



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 93 OF 2013**

**RING ROAD DEVELOPERS LTD.....PLAINTIFF**

**VERSUS**

**PAPELLO INVESTMENTS.....1<sup>ST</sup> DEFENDANT**

**RIDGE CREST INVESTMENT LTD.....2<sup>ND</sup> DEFENDANT**

**LUKAS CHIMERA KENGA.....3<sup>RD</sup> DEFENDANT**

**JAMBO C MKANDARANGA.....4<sup>TH</sup> DEFENDANT**

**KULOLA DZENGO.....5<sup>TH</sup> DEFENDANT**

**KALUME MWANONGO.....6<sup>TH</sup> DEFENDANT**

**CHIROMBO SINDA.....7<sup>TH</sup> DEFENDANT**

**JOSEPH MWATEBE SAA.....8<sup>TH</sup> DEFENDANT**

**KENGA WESA.....9<sup>TH</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....10<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....11<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By an Originating Summons dated 2<sup>nd</sup> August, 2012 filed at the High Court of Mombasa as HCCC No. 158 of 2012, Fredrick Ndegwa Karume claimed to have become entitled to all that parcel of land known as LR No.15068 (CR No. 24507) Kilifi registered in the name of Ring Road Developers Ltd by virtue of adverse possession and urged the court to determine: -

**i) whether the applicant (himself) was entitled to the same by virtue of adverse possession;**

**ii) whether he was entitled to be duly registered as the proprietor of the said parcel of land.**

2. The said suit was later transferred to Malindi as ELC No. 140 of 2014 on the basis that the suit property falls within its primary jurisdiction.

3. In the meantime, by a Plaint dated 6<sup>th</sup> June, 2013, M/s Ring Road Developers Ltd filed Malindi ELC No. 93 of 2013 against some 11 Defendants praying for: -

**a) A declaration that the 1<sup>st</sup> to the 9<sup>th</sup> Defendants title to, claim and/or occupation of the piece of land known as LR No. 15068, Kilifi or any part of portion thereof is illegal, null and void ab initio;**

**b) An order of a permanent injunction to restrain the 1<sup>st</sup> to 9<sup>th</sup> Defendants from trespassing upon, occupying, working, ploughing, farming, constructing upon, wasting, alienating, transferring and/or in other way dealing or interfering with the parcel of land known as LR No. 15068, Kilifi;**

**c) An order directing and/or compelling the 10<sup>th</sup> and 11<sup>th</sup> Defendants to cancel the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant is purported title to the piece of land known as LR No. 15068, Kilifi;**

**d) An order of eviction and grant of vacant possession against the 1<sup>st</sup> to 9<sup>th</sup> Defendants.**

4. By an Order made on 29<sup>th</sup> September, 2015, the two suits were consolidated with the Applicant in Malindi ELC No. 140 of 2014 being made the 12<sup>th</sup> Defendant in Malindi ELC No. 93 of 2013.

5. It is the Plaintiff's case that at all times material to this suit, it was the registered owner of the said property by virtue of a Grant issued by the Commissioner of Lands on 5<sup>th</sup> December, 1990. Sometime in the year 2006, the 4<sup>th</sup> to 9<sup>th</sup> Defendants trespassed upon the property and started constructing illegal structure thereon.

6. Upon filing a suit at the Kilifi Senior Resident Magistrates Court against the 4<sup>th</sup> to 9<sup>th</sup> Defendants, the Plaintiff came to learn that those Defendants were in possession of documents of title indicating that the suit property belonged to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Despite a complaint lodged with the 10<sup>th</sup> and 11<sup>th</sup> Defendants however, no action has been taken and the Plaintiff is now apprehensive that unless the Orders sought herein are granted, the Defendants may proceed with their fraudulent dealings and unlawful occupation of the suit property thereby dispossessing the Plaintiff thereof.

7. By a Notice of withdrawal of suit dated 27<sup>th</sup> August, 2014 and filed herein on 9<sup>th</sup> September, 2014, the suit against the 7<sup>th</sup> and 9<sup>th</sup> Defendants was subsequently withdrawn.

8. The 1<sup>st</sup>, 2<sup>nd</sup> and 8<sup>th</sup> Defendants neither entered appearance nor filed any defence in these proceedings.

9. In their joint Statement of Defence dated 23<sup>rd</sup> August, 2013, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants aver that at all times material, the suit property belonged to their Mwanongo family as a result of which they have beneficial interests therein.

10. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants further state that they are indeed in open and notorious occupation of the said property and the Plaintiff has absolutely no right to own the same as it has never occupied any portion thereof. They assert that all attempts by the Plaintiff to evict them have been unsuccessful as they have insisted on their right of ownership being respected.

11. In a Statement of Defence dated 26<sup>th</sup> May, 2015, the Commissioner of Lands and the Attorney General (the 10<sup>th</sup> and 11<sup>th</sup> Defendants) aver that the suit as filed does not reveal any cause of action against their esteemed offices and urge the court to dismiss the same with costs.

#### **THE PLAINTIFFS CASE**

12. At the trial herein which commenced before the Honourable Angote J., the Plaintiff called 1 witness.

13. PW1 – Anthony Kamwiru Gitau told the court that he was a Director of the plaintiff Company. He told the court that the suit property was allocated to their company after a successful application to the Government. Sometime in 2008, PW1 received information that a group of squatters masquerading as fishermen had erected temporary makuti structures on one end of the property near the beach.

14. PW1 further told the court that about 6 squatters moved into the land in 2009. He reported the issue to the Provincial Administration and the trespassers were summoned to Kilifi and were warned to move out. When they did not move out, the Plaintiff filed a suit being Kilifi SRMCC No. 285 of 2009 where they obtained eviction orders against them. However immediately after the trespassers were evicted, the 3<sup>rd</sup> Defendant herein filed an application to set aside the Judgment on the purport that the land belonged to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

15. PW1 testified that they became alarmed at this turn of events and complained to the police as well as to the Lands Registry in Mombasa about what appeared to be a conspiracy by fraudsters to defraud them of their land. He told the court that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are faceless companies being used by fraudsters to grab their land.

#### **THE DEFENCE CASE**

16. The defence called 2 witnesses in support of their respective cases.

17. DW1 – Fredrick Ndegwa Karume was the Applicant in the Originating Summons and the 12<sup>th</sup> Defendant herein. He told the court that he was born and grew up on the suit land after his parents got there in 1959. He cultivated maize and keeps livestock on the land. He told the court he lives on the land with the other Defendants and that the 3<sup>rd</sup> Defendant is his nephew. They have about 10 houses on the land.

18. DW1 further told the court that they have buried their deceased relatives on the land including his step-mother. He testified that no one has ever tried to get them evicted from the land save for the Plaintiff who however did not effect any orders of eviction on the same but on an adjacent parcel. DW1 urged the court to declare him the owner of the parcel of land.

19. DW2 – Gabriel Kiti Konde is a Land Surveyor with the County Government of Kilifi. He told the court that he carried out a survey in regard to the suit property and did a Report dated 18<sup>th</sup> November, 2016. He told the court that the property belonged to Mzee Flora Zengo and that he found 12 houses thereon when he went to conduct the survey.

### **ANALYSIS AND DETERMINATION**

20. I have perused and considered the pleadings, the oral testimony of all the witnesses as well as the evidence adduced at the trial herein. I have equally considered the written submissions and the authorities filed herein by the Learned Advocates acting for the respective parties herein.

21. The Plaintiff's claim is that it is the registered owner of the suit property. It accuses the Defendants of trespassing upon the property and urges the court to revoke a title purportedly issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and to proceed to evict the Defendant from the suit property.

22. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not enter appearance. On their part the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 12<sup>th</sup> Defendants assert that they have been in open, continuous and uninterrupted occupation of the suit property for a period exceeding 12 years and that they have developed the same by planting coconut trees, constructing houses and utilizing the same for subsistence farming. It is accordingly their position that they are entitled to the suit property by virtue of adverse possession.

23. In support of their case the Defendants relied on the testimony of the 12<sup>th</sup> Defendant Fredrick Ndegwa Karume who testified herein as DW1. According to DW1, his parents moved onto the suit property which they describe as Government land sometime in 1959 and he lives on the land together with the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Defendants herein who are his relatives.

24. In the Affidavit in support of the Originating Summons he filed in Mombasa HCCC No. 158 of 2012 which was later transferred to Malindi (as ELC No. 140 of 2014) and consolidated with this suit, DW1 avers at Paragraphs 3 to 6 as follows: -

**3. That I have always been in occupation of the parcel of land known as LR No. 20824. I have also developed the said property by building a permanent house, planting coconut trees and carried out subsisting (sic) farming. Further, I have also buried my loved ones on the said parcel of land. I annex photographs in support of the said developments and I mark the same as "FNK0-2."**

**4. That ever since nobody has ever come therein neither claim ownership of the property nor challenged my possession thereof or in any way required me to vacate from the said parcel. My occupation of the parcel of land has been open and continuous for over 12 years and has not been interfered with at all.**

**5. That I annex hereto a copy of Certificate of Title showing that the said parcel of land is registered in the name of the Respondent and I mark the same as annexures "FNK-3".**

**6. That I have for over 12 years been in occupation, maintaining and developing the said property and I now wish to obtain documents of title thereof as I honestly believe that I have acquired the rights of ownership over the said land on account of my many years of open uninterrupted and unchallenged occupation."**

25. While DW1 did not state so in the Originating Summons, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants submit that the said Originating Summons was instituted by DW1 on behalf of their entire family and as such their claim for adverse possession is well covered in the suit as filed by DW1.

26. As it turned out, at the trial herein, DW1 also asserted a claim on the suit property on the basis that the same had been adjudicated to his family. During his cross-examination by Mr. Mutubia, Learned Counsel for the Plaintiff, DW1 testified inter alia as follows: -

**"... The survey people put up the boundaries (to the land) in 1978. That was on adjudication. It was then referred to as Roka/Uyombo. I am in the settlement scheme. I do not know if it is Roka/Uyombo A or B. People were shown their parcels of land in 1978 by the Lands people. Everyone including the men in court were all shown their land. Even my father and my uncles who are in court were all shown their land. We all live on the land. The land is 16 acres. In the scheme, people were given land that is equal.... The whole family was given the 16 acres. We do not have a title for the land. I know there was a register .... We were allocated land according to the houses. I was not given land in Roka/Uyombo. Five people were registered on behalf of the family – Kalume Mwanongo, Kulola Dzengo, Joseph Saa Mwatebe, Mwajima Mwanongo – they were four people...."**

27. If indeed the Defendants parents had been allocated the land as alleged nothing was placed before the court to show why they did not proceed to process title in their respective names. Indeed, nothing was placed before me to demonstrate that any such allocation was done to enable the Defendants claim title to the suit property.

28. At any rate, I did not think that one can claim that the land belongs to them by virtue of land adjudication and at the same time claim the same to accrue to them by virtue of adverse possession. In **Mtana Lewa -vs- Kahindi Ngala Mwamgandi (2005) eKLR**, the Court of Appeal states as follows: -

**“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”**

29. It is also a well settled principle that a party claiming adverse possession ought to prove that this possession was as they say, “*nec vi, nec clam, nec precario*,” that is to say, peaceful, open and continuous. Accordingly it was incumbent upon the Plaintiffs to demonstrate that they have been on the land for the said 12 years.

30. From the material placed before me, the Plaintiff was allocated the suit property and have been the owners thereof since 1990. While the Defendants claim to have been on the land since 1959, not a single document was placed before me to evidence the same. While the Defendants produced photos of residential houses on the land, it was difficult from a perusal thereof to ascertain when the same were built.

31. Whatever the case, it was evident that at some point in time when the Plaintiff learnt of the Defendants’ presence on the land they instituted Kilifi SRMCC No. 285 of 2009 wherein they obtained orders of eviction against the Defendants on 9<sup>th</sup> July, 2009. It was indeed apparent to me that it is the resulting eviction process that prompted the 12<sup>th</sup> Defendant herein to proceed to Mombasa where he instituted HCCC No. 158 of 2012 (OS) and sought orders of adverse possession against the Plaintiff. The orders issued in Kilifi were apparently never set aside or appealed.

32. That suit and claim in Mombasa in my view came a little too late after the Plaintiff had asserted his title and rights over the suit property. That meant that if the Defendants re-occupied the land after their eviction, the computation of time for adverse possession would have to commence afresh. By any stretch of imagination, it would not yet be 12 years when the 12<sup>th</sup> Defendant instituted the said Mombasa HCCC No.158 of 2012 (OS).

33. Arising from the foregoing, I was not satisfied that the Defendants claim over the suit property had any merit. The same is dismissed. On the contrary I find and hold that the Plaintiff has proved its case on a balance of probabilities.

34. Accordingly, Judgement is hereby entered for the Plaintiff as prayed in the Plaint. Prayer No. ‘d’ on eviction of the Defendants shall however remain suspended for 60 days to allow the Defendants to remove their properties from the suit property.

35. The Plaintiff shall have the costs of both the consolidated suits.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2019.**

**J.O. OLOLA**

**JUDGE**