that the suit property was their ancestral land and that they are the owners of the suit property. Since then. The Defendants have continued occupying their respective business premises and earning profits therefrom without paying rent to the Plaintiff.

4. Thereafter, the Plaintiff proceeded to institute proceedings at the Business Premises Rent Tribunal against the Defendants. Subsequently, the Defendants were issued with fresh notices of termination dated 1<sup>st</sup> September 2012 and effective on 1<sup>st</sup> November 2012 but the Defendants have to date refused to vacate the premises.

5. By an Amended Statement of Defence and Counterclaim dated 1<sup>st</sup> April 2016 and filed herein on 19<sup>th</sup> April 2016, the Defendants generally deny the averments made in the Plaint. It is their case that they are entitled to occupation and possession of the suit premises by virtue of the fact that they have been residing on the same for over 12 years and any claim by the Plaintiff if any has been extinguished under the Limitation of Actions Act.

6. In particular, the 4<sup>th</sup> to 23<sup>rd</sup> Defendants assert that the Plaintiffs title has been extinguished by operation of the law in that they have acquired adverse possession of their respective portions of land. They further maintain that the portions of land they occupy do not fall within Kilifi/Roka/529 and as such the Plaintiff has no right of title thereof.

7. By way of their Counterclaim, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants contend that they leased portions of the suit property that they erected permanent buildings within the property and with the consent of the Plaintiff. They aver that the Plaintiff did not inform them that the lease was of a temporary nature and as such they invested heavily on the suit property without any objection from the Plaintiff. They therefore demand

from the Plaintiff payment of the current Market Value of their buildings and fixtures.

8. On their part, the 4<sup>th</sup> to 23<sup>rd</sup> Defendants aver that they are entitled to the premises by virtue of their long occupation that is in excess of 12 years and they seek a declaration that they have acquired the suit property under the doctrine of adverse possession by dint of which the Plaintiff's title has since been extinguished.

#### **THE PLAINTIFF'S CASE**

9. At the trial herein, the Plaintiff called two witnesses in support of their case.

10. PW1-John Mramba is the Plaintiff herein. He testified that he was the legal representative of his brother Paul George Kenga in whose name LR No. Kilifi/Roka/529 is registered. He told the Court that the Defendants herein moved into his brother's parcel of land and were selling all sorts of merchandise thereon. They built stalls and were paying "pepper corn" rent for the same.

11. PW1 told the Court that when his family decided to develop the land, the Defendants declined to move out claiming that the land was their ancestral land. Thereafter they refused to pay any rent. This forced PW1 to refer the matter to the Business Premises Rent Tribunal where the Defendants were issued with notices terminating their tenancy.

12. PW1 testified that the Defendants never filed reference to the Tribunal and it was only fair that they be evicted from the land so that the beneficiaries of the estate can have back their land.

13. PW2- Grace Kabibi Kenga is a daughter of the late Paul George Kenga. She adopted as her evidence-in-chief her Statement lodged herein on 30<sup>th</sup> April 2015. It was her evidence that the land belongs to her father and that the Plaintiff herein is her uncle.

14. PW2 told the Court that when her father bought the land, there were a few people who built semi-permanent structures by the roadside and who used to conduct some small scale businesses thereon. Sometime in the early 1990s, PW2's late father and the defendants entered into a tenancy agreement. The Defendants would then pay rents ranging from Kshs 100 to 500 per month. That went on until the year 2006 when they refused to pay.

15. PW2 further stated that her family tried to negotiate the dispute with the Defendants after her father died. At the time, the Defendants claimed that their structures were located on a road reserve outside the boundary of the suit property. At his own cost, the Plaintiff engaged the services of a surveyor who after identifying the beacons reported that the tenants structures were within the cadastral survey boundaries of the suit property. The Defendants however refused to move out.

#### **THE DEFENCE CASE**

16. The Defence on their part called a total of seven witnesses in support of their case.

17. DW1-David Chivatsi Muranga is the 5<sup>th</sup> Defendant herein. He told the Court that he entered into the land he occupies sometime in April 1995. The land belonged to the Government, a fact he was told by one Dixon Muranga who was a caretaker of the adjacent land No. Tezo/Roka/529(the suit property) which was owned by one Maurice Mboja.

18. DW1 told the Court that after he settled on the land, the caretaker of the suit property brought a Surveyor to the land who tried to amalgamate their portion of the land. Thereafter the owner of the suit property tried to force them to pay rent on the ground that they were occupying his land. DW1 and the others refused to pay rent and the Plaintiff then filed this case.

19. DW1 told the Court that he has invested on his portion of the land by erecting business premises without any objection from the Plaintiff or any of the previous owners of the suit property.

20. DW2-Sebastian Mrima Jembe is the 4<sup>th</sup> Defendant herein. He testified that he entered the property in April 1997. He was given a small portion measuring 50ft x 100ft to build a business by one David Kamutu Mwaringa. He was to pay monthly rent of Kshs 400/-. He then built his business premises thereon and commenced paying the rent.

21. DW2 testified that sometime in the year 2009, the daughter of George Kenga who owned the land decided to increase the rent to Kshs 10,000/- per month without notice or agreement. DW2 declined to pay.

22. DW3-Fatuma Ngoya is the 9<sup>th</sup> Defendant. She told the Court that she entered the suit property in April 1972 after she was given a small portion by the Chief Tezo Location one Benjamin Shaha. The land belonged to the Government. The portion she was given bordered one that belonged to one Makupe Mongo who would later sell his portion to Maurice Mboja. DW3 never had any dispute with either Makupe or Maurice.

23. It was DW3's testimony that later on, Maurice sold the land to the late Paul George Kenga in 1987. The caretaker of Paul George Kenga's land then brought a surveyor who tried to amalgamate DW3's portion of land. Thereafter the caretaker tried to force DW3 to pay rent. DW3 refused to pay and the Plaintiff brought this case.

24. DW4-Nguma Mwachipuli Mramba is the 23<sup>rd</sup> Defendant. He told the Court that he entered his portion of land during the time when the adjacent portion was owned by the late Makupe Mongo. He had no dispute with Makupe, the boundary of whose land was clearly marked

by a sisal hedge. Later Makupe sold the land to Maurice Mboja. Again DW4 had no dispute with Maurice.

25. DW4 stated that when Maurice sold the land to George Kenga in 1987, the care taker of Kenga's land brought a surveyor who tried to take over DW4's land. Later the caretaker required DW4 and others to pay rent. DW4 refused.

26. DW5-Kavuna Tunje is the 10<sup>th</sup> Defendant. He testified that he entered the land in 1972 after being given a portion by the Area Chief Benjamin Shaha. The land belonged to the Government and he lived thereon peacefully until around 1987 when the owner of the adjacent parcel sold his piece of land to George Kenga. Kenga's caretaker brought a surveyor who tried to amalgamate DW5's portion of land. The caretaker also tried to force DW5 to pay rent. DW5 and his colleagues refused to pay and the caretaker filed this suit.

27. DW6- Nicholas Kazungu Burwa is the 3<sup>rd</sup> Defendant herein. He testified that he entered the land in April 1997 after being given a small portion by one David Kamutu Mwaringa. He was to pay a monthly rent of Kshs 300/- which he paid until 2009 when a daughter of the late George Kenga who owned the land increased the rent to Kshs 10,000/- without notice or agreement. DW6 had by then invested heavily on the land and he prays for compensation.

28. DW7-Raymond Munga Nataka is the 2<sup>nd</sup> Defendant. He told the Court he entered into the land in April 1998. He was given a portion measuring 50 x 100 feet by one David Mwaringa and he was to pay monthly ground rent of Kshs 400/-. DW7 then built his business premises and started paying rent.

29. In 2009, a daughter of the owner of the land George Kenga increased the rent to Kshs 10,000/ per month. DW7 and his colleagues refused to pay. DW7 had by then invested heavily on the land and he prays for compensation.

### **ANALYSIS AND DETERMINATION**

30. I have perused and considered the pleadings filed by both the Plaintiff and the Defendants herein. I have also considered the testimonies of all the witnesses who testified herein, the evidence adduced and the written submissions and authorities availed to me by the Learned Advocates for the parties.

31. From the material placed before me, the suit property, described herein as Kilifi/Roka/529 was previously owned by one Maurice Mboja. On some unclear date between the years 1987 and 1991, the property was purchased from the previous owner by one Paul George Kenga, a brother to the Plaintiff herein.

32. Subsequently, on 9<sup>th</sup> July 1991, the property whose area is given on the title as 14.10 acres was registered in the name of the said Paul George Kenga and a Title Deed was issued to him to that effect. As fate would have it, Paul George Kenga passed away on 12<sup>th</sup> October 2006. Following an application lodged in Nairobi High Court Succession Cause No. 283 of 2008, a Grant of Probate of his Written Will was issued to his brother, the Plaintiff herein on 24<sup>th</sup> June 2008.

33. According to the Plaintiff, the 23 Defendants herein came into the suit property some time after his deceased brother acquired the suit property. The Defendants then proceeded to build stalls and other business structures on the suit property. At some point in time, his brother entered into a tenancy agreement with the Defendants as a result of which the Defendants would pay what the Plaintiff termed as 'pepper corn' rent ranging from Kshs 100/- to 500/- per month.

34. According to the Plaintiff, the family decided to develop the land after the death of his brother. Consequently, they issued all parties with notices terminating their respective tenancies on the subject parcel of land. He produced copies of the notices all dated 27<sup>th</sup> January 2006. The notices issued were in the nature of those prescribed under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 of the Laws of Kenya.

35. The Plaintiff asserts that given that the Defendants did not challenge the notices by filing a reference as prescribed in law or taking any other action to object to the same, the Defendants were legally bound to vacate the suit premises but they declined and remain in those premises to-date and hence necessitating this suit.

36. The Defendants admit that they are on the suit property. They however accused the Plaintiff and his witness of being economical with the truth and dispute their version of how they came into the suitland. Arising from their Defence and Counterclaim as well as the oral testimonies they gave before this Court, they resist the Plaintiff's claim on a three-pronged basis.

37. First and foremost a number of the Defendants in particular the 4<sup>th</sup> to 23<sup>rd</sup> Defendants assert that the portion of land they occupy was Government land and/or a road reserve and that the area they occupy was not within Title No. Kilifi/Roka/529(the Suit Property) and that therefore, the Plaintiff has no right of title to that portion of land.

38. On the second front the 4<sup>th</sup> to 23<sup>rd</sup> Defendants assert that they are entitled to occupation and possession of the suit premises by virtue of the fact that they have been residing thereon for a period exceeding 12 years and that the Plaintiff's claim if any to the said property has been extinguished by operation of the law in that they have since acquired adverse possession of their respective portions of the land.

39. On the third front, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants agree that they leased portions of the suit property from the Plaintiff. It is their case however that the Plaintiff did not inform and/or advise them that the lease was of a temporary nature and as a result, they proceeded to erect permanent buildings on the suit property with the consent of the Plaintiff. It is hence their prayer that if they are to be required to vacate the premises in which they have invested heavily, the Plaintiff should be compelled to compensate them therefor at the current Market Value of their buildings and fixtures erected on the suit property.

40. Arising from the foregoing, the issues that then arise for my determination are also three-fold:-

***i) Whether the land occupied by the Defendants falls within the suit property;***

***ii) Whether the Defendants have acquired their Portions of the suit property by way of adverse possession; and***

***iii) Whether the Defendants are entitled to compensation for the Developments carried out on the suit property.***

(i) Whether the Land Occupied by the Defendants falls within the suit property

41. At paragraph 5B of their Amended Statement of Defence and Counterclaim the Defendants aver as follows:-

***“5B. Without Prejudice to the Foregoing Defence the 4<sup>th</sup> to the 23<sup>rd</sup> Defendants further maintain that the portions of land occupied by them are not within Title No. Kilifi/Roka/529 and as such the Plaintiff has no right of Title to the said Portions of land and (we) put the Plaintiff to the strict proof to the contrary.”***

42. In support of this averment, a number of the Defendants led by DW1 testified that the portion of land they occupy was Government land. DW1 told the Court that he was informed of this fact by one Dixon Muranga who was a caretaker of the suit property which according to DW1 was adjacent to the Portion they occupied. It was his case that the boundaries of the two parcels were clearly demarcated by a sisal hedge.

43. That same position was stated by DW3, DW4, DW5 and DW6. According to DW3 and DW5 however the land was given to them by the Tezo Area Chief one Benjamin Shaha. All the Defendants asserted that when the Plaintiff's brother George Kenga bought the land, he brought in a Surveyor who then tried to “amalgamate” their suit property.

44. As it were, none of the Defendants produced any evidence before me to demonstrate that the Portion of land they occupy was Government land. While a number of them claimed that their portion of land is a road reserve and that the Plaintiff had only bought 12 acres from the previous owner of the land, the Title Deed produced by the Plaintiff shows the approximate area of the Suit Property as 14.10 acres. No other evidence was placed before me to demonstrate that the Plaintiff had acquired a smaller parcel of land than that indicated on the Title Deed.

45. While the Defendants purported that they were told by the Plaintiff's caretaker that the portions they occupied belonged to the Government, that caretaker was not called as a witness to divulge the source of his information and/or knowledge. Neither was Chief Benjamin Shaha called to testify as to his knowledge and the authority he had to allocate the land on the basis that it was Government land. The inescapable conclusion was that the Defendants had no evidence to demonstrate that the Portion of the land they occupied belonged to the Government and/or fell outside the suit property.

46. In any event, it was my view that if indeed the parcel of land occupied by the Defendants is a road reserve and therefore Government land as claimed, the Defendants would not be entitled thereto in the manner claimed herein.

(ii) Whether the Defendants have acquired their Portions of the Suit Property by way of Adverse Possession.

47. As an alternative to their Prayer that the Portion of land they occupy belongs to the Government, the 4<sup>th</sup> to 23<sup>rd</sup> Defendants aver and maintain that they have acquired adverse possession of their respective Portions of land within the suit property. In support of this position, the Defendants asserted that they have been in occupation of the land long before the Plaintiff's brother acquired the same. It is their position that their entry onto the property was without the permission of the Plaintiff's brother and/or any of the previous owners of the land and that they had occupied the same in an open and exclusive manner adverse to the rights of the owners.

48. As the Court of Appeal sitting at Malindi stated in ***Wilson Kazungu Katana & 101 Others –vs- Salim Abdalla Bakshwein & Another(2015)eKLR:-***

***“.....for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way through out, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of Samuel Miki Waweru –vs- Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), this Court delivered the following dictum:-***

***“.....it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.”***

49. In the matter before me, the Defendants submit that they have been in continuous occupation of the Suit Property long before the

Plaintiff's deceased brother purchased it. They assert that given that they were already in occupation of the property at the time, it follows that the deceased bought the property subject to the overriding interests of the Defendants in occupation as was provided under Section 30(f) of the now repealed Registered Land Act and presently replicated at Section 28(h) of the Land Registration Act, No. 3 of 2012.

50. As we have seen herein above, a great majority of the Defendants state that they entered the land on the knowledge that it was Government land. Save for a few, almost all of them state that they entered the land between 1990 and 1991. During his cross examination herein, (DW1) David Chivatsi Muranga (the 5<sup>th</sup> Defendant) who was given authority by other Defendants to testify on their behalf and who said he entered the land in 1995 stated as follows:-

***“I lived on the land for more than 12 years without any disturbance. I knew Paul George Kenga because he had a meeting on the land and he asked us to pay for use of the land. I paid for a few months but later stopped. I stopped because people constructing the road came right up to the place I occupy and placed beacons. They told us our houses are on Government land. That is when I stopped paying.”***

51. On his part Sebastian Murima Jembe (the 4<sup>th</sup> Defendant and DW2) told the Court that he was given his portion of the land by one David Kamutu Mwaringa who informed him that the land belonged to George. He was given a 50 x 100ft portion for which he was told he would pay rent of Kshs 400/-. During his cross examination herein, he stated as follows:-

***“I agree the land belongs to Paul George Kenga. In my statement I have said I was doing business on the land. I was paying rent of Kshs 400/-.***

***I have stated Paul Kenga's daughter Grace increased rent to Kshs 10.000/-.”***

52. The 9<sup>th</sup> Defendant, Fatuma Mungeya testifying as DW3 also conceded that she used to pay rent to the late Paul Kenga. That was the same position repeated by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

53. Arising from the foregoing, it is apparent that the Defendants at one time or the other paid rent for portions of the land they occupy. In support of this fact, the Plaintiff produced in a bundle copies of receipts paid by the Defendants from the year 2005 to 2006 (Pexh 3). While the said receipts do not show who the recipient of the rent was and for what purpose the rent was being paid, the testimony of the Defendants is proof indeed that they paid rent to the Plaintiff's deceased brother.

54. As it were, the suit property was registered in the name of the late Paul George Kenga on 9<sup>th</sup> July 1991. From the Grant of Probate produced herein, Paul George Kenga died on 12<sup>th</sup> October 2006. From the evidence of Plaintiff and his witness, that is the year the Defendants refused to pay rent.

55. Given that a great majority of the Defendants claim to have entered the suit property between 1990 and 1999, it cannot be said that they were on the land prior to the purchase thereof by the Plaintiff's brother. In any event, it was apparent that even those who claim to have been there earlier later accepted to pay rent to him and thereby acknowledged his ownership and authority over the suit property.

56. As DW1 admitted during his cross-examination, the Plaintiff's brother called them for a meeting and asked them to pay rent for the land which proposal they agreed to and commenced payments. By calling for the meeting and getting the Defendants to pay him rent, the Plaintiff's deceased brother had asserted his title to the land and the period of limitation if any, thereby ceased to run in respect of the suit property. While it was not clear when the meeting took place, the Defendants thereafter remained on the land with the consent of the owner thereof on whose licence they paid rent for the land.

57. From the material placed before me, the Plaintiffs niece and George's daughter (PW2) gave notice to the Defendants thereafter to pay rent vide a letter dated 1<sup>st</sup> May 2009. In response, the Defendants wrote back through M/s Kenga & Company Advocates stating that the disputed property was their ancestral land and that they would not pay rent.

58. Given that this suit was filed in the year 2013, I am with respect unable to agree with the Defendants that they had occupied the land in a manner adverse to the Plaintiffs rights for a period of 12 years. The claim by the 4<sup>th</sup> to 23<sup>rd</sup> Defendants that they are entitled to the suit property under the doctrine of adverse possession is therefore also without basis.

**(iii) Whether the Defendants are entitled to Compensation for the Developments carried out on the Suit Property.**

59. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein had a slightly different take on the Plaintiff's case. Conceding that they had indeed leased portions of the suit property from the Plaintiff, it was their position that the Plaintiff did not at any point in time intimate to them that the lease was of a temporary nature and that they would be required to vacate the suit property. As a result they contended, they had invested heavily on the suit properties by erecting permanent buildings thereon without any objection from the Plaintiff. Accordingly they urged this Court to order that they be compensated for those buildings at the current Market Value.

60. While I did find this group of Defendants to be more honest as to what transpired between the parties herein, it was rather difficult to grant their wishes herein. For a start, there was no agreement or understanding that the tenants would be compensated for their structures upon termination of the tenancy. As a matter of prudence, they ought not to have erected permanent buildings on a parcel of land for which they only at best had a month-to month tenancy going by the mode of payment of rent.

61. Faced with a similar situation in *Saffundin Abdullahhai & 3 Others –vs- Ahmed Sunuru (2018) eKLR*, Yano J observed as follows:-

*“Whatever structures the Defendant put up was for his own use and benefit. There was no indication that any consent was sought from and/or obtained from the Landlord permitting the Defendant to put up such structures on the demised suit premises. Moreover, there was no evidence that the Defendants incurred the sum of Kshs 100,000/- in constructing and painting the alleged structure. Even if the Defendant incurred the alleged sum, he went on a frolic of his own and he ought to be held liable and accountable for expenses incurred while on his own frolic. The same cannot be refundable from the Plaintiffs.”*

62. Similarly in the matter before me, I think in the absence of any specific agreement for compensation, the Defendants herein went on frolic of their own when they put up permanent structures on the Plaintiff’s parcel of land knowing that they were tenants thereon. At any rate, while their pleadings indicated that they would assess the applicable market rates at the trial, no figures on assessment were put forth at the trial herein for the Court’s consideration.

63. In the result, having given the Defendants notice to vacate, I find and hold that the Plaintiff is entitled to vacant possession of the suit property. Given that the Defendants have failed to pay rent from 2006 to date, they shall also be required to pay the same rent as mesne profits from January 2006 until vacant possession.

64. The upshot is that I did not find any merit in the Defendants Defence and Counterclaim. The same is dismissed with costs.

65. The Plaintiff’s suit is allowed as prayed save that the order of demolition of the structures on the suit property will not take effect until the expiry of 90 days from today.

66. The Plaintiff will have the costs of this suit and that of the Counterclaim.

67. Orders accordingly.

**Dated, signed and delivered at Malindi this 8<sup>th</sup> day of October, 2019.**

**J.O. OLOLA**

**JUDGE**