



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 26 OF 2017**

**KATANA MDZOMBA KABANI.....PLAINTIFF/APPLICANT**

Suing as the administrator of the Estate of the late Tuva Mdzomba Kabani, the deceased)

**VERSU**

**GRACE KABIBI KEAH.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

(Sued as the administrator of the Estate of the late Mathias Benedict Keah, the deceased)

**KILIFI DISTRICT LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

**THE PLAINTIFF'S CASE**

1. By a Notice of Motion application dated 7<sup>th</sup> February 2017 and filed herein on 9<sup>th</sup> February 2017, the Plaintiff Katana Mzomba Kabani prays for an injunction order to issue restraining the Defendants either by themselves, their agents, servants and/or any person acting on their instructions from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging and/or in any way interfering with the property known as Title No. Kilifi/Vipingo/151, pending the hearing and determination of the suit filed herein on the same day.

2. The Plaintiff who has brought the suit in his capacity as the Administrator of the Estate of the late Tuva Mdzomba Kabani bases his application on grounds inter alia, that:-

**a. The Estate of Tuva Mudzomba is the legal and beneficial owner of the named property having acquired the same through an allotment by the Settlement Fund Trustees (SFT) for a sum of Kshs 2,830/= on 8<sup>th</sup> August, 1978.**

**b. That as at the time of his death, the deceased had not completed payment of the sum of Kshs 2,830/= but his estate continued in occupation of the land.**

**c. That Plaintiff obtained letters of administration for the estate and immediately approached the Settlement Fund Trustee who proceeded to issue a Discharge of Charge and Transfer of land Settlement Scheme on 11<sup>th</sup> April 2013;**

**d. That upon presentation of the documents to the Kilifi District Land Registry for issuance of a Title Deed, the 2<sup>nd</sup> Defendant refused to register them alleging there existed another title deed in the name of Mathias Benedict Kea, the husband of the 1<sup>st</sup> Defendant herein;**

**e. That the suit property has never been transferred to the late Mathias Keah and the Plaintiff is apprehensive that the late Mathias Keah being a former Cabinet Minister, used his influential position to illegally and fraudulently transfer the property to himself; and**

**f. Unless this Application is heard expeditiously, the Defendants may transfer, dispose, lease and/or deal with the suitland in**

a manner that infringes Sections 35 and 45 of the Law of Succession Act.

### **THE 1<sup>ST</sup> DEFENDANT'S CASE**

3. In a lengthy and detailed Replying Affidavit sworn on 18<sup>th</sup> April 2017 and filed herein on 24<sup>th</sup> April 2017, Grace Kabibi Keah, the 1<sup>st</sup> Defendant herein, avers that the Plaintiff's application is misplaced and an abuse of the Court Process. The 1<sup>st</sup> Defendant who is sued in her capacity as the Administrator of the Estate of the late Mathias Benedict Keah denies that her deceased husband had trespassed onto the subject property or at all. On the contrary, she outlines the circumstances under which she avers her husband came to acquire the property.

4. It is the 1<sup>st</sup> Defendant's case that sometime in the year 1991 Tuva Mdzomba who is a brother to the Plaintiff herein approached her husband and requested him to take over his rights in the allotted property after the said Tuva Mdzomba failed to pay the purchase price and service the loan owed to the Settlement Fund Trustees. It is the 1<sup>st</sup> Defendant's further case that the said Tuva Mdzomba subsequently transferred his interests in the allotted parcel of land to the 1<sup>st</sup> Defendant's husband through a Written Agreement. It was a term of the Agreement that the 1<sup>st</sup> Defendant's husband would pay the agreed purchase price and the loan owed to the Settlement Fund Trustees (SFT) upon which the Settlement Fund Trustees would discharge the property to the 1<sup>st</sup> Defendant's husband.

5. The 1<sup>st</sup> Defendant avers that she is aware that the Settlement Fund Trustees were made aware of the transfer of interest in the allotted property in favour of the late Mathias Keah. In turn, the Settlement Fund Trustees revoked its allotment made to Tuva Mbova and allotted the subject property to the late Mathias Keah. The 1<sup>st</sup> Defendant further avers that her husband took possession of the suit property in 1992 and has been in possession thereof since.

6. The 1<sup>st</sup> Defendant further asserts that shortly after the death of Tuva Mdzomba in 1992, his three brothers- Katana Mudzomba Kabani, Charo Mudzomba Kabani and Kazungu Mudzomba Kabani started claiming that they were entitled to part of their brother's property insisting that they had coconut and mango trees thereon. Left with no option, the 1<sup>st</sup> Defendant's husband decided to purchase the coconut and mango trees plus other developments on the suit property. As a result, on 24<sup>th</sup> October 1993, the three brothers declared before a Council of Elders that they had entered into a Sale Agreement for sale of the remainder of the allotted parcel for a consideration of Kshs 75,000/=. Upon payment of the purchase price, the brothers abandoned their claim on the land.

7. According to the 1<sup>st</sup> Defendant, they have since had exclusive and uninterrupted possession of the land where they run agribusiness activities. A title deed for the land was issued in the name of her husband on 29<sup>th</sup> August 2006.

8. In addition to the Replying Affidavit, on 24<sup>th</sup> April 2017, the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection dated 21<sup>st</sup> April 2017 giving notice that she intends to raise a Preliminary Objection on the grounds that:-

**1. The Plaintiff's application and suit offend the Provisions of Section 7 of the Limitation of Actions Act (Cap 22) which provides as follows:**

**“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or; if it first accrued to some person through whom he claims, to that person.”**

**2. That the continued pendency of the Plaintiff's Application and suit is an abuse of the process of this Honourable Court.**

### **THE 2<sup>ND</sup> & 3<sup>RD</sup> DEFENDANT'S CASE**

9. The District Land Registrar Kilifi and the Honourable the Attorney General sued herein as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively are equally opposed to the grant of the Orders sought by the Plaintiff. In Grounds of Opposition dated and filed herein on 3<sup>rd</sup> March 2017, they jointly oppose the Plaintiff's Motion on the grounds that:-

**i. The application seeks (order of) injunction against the Government the grant of which is expressly prohibited by dint of section 16 of the Government Proceedings Act;**

**ii. The Applicant has not met the threshold of the grant of the orders of injunction sought;**

**iii. The actions by the 2<sup>nd</sup> Defendant were proper and within his powers and mandate;**

**iv. The Applicant has failed to particularize the allegations of fraud or attribute the same to the 2<sup>nd</sup> Defendant; and**

**v. That the Application is otherwise an abuse of the process of this Honourable Court.**

10. On or about 26<sup>th</sup> April 2017 when the matter came before me, I directed that both the Plaintiff's Notice of Motion dated 7<sup>th</sup> February 2017 and the 1<sup>st</sup> Defendant's Preliminary Objection dated 21<sup>st</sup> April 2017 be argued together in the interest of time. The parties then agreed to canvass the two matters by way of written submissions.

### **ANALYSIS OF THE EVIDENCE**

11. I have considered both the Application and the Preliminary Objection raised thereto. I have equally taken into account the Written Submissions by the Learned Counsels representing the parties herein as well as the authorities they referred me to.

12. The Preliminary Objection raised herein goes to the issue of the jurisdiction before me. As was stated by the Supreme Court in **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others(2012)eKLR;**

**“A Court’s jurisdiction flows from either the constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.....**

**The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings....Where the Constitution exhaustively provides for the jurisdiction of a Court of Law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through Judicial Craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon a Court of Law or tribunal, the legislature would be within this authority to prescribe the jurisdiction of such a Court or tribunal by state law.**

13. The Limitation of Actions Act, Cap 22 of the Laws of Kenya in this regard prescribes periods for the limitation of actions and arbitrations, and makes provisions concerning the acquisition of easements by prescription, and for matters incidental thereto and connected therewith. Section 7 thereof provides as follows:-

**“7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

14. According to the 1<sup>st</sup> Defendant, the Plaintiff’s suit offends the said Section 7 of the Limitation of Actions Act and should thereof be barred by virtue thereof. To advance this argument, the 1<sup>st</sup> Defendant contends that her late husband took possession of the suit property in the year 1992 after being authorized to do so by the late Tuva Mudzomba. It is her case that since then, they have used the land for agriculture as evidenced in annexure “GKK-4” of her Replying Affidavit.

15. The Plaintiff however disputes the 1<sup>st</sup> Defendant’s analogy. While not disputing the 1<sup>st</sup> Defendant’s claim that they took over the land in 1992, it is the Plaintiff’s submissions that time did not however start to run until at least the time that the same was discharged by the Settlement Fund Trustees (SFT). In this regard, the Plaintiff relies on Section 13 of the said Act which stipulates that:-

**“...a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run(which possession is in this Act referred to as adverse possession), and where under Sections 9, 10, 11 and 12 of this Act, a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”**

16. From the material placed before me, the suit property was allotted by the Settlement Fund Trustees to the late Tuva Mudzomba vide a letter of allotment dated 8<sup>th</sup> August 1978. Both parties are in agreement that as at the time of his death in 1992, the late Tuva Mudzomba had not completed payment of the sum of Kshs 2,830/= to the Settlement Fund Trustees. According to the 1<sup>st</sup> Defendant, the said Tuva Mudzomba had a year before his death approached the late Mathias Keah to take over his rights in the allotted property after he failed to pay the purchase price. It is the 1<sup>st</sup> Defendant’s case that following a written agreement between the two now deceased gentlemen, Tuva Mudzomba’s interests in the impugned parcel of land passed to Mathias Keah. It was a term of the said Sale Agreement that Mathias Keah would pay the agreed purchase price and the loan owed to the Settlement Fund Trustees upon which the Settlement Fund Trustee would discharge the property to Mathias Keah.

17. At paragraph 10 of the 1<sup>st</sup> Defendant’s Replying Affidavit, she depones as follows:-

**“10. THAT I know that the Settlement Fund Trustees, were made aware of the transfer of interests in the allotted property in favour of the late Mathias Benedict Keah. In turn, the Settlement Fund Trustees (sic) revoked its allotment made to Tuva Madzomba, and allotted the subject property to the late Mathias Benedict Keah. Annexed herewith marked “GKK-2” is a letter of confirmation of allotment to the late Mathias Benedict Keah by the Ministry of Lands and Settlement dated 9<sup>th</sup> November, 1999).**

18. The Settlement Fund Trustees was the first proprietor of the subject property. The Settlement Fund Trustees is a body of Trustees established pursuant to the provisions of Section 167 of the Agriculture Act, Cap 318. I note that under the said Act, the Trustees were mandated to settle persons on either unalienated Government land or on land purchased from private owners by the Settlement Fund Trustees.

19. From the foregoing it is clear to me that the Settlement Fund Trustees is a public entity for all intents and purposes and any land held by it is public land until such a time that the process of allotment is completed and the purchase price is paid. As was held in **Boniface Oredo – vs- Wabumba Mukile, Civil Appeal No. 170 of 1989:-**

**“The interest of the Settlement Fund Trustees is really that of a chargee. It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property.”**

20. Given that land held or allotted by the Settlement Fund Trustees remains public land until such a time that the same is discharged, it was pertinent for the 1<sup>st</sup> Defendant to establish when exactly the subject matter ceased to be Settlement Fund Trustees land and whether 12 years have lapsed since then for Section 7 of the Limitation of Actions Act to apply. This is more so because Section 41 of the Act expressly excludes public land from any claim of adverse possession.

21. In the matter before me, there are two conflicting positions advanced by the parties as to when the property was transferred. According to the Plaintiff, it was issued with a Discharge of Charge and transfer of title by the Settlement Fund Trustees on 11<sup>th</sup> April 2013(per annexure KMK 3 of the Supporting Affidavit). If the Plaintiff is to be believed, then the suit property remained under the Settlement Fund Trustees until that date and was thus until then protected by dint of Section 41 of the Limitation of Actions Act from a claim of adverse possession. This was some four years before this suit was filed.

22. On her part, the 1<sup>st</sup> Defendant does not clearly show when the loan due to the Settlement Fund Trustees was paid. They have however displayed a Certificate of Title issued on 29<sup>th</sup> August 2006 in the name of Mathias Benedict Keah. In my mind, and assuming there was a valid transfer by the Settlement Fund Trustees, time would start running from that date-the 29<sup>th</sup> of August 2006. A perusal of the record shows that his suit was filed on 7<sup>th</sup> February 2017, which my arithmetic tells me, would be slightly less than 11 years since the cause of action, if any.

23. As the Honourable Justice Munyao stated while dealing with a similar matter in *Jaber Mohsen Ali & Another –vs- Priscillah Boit & Another(2014)eKLR*

**“The cause of action does not start to accrue unless the land is in possession of a person in whose favour the period of limitation can run, so that he may be entitled to have the land through adverse possession. But in our case, time could not start running in favour of the defendants, given that the land was under the Settlement Fund Trustees. The cause of action for the Plaintiffs did not therefore accrue in the year 1972, and time against them, could not start running in 1972. Time started running against the Plaintiffs, at the same instant that time started running in favour of the defendants, which was from 5<sup>th</sup> June 2003. It is 12 years from 5<sup>th</sup> June 2003 that it can be said that the Plaintiffs were time barred.’**

24. It follows then that in the matter before me, whichever way one looks at it, the 12 years required under Section 7 of the Limitation of Actions Act have not lapsed and I find and hold that the Preliminary Objection dated 21<sup>st</sup> April 2017 is devoid of merit. The same is accordingly dismissed.

25. Turning to the Notice of Motion application dated 7<sup>th</sup> February 2017, the principles for the grant of an interlocutory injunction were settled in *Giella-vs- Cassman Brown Company Ltd(1973)EA* where Spry V.P. observed that:-

**“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.”**

26. Explaining the elements of a prima facie case in *Nguruman Limited –vs- John Bonde Nielsen & 2 Others(2014)eKLR*, the Court of Appeal stated that:-

**“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”**

27. In the matter before me, the Plaintiff states that the suit property belonged to his brother the late Tuva Mudzomba who passed away in 1992. While he claims that the estate of the deceased brother continued to occupy the suit property thereafter, he also states without elaboration at paragraph 12 of the Supporting Affidavit that he is aware that sometime in 1991, his late brother approached the late Mathias Keah as a person known to him and requested for a loan and gave out his coconut trees as security for the money given. It is not clear how he has been in occupation of the land even if the arrangement between his brother and the said Mathias Keah only gave the latter rights over the coconut trees on the land.

28. I note however that at paragraph 7 of his Supplementary Affidavit sworn on 24<sup>th</sup> May 2017, the Plaintiff somehow changes his story and now avers that:-

**“7(a) The late Mathias Keah was placed in possession of the suit property by the late Tuva Mudzomba (hereafter “the deceased owner”). Therefore, on the death of the deceased owner, the late Mathias Keah and subsequently his estate held the suit property in trust of the estate of the deceased owner;**

**(b) As trustee of the beneficiary of the estate of the deceased owner, the late Mathias Keah and subsequently his estate, fraudulently prepared illegal sale agreements purporting to have bought the suit property from my brothers and I;**

29. From the foregoing, and the previous arguments herein, the 1<sup>st</sup> Defendant has been in possession of the suit premises from around the year 1992. Annexure 4 of the 1<sup>st</sup> Defendants Replying Affidavit is a bundle of documents showing that the 1<sup>st</sup> Defendant and her family have been exclusively running a business Christened Mbogolo Farm in the suit property.

30. It is equally clear that the 1<sup>st</sup> Defendant's husband is the registered proprietor of the suit property with a title deed issued in his name on 29<sup>th</sup> August, 2006. The Plaintiff has cast very strong aspersions on how the said Title Deed was obtained and has accused the 1<sup>st</sup> Defendant's deceased husband of using his influential position as a former Cabinet Minister to illegally and fraudulently transfer the property to himself.

31. Indeed from page 4 of annexure "GKK2" of the 1<sup>st</sup> Defendant's Replying Affidavit, I note that the said Mathias Keah was an Assistant Minister for Lands and Settlement on 9<sup>th</sup> November 1999 when the Kilifi District Land Adjudication and Settlement Officer wrote to the Director of Lands Adjudication and Settlement in Nairobi seeking to have the suit property herein "documented" to the said Mathias Keah. The said letter written on the official letter-head of the Ministry of Lands and Settlement is copied to Hon Mathias Keah, the Assistant Minister in the Ministry. The Plaintiff's fears may therefore not be far fetched and at the end of it all, it will be important for the trial Court to determine how come the Settlement Fund Trustees was busy discharging the land and transferring the same to the Plaintiff on 11<sup>th</sup> April 2013 when title thereto had been issued way back on 29<sup>th</sup> August 2006.

32. As was stated in *Danchi Kiptugen –vs- Commissioner of Lands & 4 Others (2015)eKLR:-*

**“It is not enough that one issues a Lease or a Certificate of Lease and asserts that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be constricted only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a lease or Certificate of title at (some) backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

33. As it were, that sort of inquiry to determine the validity of the Title Deed issued herein can only be done at the trial of the main suit. For now and unless and until evidence is presented to back the alleged or any fraud in the acquisition thereof, this Court is bound by dint of Section 26(1) of the Land Registration Act to recognize the title issued to the 1<sup>st</sup> Defendant's husband as prima facie evidence of proprietorship of the land in dispute.

34. Accordingly, I do not find merit in the application dated 7<sup>th</sup> February 2017. The same is dismissed. Each party shall bear their own costs.

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of March, 2018.**

**J.O. OLOLA**

**JUDGE**