



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 121 OF 2014**

**FRED KAZUNGU JUSTIN DINDI.....PLAINTIFF**

**VERSUS**

**JULIUS LEWA JEFWA**

**DZENDERE KAINGU**

**SAMINI KAINGU**

**HARUN KAINGU**

**BARAKA KAINGU.....DEFENDANTS**

**JUDGMENT**

1. By a Plaint dated and filed herein on 30<sup>th</sup> June 2014, the Plaintiff prays for vacant possession and a permanent order of injunction restraining the 5 Defendants by themselves, their servants, agents and/or any other person deriving interest from them from trespassing and entering into the Plaintiff's parcel of land being Plot. No. 5044 Malindi.

2. The Plaintiff's claim arises from his averment that on 22<sup>nd</sup> October 1987, the 1<sup>st</sup> Defendant sold to him the said parcel of land measuring approximately 4.5 acres at an agreed purchase price of Kshs 15,000/= It is the Plaintiff's case that immediately upon the completion of payment of the purchase price, the Defendants granted him vacant possession of the suit property and he went ahead to cultivate and develop the same.

3. The Plaintiff states that after about 26 years of quiet possession and use of the land, the Defendants began trespassing upon the suit property some time in 2013 and have proceeded to chase away his workers therefrom. Despite various complaints made to the local Area administration and the police, the Defendants have persisted in their trespass and have since started constructing various structures thereon hence necessitating the orders sought herein.

4. In their Written Statement of Defence dated 6<sup>th</sup> August 2014 and filed herein on 16<sup>th</sup> October 2014, the Defendants jointly and severally deny that the Plaintiff bought the suit property as stated in the Plaint. On the contrary, they aver that the suit premises was rented to the Plaintiff for Kshs 15,000/= and that he was to hold the same in trust on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants until such a time that they reach the age of majority.

5. The Defendants further deny granting vacant possession of the suit premises to the Plaintiff. Instead they aver that the coconut, mango and cashew nut trees that the Plaintiff accuses them of unlawfully harvesting were in existence when the suit premises were rented to the Plaintiff and they cannot now be accused of trespassing onto their own land and harvesting fruits therefrom while the Lease Agreement lapsed the moment the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants reached the age of majority.

6. At the trial herein which commenced partly before the Honourable Justice Angote on 9<sup>th</sup> May 2016, the Plaintiffs called two witnesses in support of the case. The Defendants on their part called three witnesses to refute the Plaintiff's claim.

7. Testifying as PW1, the Plaintiff told this court that sometime in 1987, the 1<sup>st</sup> Defendant approached him to buy the portion of land measuring 4.5 acres situated at Msabaha to enable the 1<sup>st</sup> Defendant to take one of his family members for medication. In a written agreement dated 22<sup>nd</sup> October 1987, they agreed that the parcel of land which did not have title documents would be sold to him at Kshs 15,000/=. At the time of execution of the agreement, he paid a deposit of Kshs 8,000/= which he described as a lot of money at the time. He paid the balance later on 1<sup>st</sup> December 1987.

8. PW1 testified that upon completion of payment of the purchase price, the 1<sup>st</sup> Defendant granted him vacant possession of the land subsequent to which he embarked on its development by planting coconut, mango, cashewnut and other trees thereon.

9. PW1 further told the Court that thereafter and for about 26 years, he used the land for various purposes without any interference from anyone. Things however changed when sometime in 2013, the 5 Defendants who are all family members began trespassing on the property converting his crops and fruits to their own use after chasing away PW1's workers. According to PW1, the defendants gradually became emboldened and started building structures on the land.

10. Fatma Karisa Tete (PW2) a neighbor of the Plaintiff's at the disputed property also testified in support of the Plaintiff's case. PW2 testified that the 1<sup>st</sup> Defendant had inherited the land from his late brother who was the husband of the 2<sup>nd</sup> Defendant and the father of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. According to PW2, the 2<sup>nd</sup> Defendant who is her cousin was mentally unstable at the time and the Defendants needed money. After they were paid, they left the land for PW1 and PW1 asked PW2 to look after the land on his behalf as her own land neighbours the disputed land.

11. PW2 further told the Court that she used to collect the coconut fruits from PW1's land but in 2013, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants went into the land and cut trees therefrom and generally became violent. Even after the matter was reported to the police and the local provincial administration, the Defendants kept going back to the land.

12. In response to the Plaintiff's case, the 1<sup>st</sup> Defendant testifying as DW1 told the Court that sometime around 1986, he went to borrow Kshs 15,000/= from the Plaintiff whom he knew. The Plaintiff agreed to lend him the money and in return, he gave out his title as a guarantee. DW1 stated that at the time, there were already fruits on the land and he told PW1 to eat the fruits but once he got the money to repay, he would take his land back.

13. DW1 further testified that at the time, his elder brother had died leaving behind a widow and young children. The widow was unwell and required treatment. According to DW1, he was to refund the money once the children became adults. His attempts to do so through the Area Chief's Office had however failed after PW1 refused to take back the money. It is DW1's wish that the 'children' be given the land as it belonged to their father.

14. Mary Kaingu Lewa (Dzendere), the 2<sup>nd</sup> Defendant herein testified as DW3. She told the Court that her husband Joseph Kaingu died sometime in 1986 and she herself became unwell thereafter. When she recovered from her illness, she found that her husband's brother (DW1) had leased out the land to the

Plaintiff. When her children grew up, they called the Plaintiff to the Chief Office but he never responded. They then decided to go back to their land after the Plaintiff failed to sit down with them.

15. Further in support of the Defence case Baraka Yusuf Lewa testified as DW2. He told the Court that his father died when he was young and that DW3 is his mother. It was his testimony that he knew his father inherited land measuring 4.5 acres in Msabaha. According to him DW1 who is his uncle, did not have any land and used to live in his father's land.

16. DW2 told the Court that when he was young, they were evicted from the land after his uncle DW1 pawned it. Later when he got the Plaintiff's phone number, he called him and offered to pay him back his money so that they could have their land. It was DW2's testimony that what had transpired was fraud perpetrated by his uncle as the land belonged to their father and his (DW2's) family was never involved when the land was given to the Plaintiff. In conclusion, he told the Court that the Plaintiff should have sued only the 1<sup>st</sup> Defendant as the rest of them did not know about the transaction.

17. At the conclusion of the hearing, the parties filed submissions in support of their respective positions. I have considered the said submissions and the evidence placed before me.

18. At the heart of this dispute is a Sale Agreement dated 22<sup>nd</sup> October 1987 between the 1<sup>st</sup> Defendant as Vendor and the Plaintiff as purchaser. The said agreement stated to be drawn by MM Kugalia Advocate reads in the relevant portion as follows:-

***“WHEREAS the Vendor is possessed of or otherwise entitled to ALL THAT piece of land at Msabaha comprising 4.5 acres approximately neighbouring Charo Chara on the North, Karisa Yete on the East, Suruvu on the West and Bimgandi on the South and WHEREAS the Purchaser has agreed with the Vendor for the sale to him (of) the said piece of land at an agreed price of shillings 15,000/=***

***NOW THIS AGREEMENT WITNESSETH that in CONSIDERATION of the sum of Kshs 8,000/= on or before execution hereof paid to the Vendor by the purchaser(receipt whereof the Vendor doth hereby acknowledge) and the balance payable as follows; Kshs 3,500/= on or before end of October 1987 and Kshs 3,500/= on or before 15<sup>th</sup> November 1987. The Vendor as the beneficial owner of the above piece of land agrees to transfer and convey his right title and interest in the above plot into the Purchaser on completion of the purchase price.”***

19. Thus while the Defendants contend that the 1<sup>st</sup> Defendant merely leased the suit property to the Plaintiff, a plain reading of the Agreement executed by the parties seems to suggest that the land was sold to the Plaintiff. When confronted with the Sale Agreement during cross-examination, the 1<sup>st</sup> Defendant stated that he did not understand English and that when he went to the Plaintiff's office, he was given a document which he just signed. It was therefore his case that the Sale Agreement did not reflect the correct position on what was agreed.

20. It is instructive to note that a second document attached to the Sale Agreement and dated 1<sup>st</sup> December 1987 in which the 1<sup>st</sup> Defendant acknowledges receipt of the balance of the purchase price is also written in English.

21. From the material placed before me, it is evident that the land in dispute had no title and has indeed never been registered to-date. According to DW2, his father inherited the land which measures approximately 4.5 acres. DW1 while acknowledging eventually that the land belonged to his deceased brother also earlier in his testimony referred to the land as belonging to himself. He did not however state how the brother acquired the land. On her part, DW3 stated that her husband bought the land for her and that the same still belongs to her.

22. While the history of how the Defendants acquired the land is not clear, it is apparent that in 1987 DW1 had some form of control over the parcel in which all the Defendants resided at the time. That

control is evident in the fact that shortly after he entered into the transaction which he purported to be a temporary lease of the land, he moved the entire family away and let the Plaintiff take over possession of the land. In his testimony before this Court, he did not offer any explanation why it was necessary to move away the entire family from the whole piece of land measuring 4.5 acres if the Plaintiff's use thereof was to be of a temporary nature.

23. According to PW2 who was their neighbor DW1 knowingly sold the land after he allegedly inherited the same from his deceased brother. While it is not very clear how this inheritance came to be it is not disputed as we have seen that DW1 lived with his brother's family on the same land before he sold the same. At the time, DW3 was apparently unwell and required some intensive treatment. DW3 herself acknowledges this fact and states that due to the illness, she went back to live with her parents leaving behind her children (the 3<sup>rd</sup> to 5<sup>th</sup> Defendants) with her husband's sole brother, DW1. According to DW3, when she came back well, she found the land had been "leased" to the Plaintiff. It was however not clear from the testimony in Court how long the illness took and/or when she came to notice the fact that the land had been leased or rented to the Plaintiff.

24. Whatever the case, it is plain that in 2013, some 26 years after the Plaintiff had taken possession of the land, the Defendants went back to the land and took some form of control over it. They did not however clearly explain how and when the lease came to an end and/or why they would want to refund the sum of Kshs 15,000/= if indeed it had been paid for purposes of leasing the land. And while their purported repossession of the land stems from their relationship with the deceased Joseph Kaingu Lewa, they did not produce any letters of administration entitling them to take over the land as heirs of the estate and/or demonstrating that the land belonged to their father.

25. As it were, even if the Defendants held title to the land, the long period of possession by the Plaintiff is a right recognized in law and would amount to an overriding interest capable of protection under the law. I say so because, Section 30 of the Registered Land Act (now repealed) provided that:-

***"30. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same without them being noted on the register:***

***a).....***

***b).....***

***c).....***

***d).....***

***e).....***

***f).....***

***g) The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed."***

26. Such interests remain binding under Section 126 of the Land Registration Act. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants having put the Plaintiff in possession of the suit property and having let him stay in the land for more than 26 years in my mind created an overriding interest in favour of the Plaintiff in relation to the suit property which is deserving of protection, even where the land were to be subsequently registered in the name of the Defendants or any other person.

27. In *Mwangi & Another –vs- Mwangi (1986) KLR 328*, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject

to those rights. Accordingly, I do not think it was open for the Defendants to just stroll back into the land which the Plaintiff had been in possession of for 26 years and purport to take over the same in the manner they did. Such conduct could precipitate anarchy and breed a general state of disorder which this Court cannot sanction.

28. Arising from the foregoing, I am satisfied that the Plaintiff has proved his case on a balance of probabilities. Accordingly, I hereby allow the Plaintiff's suit as prayed in the Plaint.

29. The Defendants shall handover vacant possession of the suit property within 30 days failure to which Court the Bailiff is hereby commanded to ensure their eviction from the suit property forthwith.

30. The Plaintiff shall also have the costs of this suit.

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

**J.O. OLOLA**

**JUDGE**